

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

SUE Y. JAMES, Appellant

and

**DEPARTMENT OF THE NAVY, PORTSMOUTH
NAVAL HOSPITAL, Norfolk, VA, Employer**

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**Docket No. 04-1203
Issued: December 10, 2004**

Appearances:
Sue Y. James, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On September 22, 2003 appellant filed a timely appeal of a merit decision of the Office of Workers' Compensation Programs dated October 8, 2002 which rejected her claim for a recurrence of disability commencing June 11, 2002, and a nonmerit decision of the Office dated July 24, 2003 which rejected her request for further reconsideration of her case on its merits under 5 U.S.C. § 8128(a). Pursuant to 20 C.F.R. §§ 501.2(d)(2) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she sustained a recurrence of disability commencing June 11, 2002, causally related to her accepted thoracic and lumbar muscular strain injuries; and (2) whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted that on September 25, 1996 appellant, then a 41-year-old air conditioning mechanic, sustained thoracic and lumbar strains. She did not stop work but returned to work with restrictions as a work control clerk.

On May 30, 2001 the Office advised appellant that, based on the medical evidence, her condition at that time was not a recurrence of disability but rather was a continuation of medical problems related to her accepted work injuries. The Office noted that she continued to work in her permanent reassigned position within the imposed work restrictions.¹

On July 1, 2002 appellant filed a Form CA-2a claim for recurrence of disability alleging that on June 11, 2002 she could no longer get her medication or having the use of a transcutaneous electrical nerve stimulator (TENS) unit for control of her pain. Appellant indicated that this problem was not a recurrence but was a continuation of medical care from her original injury. She stopped work on June 19, 2002.

In a letter dated August 9, 2002, the Office advised appellant that she had not submitted sufficient evidence to establish a recurrence of disability, and it requested that she provide a narrative medical report addressing her history of injury, her current clinical findings, a firm diagnosis and the physician's rationalized medical opinion explaining the causal relationship with her accepted conditions.

In response appellant submitted a June 18, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine which was reported as revealing "a mild focal protrusion/herniation paramidline posterior to the left at L5-S1, with mild mass effect upon the left S1 nerve root. There is mild facet hypertrophy at this level with mild element of foraminal narrowing, [and] at L2-3 through L4-5 there is mild posterolateral endplate spurring and bulging disc material with mild ligamentum flavum and facet hypertrophy. There are mild elements of foraminal narrowing without significant central encroachment."

In a July 23, 2002 attending physician's report, Dr. Anuradha K. Datyner, Board-certified in physical medicine and rehabilitation, noted as history that appellant had experienced a one-month flare-up of back and leg pain, that MRI scan revealed a left L5-S1 herniated nucleus pulposus, and she diagnosed "disc herniation with flare-up of back pain, lumbar radiculopathy." Dr. Datyner opined by writing dates on the CA-20 form report that appellant was totally disabled from June 19 through July 23, 2002 but could return to work with her permanent restrictions on July 24, 2002.

In a July 23, 2002 medical progress note, Dr. Daytner noted appellant's complaints of a low back pain radiating into her left buttock and leg, noted that an MRI scan demonstrated a small L5-S1 herniated disc, and indicated that she was improving with physical therapy and was released back to her work with her usual permanent restrictions.

¹ Appellant's work restrictions included no reaching above the shoulders or climbing ladders, intermittent walking bending, squatting, kneeling, twisting, standing and lifting no more than 10 to 20 pounds intermittently. She could work eight hours per day.

By work restriction evaluation form report dated July 23, 2002, Dr. Datyner indicated that appellant could return to work on regular duty with her permanent restrictions from before. She indicated that appellant could work eight hours per day.

Also submitted was an August 6, 2002 narrative report from Dr. Datyner which noted that she saw appellant on June 11 and July 23, 2002 complaining of severe low back pain which radiated down the left leg, and that an MRI demonstrated a small L5-S1 disc herniation on the left. Appellant was given physical therapy and released to return to work. Dr. Datyner opined that “with regards to causal relationship, when I initially saw [appellant], the pain she was experiencing was thoracic. Her lumbar symptoms are new onset and not related to the initial complaints that I saw her for from 1998 to 2000. [Appellant] does not give me any particular history that this lumbar pain with left sciatica was a result of her work injury. I do not believe that her lumbar pain and left sciatica are related to her work injury of 1996.

In a decision dated October 8, 2002, the Office rejected appellant’s recurrence claim finding that she had not submitted any rationalized medical evidence to support that her present condition was causally related to her original accepted injuries. The Office indicated that on August 6, 2002 Dr. Datyner had opined that appellant’s “lumbar symptoms are new onset and not related to the initial complaints that I saw her for from 1998 to 2000. [Appellant] does not give me any particular history that this lumbar pain with left sciatica was a result of her work injury. I do not believe that her lumbar pain and left sciatica are related to her work injury of 1996.” The Office found that this opinion negated any causal relationship between appellant’s initial accepted employment injuries of thoracic and lumber strain and her present condition, such that it did not support causal relationship.

