United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 13-666**
	)	**Issued: July 8, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Cincinnati, OH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 30, 2013 appellant filed a timely appeal from an October 19, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that she did not establish a recurrence of disability and a November 13, 2012 nonmerit decision denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the November 13, 2012 nonmerit decision.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability from November 11, 2011 through February 6, 2012 causally related to her accepted employment injury; and (2) whether OWCP properly denied her request to reopen her case for further review of the merits under 5 U.S.C. § 8128.

[1] 5 U.S.C. § 8101 *et seq*.

FACTUAL HISTORY

On April 11, 2007 appellant, then a 56-year-old mail handler, filed an occupational disease claim alleging that she sustained chronic lumbar and pectoral strain, left shoulder tendinitis, neck strain and a knee condition causally related to factors of her federal employment. OWCP accepted the claim for an aggravation of the right cervical rib, an aggravation of osteoarthritis of the left shoulder, an aggravation of cervical osteoarthritis and an aggravation of chronic lumbar strain. On July 25, 2007 appellant began working modified duty in the rewrap unit.[2]The duties consisted of sitting in a chair doing rewrapping work for eight hours a day with no reaching above the shoulder, climbing, bending, pushing, pulling, twisting or lifting and carrying over five pounds.

OWCP previously accepted that on May 10, 2000 appellant sustained cervical strain and a left pectoralis strain under file number xxxxxx345 and an aggravation of lumbar spondylosis under file number xxxxxx330. It combined the cases under the current file number.

In a report dated November 15, 2011, Dr. James T. Lutz, who specializes in family medicine, related that objective studies revealed cervical disc displacement and radiculopathy. He attributed the diagnosed conditions to repetitive work in the course of appellant's modified employment. Dr. Lutz advised that shemight require further work restrictions and a chair for neck and back support.

In a Family and Medical Leave Act (FMLA) certification dated November 15, 2011, Dr. Lutz found that appellant could not perform her job functions of heavy repetitive lifting, reaching, turning and prolonged sitting. He diagnosed lumbar disc displacement and lumbar strain. Dr. Lutz indicated that appellant was off work for 8 to 12 weeks.

On December 5, 2011 Dr. Lutz evaluated appellant for pain in the low back and left shoulder. He listed findings on examination and diagnosed lumbosacral sprain, primarily osteoarthritis and osteoarthritis of the left shoulder. Dr. Lutz noted that appellant related that her symptoms had improved with not working and that her low back condition was "exacerbated with exertional activities and prolonged sitting, standing and walking."

On December 15, 2011 appellant filed a claim for compensation for intermittent disability from November 19 to December 2, 2011.[3]

By letter dated December 20, 2011, OWCP requested that appellant submit additional factual and medical information in support of her claim for disability.

On January 4, 2012 Dr. Lutz related, "[Appellant] was taken off work beginning November 11, 2011 due to a worsening of her low back condition making even sedentary work impractical. Objective findings included loss of range of motion and spasm of the lower lumbar

[2] By decision dated April 7, 2008, OWCP granted appellant a schedule award for a six percent permanent impairment of the left upper extremity.

[3] Appellant used leave for some periods.

and upper sacral regions bilaterally."[4] He determined that she could resume modified employment on February 7, 2012.

On January 14, 2012 appellant related that she had worked modified duty since 2008. She indicated that she did not have a chair to sit in at work until an employee left from a prior shift. Appellant alleged that her work duties increased after her unit relocated because she had to lift and carry mail a greater distance.

By letter dated February 27, 2011, OWCP informed appellant of the definition of a recurrence of disability and requested that she submit a narrative report from her physician explaining why she was unable to perform her modified employment due to a spontaneous worsening in her condition. It indicated that it appeared that she was claiming a new injury as she maintained that new work factors caused or aggravated her condition. OWCP noted that appellant had filed an occupational disease claim, assigned file number xxxxxx821, due to work factors beginning July 25, 2007.

In a decision dated April 11, 2012, OWCP denied appellant's claim for compensation beginning November 19, 2011.[5] On April 19, 2012 appellant requested a telephone hearing before an OWCP hearing representative.

In reports dated January 5 and March 13, 2012, received by OWCP on May 2, 2012, Dr. Dan Buchanan, a chiropractor, described appellant's complaints of pain in the neck and low back and stated that it was "probable that [her] current symptoms are causally related to the original injury."

