United States Department of Labor
Employees' Compensation Appeals Board

B.M., Appellant	)	
and	)	**Docket No. 09-260**
	)	**Issued: December 4, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Portland, OR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 4, 2008 appellant filed a timely appeal from a May 13, 2008 wage-earning capacity decision of the Office of Workers' Compensation Programs, a July 23, 2008 merit decision finding that she did not establish a recurrence of disability and an October 15, 2008 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that appellant's actual wages as a modified patient service assistant fairly and reasonably represented her wage-earning capacity; (2) whether she has established that she sustained a recurrence due to her accepted work injury; and (3) whether the Office properly denied her request for further review of the merits of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On March 31, 2004 appellant, then a 51-year-old patient services' assistant, filed a claim alleging that she injured her left shoulder on February 5, 2004 due to repetitively reaching above her shoulder in the performance of duty. The Office accepted the claim for a left shoulder rotator cuff tear.[1] Appellant underwent a rotator cuff repair on August 19, 2005.

On January 23, 2007 Dr. James R. Loch, a Board-certified orthopedic surgeon, determined that appellant had permanent work restrictions for the left shoulder. He found that she could not do any repetitive work with the left upper extremity, work at or above shoulder level, push or pull with the left arm or lift more than two pounds.[2] The employing establishment provided appellant work as a modified patient services' assistant within Dr. Loch's work restrictions.

In a disability form dated April 17, 2008, Dr. Loch related that appellant could work with restrictions on pushing, pulling or repetitive lifting of over a half pound and could perform no work at or above the left shoulder and or with the "proxy button."

By decision dated May 13, 2008, the Office determined that appellant's actual earnings as a modified patient services' assistant effective January 23, 2007 fairly and reasonably represented her wage-earning capacity. It noted that this was the same position that she worked when she was injured as modified for her restrictions and found that her actual earnings met or exceeded her wages earned on the date of injury. The Office discussed Dr. Loch's April 17, 2008 report but found that he did not submit sufficient rationale to support the increased work restrictions.[3]

On June 3, 2008 appellant filed a recurrence of disability claim on March 5, 2008 due to her February 5, 2004 employment injury. She related that she did not miss any days from work. Appellant described her continuous left shoulder pain and neck spasm which she attributed to the performance of her work duties. The employing establishment noted that at the time of her alleged recurrence of disability she was working under Dr. Loch's April 17, 2008 work restrictions.

On June 10, 2008 the employing establishment notified appellant of its proposed removal of her from employment for unauthorized access to records. Appellant resigned on June 23, 2008.

[1] In decisions dated May 10 and July 1, 2005, the Office denied appellant's claim on the grounds that the evidence was insufficient to demonstrate that she sustained an injury as alleged. By decision dated July 21, 2006, it vacated its July 1, 2005 decision and accepted the claim for a left rotator cuff tear.

[2] By decision dated October 16, 2007, the Office granted appellant a schedule award for a nine percent permanent impairment of the left arm.

[3] The Office referred to Dr. Loch as Dr. Tilson.

On June 12, 2008 the Office requested that appellant clarify her notice of recurrence form. It noted that she had not claimed any time lost from work and that her case was open for medical treatment.

In a report dated June 16, 2008, Dr. Loch diagnosed left shoulder residuals of a rotator cuff repair with chronic impingement syndrome. He listed additional permanent work restrictions in order to prevent "further recurrences of exacerbation of left shoulder impingement."

On June 18, 2008 appellant related that she was "claiming all future medical treatment, vocational rehabilitation training and compensation to suffice for my permanent impingement to my left shoulder." She described her work duties since January 2006. In another letter of the same date, appellant advised that she had to repetitively use the "proxy button" at work. She noted that she had not missed time from work.

On June 20, 2008 appellant accepted a temporary limited-duty assignment in accordance with Dr. Loch's June 16, 2008 work restrictions. On June 23, 2008 she resigned from employment.

By decision dated July 23, 2008, the Office found that appellant failed to establish a recurrence of disability due to her February 5, 2004 work injury.[4] On September 19, 2008 appellant requested reconsideration. She submitted additional medical evidence and requested that the Office approve her future claim for surgery. In a narrative report dated April 17, 2008, Dr. Loch noted that appellant had to repetitively push a button throughout the day and found that she required a repeat MRI scan study to determine whether she required further surgery. He listed work restrictions of no lifting over a half pound with the left arm, any pushing or pulling or work at or above the shoulder level. In a report dated April 4, 2008, Robert C. Young, MD, diagnosed fibromyalgia, chronic nonmalignant pain, facet syndrome, osteoarthritis, sleep disorder and obesity. He found that the "most significant contributor to her chronic long-standing pain is a case of chronic fibromyalgia…." In a report dated September 18, 2008, Dr. Loch recommended a second opinion to determine whether she required further surgery on her left shoulder. He opined that appellant should continue working with her current restrictions.

In a decision dated October 15, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review under section 8128.

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act[5] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her

[4] In a letter dated June 18, 2008, appellant described her employment duties.

[5] 5 U.S.C. §§ 8101-8193.

wage-earning capacity.[6] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[7] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[8] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[9] Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[10]

The Federal (FECA) Procedure Manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented her wage-earning capacity and the work stoppage did not occur because of any change in the injury-related condition affecting the ability to work.[11]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a rotator cuff tear of the left shoulder on February 5, 2004. On January 23, 2007 appellant's attending physician, Dr. Loch, opined that she could work with limitations on lifting more than two pounds, pushing or pulling with the left arm, working above or at shoulder level or repetitive use of the left upper extremity. Appellant worked within Dr. Loch's restrictions until April 17, 2008, when he increased her work restrictions to include no use of the "proxy button" and no repetitive lifting over a half pound. The employing establishment provided her with a new position within Dr. Loch's April 17, 2008 work restrictions.