In a letter dated October 28, 2002, appellant requested reconsideration of the October 8, 2002 decision and argued that she did not receive any letter asking for further information. In support of her request, appellant submitted some duplicate and unrelated forms and reports, including another copy of the June 18, 2002 MRI scan, the July 23, 2002 attending physician’s form report, the 1996 acceptance letter, two copies of the May 30, 2001 letter, a 1996 work status report, a 1998 work restriction evaluation, a July 27, 2000 letter including appellant’s medical restrictions, a November 7, 2002 medical progress note clarifying appellant’s work restrictions.

Also submitted was a June 11, 2002 medical progress note from Dr. Datyner which noted that appellant had positive straight leg raising but normal muscle strength and reflexes. On June 25, 2002 Dr. Mark B. Kerner, an orthopedic surgeon, noted that appellant had an equivocal straight leg raising, and needed to continue physical therapy.

On March 25, 2003 and again on April 10, 2003, appellant, through her congressional representative, requested reconsideration of the October 8, 2002 decision.

By letter dated April 8, 2003,² appellant again requested reconsideration of the October 8, 2002 decision, and in support she submitted duplicative medical evidence dated July 23, 2002. Appellant also submitted a June 25, 2002 medical progress note from Dr. Kerner which noted

² Mistyped on the letter as “2002.”

her symptoms as bilateral buttock pain with left-sided sciatica, right-sided pain, pain that went up her back and arm pain. He noted that the MRI scan demonstrated a small L5-S1 disc herniation on the left, and he recommended continued physical therapy. Dr. Kerner did not address disability.

By decision dated July 24, 2003, the Office declined to reopen appellant's case for a further review on its merits finding that her letter neither raised substantive legal issues nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative, and substantial evidence and to show that he or she cannot perform the light duty.³ As part of this burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.⁴

ANALYSIS -- ISSUE 1

In the present case, appellant returned to light duty with permanent work restrictions, at which she worked successfully for over four years. After she alleged that she sustained a recurrence of disability on June 18, 2002, the only medical evidence submitted to the record that addressed the question of whether appellant was disabled on or after June 18, 2002, causally related to a recurrence of employment-injury related disability, were the reports of Dr. Datyner which noted that a recent MRI scan demonstrated a small left-sided L5-S1 herniated disc and she diagnosed "disc herniation with flare-up of back pain, lumbar radiculopathy." Dr. Datyner opined by indicating dates on the CA-20 form report, that appellant was totally disabled from June 19 through July 23, 2002 but could return to work with her permanent restrictions on July 24, 2002. However, Dr. Datyner opined in a narrative statement that "with regards to causal relationship, when I initially saw [appellant], the pain she was experiencing was thoracic. Her lumbar symptoms are new onset and not related to the initial complaints that I saw her for from 1998 to 2000. [Appellant] does not give me any particular history that this lumbar pain with left sciatica was a result of her work injury. I do not believe that her lumbar pain and left sciatica are related to her work injury of 1996."

No other medical evidence was submitted to the record that mentioned whether appellant was disabled on or after June 18, 2002 and addressed whether or not such disability was causally related as a recurrence to her accepted employment injuries. Therefore, appellant has not met her burden of proof to establish a recurrence of disability by establishing either a change in the nature and extent of her injury-related condition or a change in the nature and extent of her light-duty job requirements. She has therefore, not met her burden of proof to establish her recurrence claim.

³ *Terry R. Hedman*, 38 ECA 222,227 (1986).

⁴ *Id.*

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim. Evidence or argument that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁵ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁶

ANALYSIS -- ISSUE 2

In this case, with her request for reconsideration of the denial of her recurrence claim appellant submitted duplicate copies of evidence previously of record and considered by the Office. The duplicate physician's reports have no new probative value, as they have been previously considered. The MRI scan report was previously submitted and provides no new data regarding any recurrence of disability. The work status reports from 1996 and 1998 are not germane to the issue of whether or not appellant had a recurrence of disability in April 2002 as they preceded that event by several years. Finally, the repetition of appellant's work restrictions has no probative value when discussing a recurrence of disability years later. No further new factual or medical evidence was submitted and no legal argument was successfully made. Therefore, appellant did not meet the requirements of 20 C.F.R. § 10.606(b), and accordingly her request to reopen her case for further reconsideration on its merits must be denied in accordance with 20 C.F.R. § 10.608(b).

⁵ *Helen E. Paglinawan*, 51 ECAB 591 (2000).

⁶ *Kevin M. Fatzer*, 51 ECAB 407 (2000).

CONCLUSION

Appellant has not met her burden of proof to establish that she sustained a recurrence of disability on June 18, 2002, causally related to her accepted thoracic and lumbar strains. The Board further finds that the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for a further review on its merits pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 24, 2003 and October 8, 2002 are hereby affirmed.

Issued: December 10, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member