At the telephone hearing, held on August 8, 2012, appellant asserted that she was requesting compensation from November 11, 2011 through February 6, 2012. She maintained that her physician found that she could not work for three months due to her accepted employment injury. Appellant related that she filed a new claim for cervical radiculopathy and disc displacement that had now been approved.

By decision dated October 19, 2012, the hearing representative affirmed the April 11, 2012 decision. He found that the evidence indicated that new work factors caused her condition and noted that appellant was pursuing an occupational disease claim under another file number.

On October 29, 2012 appellant requested reconsideration of the denial of compensation from November 11, 2011 through February 6, 2012. She noted that the employing establishment did not challenge her depiction of her work duties. Appellant indicated that in a decision dated June 22, 2012 a hearing representative found that she was entitled to compensation in May 2011. She resubmitted a November 15, 2011 duty status report and a January 4, 2012 medical report from Dr. Lutz in support of her request for reconsideration. Appellant also resubmitted May 2

[4] Dr. Lutz' report is dated January 4, 2011 instead of January 4, 2012; however, it appears from the context of the report that this is a typographical error.

[5] By decision dated March 7, 2012, OWCP denied appellant's claim for compensation from May 3 to 6, 2011. It determined that she had not submitted medical evidence supporting that she was disabled from her limited-duty employment. In a summary decision dated June 22, 2012, an OWCP hearing representative reversed the March 7, 2012 decision and found that appellant had established employment-related disability from May 3 to 6, 2011.

and 31, 2011 reports from Dr. Thomas E. Shockley, a Board-certified orthopedic surgeon, addressing disability in May 2011. She also enclosed a photograph which she maintained showed her lifting over five pounds and a copy of a June 13, 2012 hearing representative's summary decision regarding her claim for wage loss from May 3 to 6, 2011.

In a nonmerit decision dated November 13, 2012, OWCP denied appellant's request for reconsideration after finding that she had not submitted evidence or raised an argument sufficient to warrant reopening her case for further merit review under section 8128.

On appeal, appellant argues that she submitted sufficient evidence to show that she was off work due to her accepted injuries. She asserts that Dr. Lutz removed her from work as a result of her accepted condition under the current file number and did not find that she sustained a new injury. Appellant relates that all the physicians found that her condition was chronic and would require time off work. She notes that her limited-duty assignment did not change but required lifting over five pounds, as demonstrated by her photograph. Appellant indicates that she claimed a cervical rather than a back, knee and shoulder condition in her occupational disease claim assigned file number xxxxxx821.

LEGAL PRECEDENT-- ISSUE 1

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 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.[6]

OWCP regulations provide that a recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[7] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[8]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained an aggravation of the right cervical rib, an aggravation of osteoarthritis of the left shoulder, an aggravation of cervical osteoarthritis and an

[6] *Richard A. Neidert*, 57 ECAB 474 (2006); *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[7] 20 C.F.R. § 10.5(x).

[8] *Id.*

aggravation of chronic lumbar strain causally related to factors of her federal employment. On July 25, 2007 appellant accepted a position working modified duty in the rewrap unit. She stopped work on November 11, 2011 and filed claims for compensation.

Appellant has not alleged a change in the nature and extent of her light-duty job requirements. On appeal,she specified that her limited duty did not change but instead maintained that she was consistently required to work outside of her restrictions and lift over five pounds. A recurrence of disability, however, does not include disability resulting from exposure to new work factors, even if it involves the same part of the body previously injured.[9] Appellant must provide medical evidence to establish that she was disabled due to a worsening of her accepted work-related condition.[10]

On November 15, 2011 Dr. Lutz diagnosed cervical disc displacement and radiculopathy. He found that appellant required increased work restrictions and a chair with support. OWCP, however, has not accepted cervical disc displacement and radiculopathy under the current file number. Where appellant claims that a condition not accepted or approved by OWCP was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[11] Dr. Lutz attributed her cervical disc displacement and radiculopathy to performing her modified employment rather than her accepted work injury and thus his opinion is insufficient to meet her burden of proof.

