United States Department of Labor
Employees' Compensation Appeals Board

V.H., Appellant	)	
and	)	**Docket No. 08-2142**
	)	**Issued: May 18, 2009**
DEPARTMENT OF VETERANS AFFAIRS, SOUTHERN OREGON REHABILITATION CENTER & CLINICS, White City, OR, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2008 appellant, through her attorney, filed a timely appeal from August 28, 2007 and February 11, 2008 merit decisions of the Office of Workers' Compensation Programs denying her claim for disability compensation and from April 9 and June 5, 2008 nonmerit decisions denying her requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the April 9 and June 5, 2008 nonmerit decisions.

ISSUES

The issues are: (1) whether appellant has established that she was disabled from March 20 through June 29, 2007 due to her February 3, 2007 work injury; and (2) whether the Office, in its April 9 and June 5, 2008 decisions, properly denied her requests for reconsideration under 5 U.S.C. § 8128.

FACTUAL HISTORY

On March 2, 2007 appellant, then a 48-year-old nursing assistant, filed a claim alleging that she sustained an injury to her back on February 3, 2007 when she tripped on a laundry cart and fell. She stopped work on February 3, 2007. The Office accepted the claim for a contusion of the back.

In a report dated February 3, 2007, Dr. Ken Brown, Board-certified in emergency medicine, related that appellant experienced pain in the S1 area after falling on her left side pushing a cart. He noted that she had previously sustained an injury to her back in the same location. Dr. Brown diagnosed back pain and recommended follow-up care from appellant's attending physician. In a return to work form, he found that she was unable to work until February 5, 2007.

On April 27, 2007 appellant filed a claim for compensation (Form CA-7) requesting compensation for total disability from March 20 to April 28, 2007. By decision dated June 18, 2007, the Office denied her claim for compensation from March 20 to April 28, 2007 on the grounds that the medical evidence did not establish that she was disabled for the period claimed.

Appellant filed claims for compensation from April 29 through June 29, 2007. On July 16, 2007 the Office requested that she submit medical evidence supporting that she was disabled from employment due to her accepted work injury or evidence to show that she had no light duty available within her limitations.

In a report dated July 27, 2007, Dr. Thomas J. Purtzer, a Board-certified neurosurgeon, related that he initially evaluated appellant on November 6, 2006 for back pain subsequent to a March 16, 2005 work injury. Appellant continued to experience lumbar and sacral back pain radiating into her buttocks and left lateral thigh. Dr. Purtzer stated:

> "[Appellant] was then seen back on February 13, 2007, and was noted to have suffered from a fall at work on February 3, 2007. [She] states that she was pushing a cart with laundry in it. Apparently the cart tipped over and [appellant] held on to it in an effort to save the cart and the contents of it and landed on her left side. [She] felt that she had injured her neck. She was given an off-work note. We refilled her medications. [Appellant] had x-rays performed by Dr. Mark Logan, which showed significant changes in the cervical spine.… [She] is noted to be off work at the advice of Dr. Logan. Apparently Dr. Logan had recommended that [appellant] take the following year off of work and focus on rehabilitation of the spine."

Dr. Purtzer found that appellant was disabled from work due to low back and neck pain from her two prior injuries.

By decision dated August 28, 2007, the Office denied appellant's claim for compensation for the period April 29 through June 29, 2007 after finding that the medical evidence was insufficient to establish that she was disabled from employment. It accepted the condition of sacroiliac strain as due to her work injury.

By letter dated November 6, 2007, the Office requested that Dr. Purtzer review the job description for appellant's date-of-injury position and discuss whether she could perform these duties. It further asked that he address whether her February 3, 2007 employment injury disabled her from work or aggravated a prior employment injury and complete an enclosed work restriction evaluation.

On November 12, 2007 appellant requested reconsideration. She submitted a note from Dr. Purtzer dated August 15, 2007. Dr. Purtzer discussed appellant's attempt to obtain disability retirement.[1] In a work restriction evaluation dated November 25, 2007, he found that she was unable to work her usual employment because of low back pain with standing, walking, bending or lifting. Dr. Purtzer asserted that appellant was disabled from work.

By decision dated February 11, 2008, the Office denied modification of its June 18 and August 28, 2007 decisions. On February 15, 2008 appellant requested reconsideration. She submitted letters dated February 15, 2008 to her senator and congressional representative describing her injuries and medical treatment.

By decision dated April 9, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence was irrelevant and thus insufficient to warrant further review of the merits under section 8128.

On April 26, 2008 appellant again requested reconsideration. In a report dated April 21, 2008, Dr. Allen J. Thomashefsky, Board-certified in family practice, described appellant's history of a motor vehicle accident on July 2002, and injuries at work on March 16, 2005, September 15, 2006 and February 3, 2007. He related that x-rays obtained on February 1, 2006 showed mild to moderate lumbar scoliosis and that x-rays obtained on February 3, 2007 showed "severe scoliosis in her lumbar spine, but also a very, very severe thoracic scoliosis with osteophytic change." Dr. Thomashefsky found that appellant's scoliosis put her at risk for injury and caused musculoligamentous tears that never properly healed. He stated, "Since the other two injuries that she had both in September 2006 and February 3, 2007, her scoliosis has gotten more severe and her pain has gotten so severe that she cannot work."

