

**United States Department of Labor
Employees' Compensation Appeals Board**

BRENDA WARD, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Mount Vernon, NY, Employer**

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**Docket No. 03-2192
Issued: February 19, 2004**

Appearances:

Thomas Harkins, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 9, 2003 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated June 19, 2003, which denied her request for reconsideration of a June 15, 2002 decision, which terminated her compensation effective July 12, 1999. Appellant also filed a timely appeal from an Office merit decision dated June 19, 2003, which found that she had not sustained a recurrence of total disability as of January 21, 2000. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions. Because more than one year has elapsed between the last merit decision concerning the termination of appellant's compensation and the filing of this appeal on September 3, 2003 the Board lacks jurisdiction to review the merits of the termination issue.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a); and (2) whether appellant sustained a recurrence of total disability as of January 21, 2000.

FACTUAL HISTORY

On April 27, 1998 appellant, then a 47-year-old mail clerk, filed a traumatic injury claim (Form CA-1) alleging that she injured the upper right side of her stomach when she was struck by a mail rack. Appellant did not seek immediate medical attention, but returned to work the next day, felt pain in her side and went to a hospital emergency room where she was diagnosed with a contusion of her chest wall.

In an April 27, 1998 report, Dr. Marco Verga, a radiologist, stated that x-rays revealed no acute or chronic rib fracture. In a June 16, 1998 report, Dr. Charles Totero, a Board-certified surgeon, noted that appellant presented with pain in the posterior rib cage below her right scapula. On examination he found that appellant had a complete range of motion of her thoracic and lumbar spine with no break in her skin in the contused area. He noted no swelling or palpable tenderness and no pain with thoracic cage compression. Dr. Totero found that appellant had complete inspiration and expiration with no discomfort. He listed discomfort in the posterior thoracic cage region below the level of the scapula. Dr. Totero diagnosed contusion of the right anterior chest wall and stated that no disability existed or further medical treatment was necessary. In a June 16, 1998 report, Dr. Joseph Grossman, a Board-certified orthopedic surgeon, diagnosed contusion of the right anterolateral rib cage, possible initial fracture of the rib cartilage and wrote that appellant could return to work immediately with no physical restrictions.

On June 27, 1998 appellant filed of recurrence of disability claim, stating that the pain never ended after the original injury and her return to work caused it to increase. In a September 5, 1998 decision, the Office accepted the claim for chest contusion and later accepted her recurrence of disability claim.

In a handwritten October 2, 1998 report, Dr. Mohammed Rashid, an internist, stated that the history of injury included an injury to the right side of the abdomen, back, leg and lumbar spine. He diagnosed a contusion to the right side of the ribs, abdomen, spine and legs. On October 10, 1998 appellant returned to light-duty work four hours a day. A magnetic resonance imaging (MRI) scan of the lumbar spine taken on December 14, 1998 was reported as normal. In a February 25, 1999 report, Dr. Shariar Sotudeh, an orthopedist, stated in a progress note that he had been treating appellant for a chest contusion and lumbosacral spine syndrome and that she could return to work for four hours a day with no prolonged standing, lifting over five pounds or going up and down stairs.

Appellant was referred for a second opinion medical evaluation. In a March 18, 1999 report, Dr. Phillip Keats, a Board-certified orthopedic surgeon, indicated that appellant presented with pain in her back, chest, abdomen, right leg and foot with numbness in her big toe. Appellant told him that she had trouble walking and lifting and had difficulty moving her right leg. On examination he found that appellant's cervical and lumbosacral spine and shoulders to have full range of motion and to otherwise be normal. He found no tenderness in her ribs and noted that she had full and pain free inspiration and expiration. Dr. Keats stated that a neurological examination of the lower extremities showed reflexes, muscle testing and sensation to be intact. He stated that he could find no objective evidence consistent with a chest contusion, which he opined had resolved. Dr. Keats stated that appellant could return to full-time work with

no physical restrictions. He concluded that appellant had multiple subjective complaints with no objective findings to substantiate her complaints and that her injuries were soft tissue injuries that had resolved.

In a May 5, 1999 letter, the Office proposed terminating appellant's compensation based on Dr. Keats' report. No further evidence was submitted. In a July 12, 1999 decision, the Office terminated her compensation benefits effective that date.

Appellant requested reconsideration and submitted an October 20, 1999 report from Dr. Krishna Murthy, a Board-certified neurologist, who stated that an MRI scan revealed a midline herniated disc at C3-4 and C5-6, which she opined was not related to appellant's accepted injury. According to Dr. Murthy, appellant injured her neck in a 1991 automobile accident. On examination she found limited movements of the lumbosacral spine and tenderness over the sacroiliac joint on the right side as well as some gluteal myositis in the right. Dr. Murthy stated that appellant had symptomatic, mechanical as well as neurological evidence of chronic lumbar pain with right L5 radiculitis and chronic pain of the contusion of her lower ribs. She recommended further testing of appellant's lower extremity pain, which she felt was related to the accepted injury. In an October 29, 1999 report, Dr. Murthy wrote that a lumbar MRI scan was normal and electromyogram test showed right radiculopathy of the lower extremity that was likely caused by a pinched nerve. A cervical MRI scan showed a midline herniation at C4-5 and C6-7 that Dr. Murthy opined was not related to the accepted injury.