In an FMLA certification dated November 15, 2011, Dr. Lutz diagnosed lumbar strain and lumbar disc displacement and determined that appellant was unable to perform repetitive heavy lifting, reaching, turning and prolonged sitting. He found that she would be unable to work for 8 to 12 weeks beginning November 11, 2011. Dr. Lutz did not, however, address the cause of appellant's disability. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[12]

On December 5, 2011 Dr. Lutz diagnosed lumbosacral sprain, primarily osteoarthritis and osteoarthrosis of the left shoulder. He noted that appellant related that her symptoms had improved as she was not working. As Dr. Lutz did not specifically address causation or provide his own opinion that she was disabled from employment, his report is of little probative value.[13]

On January 4, 2012 Dr. Lutz indicated that he found appellant unable to work from November 11, 2011 because her low back condition deteriorated such that she could not perform

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(2) (May 1997).

[10] *See Jackie D. West*, *supra* note 6.

[11] *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

[12] *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

[13] *See A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, *supra* note 11; (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of little probative value on the issue of causal relationship); *Carol A. Lyles*, 57 ECAB 265 (2005) (whether a particular injury caused an employee disability from employment is a medical issue which must be resolved by competent medical evidence).

sedentary employment. He provided objective findings of low back and upper sacral spasms and loss of range of motion. Dr. Lutz, however, did not explain how the accepted employment injury caused disability from appellant's limited-duty employment beginning November 11, 2011. A physician must provide an opinion on whether the employment injury caused or contributed to claimant's diagnosed medical condition and support that opinion with medical reasoning to demonstrate that the conclusion reached is sound, logical and rationale.[14]

Appellant further submitted reports dated January 5 and March 13, 2012 from Dr. Buchanan, a chiropractor. Section 8101(2) of FECA provides that the "term 'physician' includes chiropractors only to the extent that their reimbursable services are limited "to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist…."[15] Dr. Buchanan did not diagnose a subluxation as demonstrated by x-ray and thus he is not considered a "physician" under FECA and his report is of no probative value.[16]

On appeal, appellant argues that Dr. Lutz found that she was disabled from work due to her employment injury rather than new work factors and that all her physicians indicated that her chronic condition would require time off work. She further notes that she alleged a cervical rather than a back, knee or shoulder condition due to performing her modified employment. As discussed, however, appellant did not submit rationalized medical evidence establishing disability for work beginning November 11, 2011 as a result of her accepted employment injury. Consequently, she did not meet her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[17] OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) submit relevant and pertinent new evidence not previously considered by OWCP.[18] To be entitled to a merit review of an OWCP 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.[19] When a claimant fails to meet one of the above standards, OWCP

[14] *John W. Montoya*, 54 ECAB 306 (2003).

[15] 5 U.S.C. § 8101(2); *see also Michelle Salazar*, 54 ECAB 523 (2003).

[16] *Isabelle Mitchell*, 55 ECAB 623 (2004).

[17] *Supra* note 1. Section 8128(a) of FECA provides that "[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."

[18] 20 C.F.R. § 10.606(b)(2).

[19] *Id.* at § 10.607(a).

will deny the application for reconsideration without reopening the case for review on the merits.[20]

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.[21] 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.[22] 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.[23]

ANALYSIS -- ISSUE 2

On October 29, 2012 appellant requested reconsideration. She argued that the employing establishment did not dispute that she worked outside of her restrictions. Appellant submitted a photograph purporting to show that she lifted over five pounds in the course of her employment. As discussed, however, a recurrence of disability is a spontaneous worsening unrelated to new work factors; consequently, her argument is not relevant to the issue at hand.

Appellant resubmitted reports from Dr. Lutz dated January 4 and 15, 2011. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[24]

Appellant also resubmitted medical reports dated May 12 and 31, 2011 from Dr. Shockley submitted in connection with her claim for disability compensation in May 2011. She further submitted a copy of the June 13, 2012 hearing representative's decision issued in connection with her claim for disability in May 2011. This evidence, however, is not relevant to determining whether she was disabled beginning November 11, 2011 due to her accepted work injury. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[25]

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP 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.

[20] *Id.* at § 10.608(b).

[21] *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

[22] *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

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

[24] *See J.P.*, 58 ECAB 289 (2007); *Richard Yadron*, 57 ECAB 207 (2005).

[25] *J.P., id.*; *Freddie Mosley*, 54 ECAB 255 (2002).

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability from November 11, 2011 through February 6, 2012 causally related to her accepted employment injury. The Board further finds that OWCP properly denied her request to reopen her case for further review of the merits under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the November 13 and October 19, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 8, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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