In a report dated September 23, 2007, received by the Office on May 29, 2008, Dr. C. Mark Logan, a chiropractor, found that she was unable to perform her usual employment duties for nine months to a year due to "her lumbar injury of sprain/strain, complicated by moderate-severe kypho-scoliosis with ligamentous laxity, multiple spondylolisthesis [and] retrolisthesis and osteoarthritis [degenerative disc disease]."

In a decision dated June 5, 2008, the Office denied appellant's request to reopen her case for further merit review. It noted that the medical evidence did not address the period of compensation claimed from March 20 to June 29, 2007.

[1] Dr. Purtzer's note is nearly illegible.

LEGAL PRECEDENT -- ISSUE 1

The term disability as used in the Federal Employees' Compensation Act[2] means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.[3] Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[4] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[5] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employee's to self-certify their disability and entitlement to compensation.[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a back contusion and sacroiliac strain due to a February 3, 2007 work injury. She filed claims for compensation for total disability beginning March 20, 2007.

On February 3, 2007 Dr. Brown diagnosed back pain and found that appellant should obtain further care from her attending physician. He opined that she was unable to work until February 5, 2007. As he did not address whether appellant was disabled after March 20, 2007, his opinion is of little probative value.

In a report dated July 27, 2007, Dr. Purtzer described appellant's March 16, 2005 and February 13, 2007 work injuries. He discussed her diagnoses of moderate chronic pain syndrome and degenerative disc disease. Dr. Purtzer related that appellant "felt that she had injured her neck" after a cart apparently tripped over on February 13, 2007 and "was given an off-work note." He noted that x-rays showed changes in her cervical spine. Dr. Purtzer opined that appellant's condition was due to her two prior injuries and found that she was disabled due to low back and neck pain. He did not, however, provide a firm diagnosis of appellant's condition due to the employment injury or fully explain how the February 13, 2007 injury resulted in disability from work. Without a firm diagnosis supported by medical rationale, the report is of little probative value.[7]

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[2] 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f).

[3] *Paul E. Thams*, 56 ECAB 503 (2005).

[4] *Id*.

[5] *Id*.

[6] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[7] *See Samuel Senkow*, 50 ECAB 370 (1999) (finding that, because a physician's opinion of Legionnaires disease was not definite and was unsupported by medical rationale, it was insufficient to establish causal relationship).

In a work restriction evaluation dated November 25, 2007, Dr. Purtzer opined that appellant was unable to work due to low back pain. He did not, however, explain how or why residuals of her employment injury caused her disability beginning March 20, 2007 other than to note that she experienced low back pain with activities. Additionally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[8]

An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between her claimed condition and his employment.[9] She must submit a physician's report in which the physician reviews those factors of employment identified by her as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[10] Appellant failed to submit such evidence and therefore failed to discharge her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[11] 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.[12] 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.[13] 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.[14]

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.[15] 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.[16] While the reopening of a case may be predicated

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

[9] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[10] *Robert Broome*, 55 ECAB 339 (2004).

[11] 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."

[12] 20 C.F.R. § 10.606(b)(2).

[13] *Id.* at § 10.607(a).

[14] *Id.* at § 10.608(b).

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

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

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.[17]

ANALYSIS -- ISSUE 2

The Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish that she was disabled from employment after March 20, 2007 as a result of her February 3, 2007 work injury. On February 18, 2008 she requested reconsideration and submitted letters that she wrote to her senator and congressional representative. The issue of whether appellant is disabled from work, however, is medical in nature and can only be resolved by the submission of medical evidence. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[18]

On April 26, 2008 appellant again requested reconsideration. She submitted a report dated April 21, 2008 from Dr. Thomashefsky, who asserted that appellant's preexisting scoliosis of the lumbar spine worsened significantly after work injuries on September 15, 2006 and February 3, 2007. Dr. Thomashefsky found that she was unable to work due to her severe scoliosis. However, he did not specifically address the relevant issue of whether appellant was disabled from March 20 through June 29, 2007 due to her accepted work injury; consequently, his report is insufficient to warrant a reopening of the case for further merit review.

Appellant also submitted a report dated May 29, 2008 from Dr. Logan, a chiropractor, who found that appellant was unable to work for nine months to a year due to lumbar sprain with scoliosis and ligamentous laxity, multiple spondylolisthesis, retrolisthesis and osteoarthritis. Dr. Logan did not, however, address the periods of disability at issue and thus his report does not constitute relevant and pertinent new evidence. Further, he cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence.[19]

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 pertinent 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 appellant has not established that she was disabled from March 20 through June 29, 2007 due to her February 3, 2007 work injury. The Board further finds that the

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

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

[19] 5 U.S.C. § 8101(2); *see also Michelle Salazar*, 54 ECAB 523 (2003). The Office's regulation, at 20 C.F.R. § 10.5(bb), defines subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See Mary A. Ceglia*, 55 ECAB 626 (2004).

Office, in its April 9 and June 5, 2008 decisions, properly denied her requests for reconsideration under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 5, April 9 and February 11, 2008 and August 28, 2007 are affirmed.

Issued: May 18, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board