

numerous times sustaining fractures, contusions and internal injuries. His claim was accepted for bilateral closed fracture of the scapula, bilateral closed fracture of the ribs, bilateral sprain of shoulder and upper arm, subscapularis and other specified sites, bilateral joint derangement in upper arms, pain in thoracic spine and pain in joint, lower right leg.

On September 26, 2006 appellant was terminated from his employment for administrative reasons, specifically for being involved in two separate motor vehicle accidents during his probationary period.

Appellant filed claims for compensation from October 23, 2006 to April 2, 2007 for which he was paid on periodic and supplemental rolls.

On March 28, 2007 appellant had right shoulder arthroscopy with subacromial decompression and open subscapularis repair with biceps tenodesis.

On May 23, 2007 appellant had a left shoulder arthroscopic subacromial decompression, open subscapularis tendon repair and biceps tenodesis.

In a September 10, 2007 report, Dr. Brett F. Gemlick, a Board-certified orthopedic surgeon, stated that appellant was six months status post right open subscapularis repair and four months status post left open subscapularis repair, had completed formalized physical therapy and was doing well. He found that appellant could return to work without restrictions.

On October 1, 2007 the Office issued a notice of proposed termination of wage-loss compensation to appellant. It based its decision on Dr. Gemlick's September 10, 2007 report. The Office informed appellant that he had 30 days to submit additional evidence or arguments. No response was received.

On October 21, 2007 appellant filed a schedule award claim.¹

In a November 1, 2007 decision, the Office finalized the proposed decision to terminate appellant's entitlement to compensation benefits effective that date. It informed appellant that the decision did not effect his entitlement to other benefits, including medical benefits for the accepted conditions. The Office noted that appellant informed it that he had been working since October 4, 2007 in a nonfederal employment position.

On December 20, 2007 appellant requested reconsideration. He argued that his employment injuries from the employing establishment were prohibiting him from doing the jobs he was used to doing, that he was having pain in the areas of the surgeries and that he had not worked since November 21, 2007. Appellant also submitted a December 14, 2007 visit report from Dr. Gemlick which noted that appellant was performing physical work at his job and became very sore. Dr. Gemlick reported that appellant was released from his job when he could not perform due to pain in both shoulders. He noted that he did not see any significant re-tearing

¹ The Office has not issued a decision addressing the schedule award claim therefore the Board does not have jurisdiction over the issue at this time.

upon physical examination. Dr. Gemlick also stated that appellant could not do the kind of job he was used to doing.

In a January 2, 2008 nonmerit decision, the Office denied appellant's reconsideration request on the grounds that no new and relevant evidence was submitted or new legal arguments presented to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.² Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.³

The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.⁴

ANALYSIS -- ISSUE 1

The Board finds that the Office properly terminated appellant's compensation benefits effective November 1, 2007 on the grounds that he had no further employment-related disability. On September 10, 2007 Dr. Gemlick reported that appellant was doing well and had reached maximum medical improvement following his surgeries. He reported his findings on physical examination and concluded that appellant was able to return to his regular work without restrictions. On October 1, 2007 the Office issued a notice of proposed termination and appellant was allowed 30 days to respond as required.⁵ No response was received.

On November 1, 2007 the Office terminated appellant's entitlement to wage-loss compensation benefits. The only medical evidence of record, from his treating physician, Dr. Gemlick, substantiated that appellant could return to his regular work and therefore was no longer disabled. There was no medical evidence of record that appellant was not able to return to work. The Office properly relied on Dr. Gemlick's report in finding that appellant's disability had ceased and that he was capable of returning to work without restrictions and therefore no longer entitled to wage-loss compensation benefits.

² *Curtis Hall*, 45 ECAB 316 (1994).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ 20 C.F.R. § 10.5(f).

⁵ 20 C.F.R. § 10.540(a).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁶

Section 8128(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for review on the merits.⁷ Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁸ Likewise, evidence that does not address a particular issue involved does not constitute a basis for reopening a case.⁹

ANALYSIS -- ISSUE 2

The Board finds that the Office improperly denied merit review. On December 20, 2007 appellant requested that the Office reconsider the termination of his wage-loss benefits. He argued that his injuries from the employment incident were not allowing him to perform the jobs that he was used to doing and that he stopped working completely on November 21, 2007. Appellant also submitted a December 14, 2007 report from Dr. Gemlick who noted that appellant could not perform his job due to pain in both shoulders and that he could not perform the kind of job he was used to doing.

After the termination or modification of compensation benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.¹⁰

Appellant's argument and Dr. Gemlick's report attempt to establish that he had continuing disability causally related to the accepted employment injury, after the termination of his wage-loss compensation benefits. The new medical evidence submitted is relevant to this issue and requires a merit review.

⁶ 20 C.F.R. § 10.606(b)(2)(i-iii).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Helen E. Paglinawan*, 51 ECAB 407, 591 (2000).

⁹ *Kevin M. Fatzner*, 51 ECAB 407 (2000).

¹⁰ *Wentworth M. Murray*, 7 ECAB 570 (1955).

As such the case will be remanded to whether appellant has established continuing disability following the termination of his wage-loss compensation benefits.¹¹

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective November 1, 2007. The Board finds that the Office improperly issued a January 2, 2008 nonmerit decision and the case will be remanded for action consistent with this decision.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated November 1, 2007 is affirmed and the decision dated January 2, 2008 is vacated and remanded.

Issued: August 20, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹¹ In the decision dated January 2, 2008, the Office noted that appellant could file a claim for recurrence of disability if he had a spontaneous return of symptoms from a previous injury. Appellant's allegations and the medical evidence submitted however does not indicate a spontaneous recurrence of disability.