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<b>B.W., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 08-669</b>
	)	<b>Issued: August 19, 2008</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>TRANSPORTATION SECURITY</b>	)	
<b>ADMINISTRATION, Tulsa, OK, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

On January 9, 2008 appellant filed a timely appeal from a November 9, 2007 nonmerit decision of the Office of Workers' Compensation Programs that denied her request for reconsideration and a May 25, 2007 decision that denied her claim for wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

The issues are: (1) whether appellant met her burden of proof in establishing that she was entitled to compensation for temporary total disability beginning December 2004; and (2) whether the Office properly denied appellant's request for reconsideration without conducting a merit review.

## **FACTUAL HISTORY**

On August 30, 2004 appellant, then a 38-year-old transportation security screener, filed a traumatic injury claim stating that she injured her right elbow while lifting bags that day. Appellant did not initially stop work but performed light duty. In an October 25, 2004 report, Dr. Bradford L. Boone, a Board-certified orthopedic surgeon, diagnosed chronic medial epicondylitis and humeral ulnar neuritis. Appellant was terminated for misconduct on December 28, 2004, after she tested positive (for methamphetamines and amphetamines) during a random drug test. On December 22, 2004 Dr. James F. Bischoff, a Board-certified orthopedic surgeon, diagnosed persistent ulnar neuropathy of the right arm and opined that appellant's condition was related to gripping and grasping items with her hand while at work. The Office accepted appellant's claim for right elbow medial epicondylitis and lateral epicondylitis.

On February 24, 2005 Dr. Boone diagnosed ulnar neuritis and cubital tunnel syndrome, which he explained had not improved with conservative treatment. He recommended that appellant undergo an ulnar nerve decompression. She underwent surgery for right elbow ulnar nerve decompression and medial epicondyle and flexor pronator micro-debridement on April 15, 2005. On April 25, 2005 Dr. Boone reported that appellant was recovering well following surgery but remained totally disabled. In an August 1, 2005 note, Dr. Boone stated that appellant was capable of performing light duty and determined that she would reach maximum medical improvement in about one month. On August 31, 2005 he concluded that she could perform regular work but was not ready for an impairment rating. On January 26, 2006 Dr. Boone explained that, although appellant had continuing medial pain, her range of motion was full, her strength was reasonably good and she was capable of performing regular work tasks. He concluded that she had reached maximum medical improvement and released her from treatment.

In a July 27, 2006 report, Dr. Boone stated that appellant's ulnar nerve condition had deteriorated over the past six months. He noted that she had improved from a pain perspective but exhibited persistent diminished sensation and very poor motor function. Dr. Boone diagnosed severe ulnar neuropathy which had progressed over the previous six months after having shown initial improvement following surgery. He suspected that the condition might be due to "something more proximal or distal" or "perhaps something systemic." On August 15, 2006 Dr. Bischoff diagnosed ulnar intrinsic atrophy of the right hand and advised that appellant was a candidate for an ulnar nerve decompression of the elbow.

On August 31, 2006 appellant underwent an authorized decompression of the right ulnar nerve of the elbow. In a September 14, 2006 report, Dr. Bischoff advised that she was recovering well from her epicondylectomy and decompression of the ulnar nerve but was currently unable to perform work tasks with her right hand. On January 17, 2007 he stated that appellant was unable to lift more than 10 pounds with her right hand and was currently not working. He determined that she would likely reach maximum medical improvement within 60 days.

In an October 4, 2006 telephone memorandum, the Office noted that appellant stated that the employing establishment fired her when she informed them that she needed surgery.

On December 11, 2006 appellant claimed compensation for wage loss since December 4, 2004 and a schedule award. On February 14, 2007 Dr. Bischoff reported that appellant's soreness had improved since her surgery, but that she still had some paresthesia in the ulnar distribution. He determined that she had reached maximum medical improvement and was able to work with a 10-pound lifting restriction for the right hand.

The employing establishment submitted a March 13, 2006 decision in which its disciplinary review board affirmed appellant's dismissal for cause. It explained that appellant was randomly selected for drug testing on December 13, 2004 and that a urine test taken that day read positive for the presence of methamphetamines and amphetamines. The employing establishment stated that it terminated appellant's employment under its "zero tolerance" policy that prohibited employees from using illegal drugs whether on or off-duty. Although appellant contended that over-the-counter medications had caused the positive test results, the employing establishment found that the gas chromatography/mass spectrometry drug test would not have yielded a false positive result based on over-the-counter medications.

In an April 6, 2007 report, Dr. Boone found that appellant was able to work with a lifting restriction and noted that if she was unable to return to her previous position, she would need vocational rehabilitation.

By decision dated May 23, 2007, the Office denied appellant's claim for wage-loss compensation from December 4, 2004 to April 14, 2005 and beginning August 2, 2005. It found that the medical evidence did not support her work-related total disability during that period. The Office noted that appellant was terminated for cause on December 28, 2004 and not for the effects of her work injury. It authorized wage-loss compensation from April 15 to August 1, 2005.<sup>1</sup> On May 31, 2007 the Office granted appellant a schedule award for 41 percent impairment of the right upper extremity.<sup>2</sup>

On August 9, 2007 appellant requested reconsideration and asserted that she was under a doctor's care and unable to work from October 25, 2004 through February 14, 2007. She also argued that she was unable to obtain employment with a different organization or agency because of her work-related injury.