The Office issued its May 13, 2008 wage-earning capacity after finding that appellant's work as a modified patient service assistant effective January 23, 2007 fairly and reasonably represented her wage-earning capacity. At the time that it issued its May 13, 2008 wage-earning capacity decision, however, she was no longer working in the position held on January 23, 2007 but instead in a similar position with increased restrictions. Appellant submitted an April 17, 2008 report from Dr. Loch indicating that she could work with restrictions on pushing, pulling or repetitive lifting over a half pound, no work at or above the left shoulder and no working the "proxy button."

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[6] *Id*. at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[7] *Lottie M. Williams*, 56 ECAB 302 (2005).

[8] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[9] 20 C.F.R. § 10.403(c).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[11] *Id*. at Chapter 2.814.7 (July 1997).

There are situations when a retroactive wage-earning capacity determination may be appropriate. As noted, the Office's procedure manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented her wage-earning capacity and the work stoppage did not occur because of any change in the injury-related condition affecting the ability to work.[12] Appellant submitted medical evidence showing that she had increased work restrictions prior to the Office's wage-earning capacity determination. The Office must evaluate any work stoppage and determine whether it is employment related prior to issuing a retroactive loss of wage-earning capacity determination.[13] In its May 13, 2008 wage-earning capacity determination, the Office considered Dr. Loch's April 17, 2008 work restrictions and found that his report was insufficiently rationalized to show that her condition had worsened.[14] The Board finds that the Office properly considered appellant's work stoppage of her job based on the January 23, 2007 work restrictions prior to issuing its loss of wage-earning capacity determination.

The Board finds that appellant's actual earnings as a modified patient services' assistant effective January 23, 2007 fairly and reasonably represented her wage-earning capacity. Appellant worked in the position for more than 60 days and there is no evidence that the position was seasonal, temporary or make-shift work designed for her particular needs.[15] The Board finds that Dr. Loch's April 17, 2008 report listing additional physical limitations is insufficient to support that appellant had increased work restrictions as he provided no explanation for his conclusion. Medical conclusions unsupported by rationale are of diminished probative value.[16] Additionally, findings on examination are needed to justify a physician's opinion regarding disability.[17] As there is no probative evidence that appellant's wages in her position did not fairly and reasonably represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.[18]

LEGAL PRECEDENT -- ISSUE 2

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or she cannot perform such light duty. As part of this burden, the

[12] *Id*. at Chapter 2.814.7 (July 1997).

[13] *See William M. Bailey*, 51 ECAB 197 (1999).

[14] The Office referred to Dr. Loch as Dr. Tilson; however, this appears to be a typographical error.

[15] *Elbert Hicks*, 49 ECAB 283 (1998); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

[16] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[17] *Laurie S. Swanson*, 53 ECAB 517 (2002).

[18] *See Loni J. Cleveland*

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.[19]

Office regulations provide that a recurrence of medical condition is a documented need for further medical treatment after a claimant is released from treatment for the accepted condition or injury when there is no accompanying work stoppage.[20] Continuous treatment for the accepted injury is not considered a "need for further medical treatment after release from treatment," nor is an examination without treatment.[21]

ANALYSIS -- ISSUE 2

Appellant alleged that she sustained a recurrence of disability on March 5, 2008. However, she noted that she had to use the proxy button repetitively during the day. She did not claim time lost from work and, as noted by the Office in its June 12, 2008 letter, she continued to be entitled to compensation for medical treatment. Appellant submitted a report dated April 17, 2008, in which Dr. Loch opined that appellant could not push or pull and could not repetitively lift over half of a pound or use the proxy button. She continued to work within Dr. Loch's restrictions until she resigned from employment. Consequently, the Board finds that appellant has neither established an inability to perform her assigned duties due to the effects of the employment-related injury; nor has she established a need for medical treatment due to the effects of the employment injury.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[22] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[23] 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.[24] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[25]

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[19] *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986); *see also* 20 C.F.R. § 10.5(e).

[20] *See* 20 C.F.R. § 10.5(y).

[21] *Id.*

[22] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

[23] 20 C.F.R. § 10.606(b)(2).

[24] *Id.* at § 10.607(a).

[25] *Id.* at § 10.608(b).

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.[26] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[27] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[28]

ANALYSIS -- ISSUE 3

The Office determined that appellant did not establish a recurrence of disability due to her February 5, 2004 work injury. Appellant requested reconsideration and asked that the Office approve her request for surgery. She submitted an April 4, 2008 report from Dr. Young, who diagnosed fibromyalgia, and a September 18, 2008 report from Dr. Loch, who recommended further surgery. Neither physician, however, addressed the relevant issue of whether appellant sustained a recurrence; consequently, these reports are insufficient to warrant reopening her case for further merit review.[29]

In a narrative report dated April 17, 2008, Dr. Loch listed increased work restrictions and noted that she had to repetitively push a button all day. The Office previously considered his work restrictions in his April 17, 2008 work restriction form and thus his report is substantially similar to a report previously of record.

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

CONCLUSION

The Board finds that the Office properly determined that appellant's actual wages as a modified patient service assistant fairly and reasonably represented her wage-earning capacity. The Board also finds that appellant has not established that she sustained a recurrence of disability and that the Office properly denied her request for merit review.

[26] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[27] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[28] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[29] *Freddie Mosley*, 54 ECAB 255 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 15, July 23 and May 13, 2008 are affirmed.

Issued: December 4, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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