In a January 21, 2000 letter, the employing establishment ended appellant's light-duty assignment based on the Office's finding that she no longer had any disabling work-related residuals. The letter stated that light duty was designed specifically for workers recovering from injury or illness and as appellant was found to no longer have a work-related disability she was no longer eligible for light duty. Appellant was informed that she could return to her regular job or take another form of leave.

In an April 12, 2000 decision, the Office denied modification of its June 12, 1999 termination.

Appellant requested reconsideration and submitted an undated handwritten report, received by the Office on April 11, 2001, from Dr. Rashid who stated that appellant sustained multiple contusions and injuries on the job, including a herniated disc at C4-5 and C6-7, pressure and compression and a pinched nerve in her lumbosacral spine, incontinence of her bladder, restricted range in her right arm and shoulder and right wrist and hand pain. He attributed these conditions to her injury, stating that the blow to the ribs transmitted via the lungs and muscle ligaments to the spine of her neck and thoracic and lumbosacral causing restricted range of motion in her spine.

In a June 1, 2001 decision, the Office denied modification of its prior decisions.

Appellant requested reconsideration and submitted a May 24, 2002 report from Dr. Sotudeh, who noted that he last saw appellant on September 23, 1999 when he diagnosed a chest contusion and lower back pain syndrome with radiculopathy, which he attributed to her work injury.

In a June 15, 2002 decision, the Office denied reconsideration finding the medical evidence repetitious and, therefore, insufficient to warrant further merit review.

In a June 24, 2002 report, Dr. Mangala Rajan, a radiologist, indicated that x-rays of appellant's lumbosacral spine revealed mild degenerative disease. In a June 9, 2003 letter through her representative, appellant requested reconsideration arguing that the Office failed to accept all of her medical conditions resulting from the accepted injury. She contended that the reports of her attending physicians showed that she had continuing work-related disability and that Dr. Keats' report did not contain sufficient rationale to support the termination of benefits. Appellant also submitted a recurrence of disability claim alleging that she was totally disabled on January 21, 2000 when the employing establishment withdrew her light-duty assignment. Appellant resubmitted various medical reports which had previously been considered by the Office, but submitted no new medical evidence to support her request.

In a June 19, 2003 decision, the Office denied reconsideration finding that appellant failed to submit new medical evidence or raise a new legal argument sufficient to warrant further merit review. In a separate June 19, 2003 decision, the Office denied appellant's recurrence of disability claim, finding no basis for the claim as the employing establishment withdrew the light-duty position after the Office determined that appellant had no further disability related to her accepted injury.

LEGAL PRECEDENT -- ISSUE 1

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.² To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.³ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁴

¹ 5 U.S.C. § 8101 *et seq.* Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

² 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

³ 20 C.F.R. § 10.138(b)(2).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

ANALYSIS -- ISSUE 1

In the present case, appellant has not established that the Office abused its discretion in its June 19, 2003 decision by denying her request for a review on the merits of its June 15, 2002 decision under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

Appellant submitted no new medical evidence with her June 9, 2003 request for reconsideration. Instead she argued that the Office failed to properly interpret the medical evidence of record. She claimed that the Office failed to accept all of her medical conditions resulting from the accepted injury, that the reports of attending physicians showed that she had continuing work-related disability and that Dr. Keats' report did not contain sufficient rationalization to support a termination. However, the issue of the termination of appellant's compensation is medical in nature and appellant's assertions regarding the sufficiency of the medical evidence, as a nonphysician, is not relevant to the issue. The Board has held that the submission of evidence, which does not address the particular issue involved does not constitute a basis for reopening a case.⁵ Appellant also resubmitted documents previously considered by the Office, but the Board has held that the submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁶

LEGAL PRECEDENT -- ISSUE 2

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.⁷

⁵ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979). All of the relevant medical evidence had been previously reviewed prior to the Office termination on July 12, 1999 or in the previous denials of modification. Additionally, only Drs. Rashid and Sotudeh attributed any condition other than a contusion to the accepted incident and none of their reports explained why or how the additional conditions were causally related to the accepted injury. Moreover, the preponderance of the medical evidence supports that appellant sustained no further injury than a chest contusion. Drs. Totero, Grossman and Keats each found that appellant had no residual or other injuries attributable to the April 26, 1998 injury.

⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁷ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

ANALYSIS -- ISSUE 2

In the present case, after the Office terminated her compensation effective July 12, 1999, appellant claimed that she sustained a recurrence of disability on January 21, 2000 due to her April 26, 1998 employment injury. However, appellant submitted no new medical evidence to support her recurrence of disability claim. Instead she argued that the employing establishment withdrew her light-duty job on January 21, 2000 leaving her with no job within her medical restrictions. However, the employing establishment withdrew the light-duty job based on the Office's July 12, 1999 determination, that appellant no longer had any disabling residuals from her accepted chest contusion. The employing establishment also informed appellant that she could return to her regular employment. Appellant did not submit any medical evidence showing that she sustained a recurrence of disability on or after January 21, 2000, due to the accepted work-related injury. Therefore, the Board finds that appellant did not meet her burden of proof to establish that she sustained a work-related recurrence of disability on or after January 21, 2000.

CONCLUSION

The Board finds that the Office properly denied appellant's request for merit review, pursuant to 5 U.S.C. § 8128(a), of its June 19, 2002 decision concerning the termination of her compensation. Moreover, appellant did not meet her burden of proof to establish that she sustained a work-related recurrence of disability on or after January 21, 2000.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 19, 2003 is affirmed.

Issued: February 19, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member