By decision dated November 9, 2007, the Office denied appellant's request for reconsideration without conducting further merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.<sup>3</sup> As used in the Federal

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<sup>1</sup> The period April 15 to August 1, 2005 represents the period that appellant was totally disabled while recovering from her April 15, 2005 authorized surgery. The Office noted that Dr. Boone released appellant to return to light duty on August 1, 2005.

<sup>2</sup> On appeal, appellant does not contest the schedule award.

<sup>3</sup> *William A. Archer*, 55 ECAB 674 (2004).

Employees' Compensation Act, the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>4</sup> Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages.<sup>5</sup> Whether a particular injury causes an employee to be disabled for employment, and the duration of that disability, are medical issues, which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>6</sup> The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>7</sup> The Board has held that when a claimant stops work for reasons other than her accepted employment injury, she has no disability within the meaning of the Act.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant developed right elbow medial and lateral epicondylitis on August 30, 2004 while lifting bags at work. She performed light-duty work until she was terminated for misconduct on December 28, 2004. Appellant underwent authorized surgeries on April 15, 2005 and August 31, 2006. Dr. Boone released her to return to light duty after her first surgery on August 1, 2005 and she received compensation for this period of disability. After appellant's August 31, 2006 surgery Dr. Boone on September 14, 2006 stated that she could not work with her right hand.<sup>9</sup> The record also does not reflect that appellant would not have been provided appropriate light-duty work had she not been terminated for cause. Compensation for a work stoppage attributable to misconduct cannot be paid.<sup>10</sup> Furthermore, appellant did not submit any medical evidence to establish that she was totally disabled prior to her termination for misconduct on December 28, 2004. She submitted an October 25, 2004 report from Dr. Boone and a December 22, 2004 report from Dr. Bischoff. Dr. Boone did not address appellant's status for work but Dr. Bischoff found that she was capable of performing regular activities.

Despite appellant's assertion that the employing establishment terminated her employment because she needed surgery, there is no evidence suggesting that she was dismissed

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<sup>4</sup> *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.5(f).

<sup>5</sup> *See Fred Foster*, 1 ECAB 21 (1947).

<sup>6</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001); *see also Edward H. Horton*, 41 ECAB 301 (1989).

<sup>7</sup> *Sandra D. Pruitt*, 57 ECAB 126 (2005); *William A. Archer*, *supra* note 3; *Fereidoon Kharabi*, *supra* note 6.

<sup>8</sup> *John W. Normand*, 39 ECAB 1378 (1988).

<sup>9</sup> The physician did not specifically indicate whether appellant had total disability for any particular period attributable to the August 31, 2006 authorized surgery. As noted, the Office paid disability compensation from April 15 to August 1, 2005 when appellant was totally disabled due to her April 15, 2005 authorized surgery.

<sup>10</sup> *See supra* note 8. *See also Major W. Jefferson, III*, 47 ECAB 295 (1996) (where there was no evidence that appellant was not capable of performing his assigned duties after the date of his termination for cause, he had no disability within the meaning of the Act after that date and had no entitlement to compensation for total disability for that period).

for reasons other than misconduct. The employing establishment explained that appellant's employment was terminated after she tested positive for methamphetamines and amphetamines during a random drug test. Appellant did not submit any evidence to establish that she was terminated for any other reason. As the withdrawal of her position was premised on misconduct, appellant is not entitled to wage-loss compensation for periods after December 28, 2004 in which she was partially disabled due to her work injury.<sup>11</sup> The Board finds that the evidence does not establish appellant's entitlement to further disability compensation for the period beginning December 2004.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8128 of the Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulation provides guidance for the Office in using this discretion.<sup>12</sup> The regulation provides that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”<sup>13</sup>

Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>14</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>15</sup>

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<sup>11</sup> Cf. 20 C.F.R. § 10.5(x) (there is no recurrence of disability where a light-duty assignment is withdrawn for reasons of misconduct).

<sup>12</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>13</sup> *Id.*

<sup>14</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>15</sup> *Annette Louise*, 54 ECAB 783 (2003).

## **ANALYSIS -- ISSUE 2**

The Board finds that the Office properly denied appellant's request for reconsideration without conducting further merit review because she failed to meet any of the listed three regulatory criteria. In support of her reconsideration request, appellant submitted a statement asserting that she was under a doctor's care from October 25, 2004 through February 14, 2007. Although appellant conceded that her employment was terminated on December 28, 2004, she stated that her medical condition precluded her from obtaining any other employment and that she was temporarily totally disabled during the period claimed. However, appellant did not assert that the Office misapplied or misinterpreted a point of fact, nor did she advance any new and relevant legal arguments. With her request for reconsideration, appellant submitted several medical reports which had been previously submitted and considered by the Office.<sup>16</sup> She did not provide any new and relevant medical reports supporting her assertion of total disability. The Board finds that the Office properly denied appellant's request for reconsideration because she neither asserted that the Office misapplied or misinterpreted a specific point of fact or law, advanced a new and relevant legal argument, nor submitted new and relevant medical evidence.

## **CONCLUSION**

The Board finds that appellant has not established that she was entitled to compensation for temporary total disability beginning December 4, 2004 and that the Office properly denied appellant's request for reconsideration without conducting a merit review.

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<sup>16</sup> Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case. *J.P.*, 58 ECAB \_\_\_\_ (Docket No. 06-1274, issued January 29, 2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 25 and November 9, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 19, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board