

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

A.R., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
BAY PINES MEDICAL CENTER,
Bay Pines, FL, Employer**

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**Docket No. 08-1474
Issued: December 8, 2008**

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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 24, 2008 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated November 7, 2007 that denied her claim for compensation and a January 22, 2008 decision that denied 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 appellant established that she had an employment-related disability for the period April 21, 2005 to April 4, 2006 causally related to her accepted lumbar condition; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 1, 2004 appellant, then a 46-year-old medical technician who worked intermittently on a fee basis, filed a Form CA-1, traumatic injury claim, alleging that on March 31, 2004 she injured her lower back and buttocks while manually moving a door. She returned to modified duty on April 23, 2004¹ and on May 14, 2004 the Office accepted that she sustained an employment-related lumbar strain.

Appellant began treatment with Dr. Susanti K. Chowdhury, an anesthesiologist, who practices pain management. In treatment notes dated March 24, April 21 and May 3, 2005, Dr. Chowdhury advised that appellant reported that she was required to work outside her restrictions. He diagnosed lumbar radiculopathy and spondylosis and postlaminectomy syndrome. In a May 10, 2005 report, Dr. Larry D. Horvath, a Board-certified osteopath specializing in neurosurgery, noted that appellant was having trouble working and even walking due to chronic low back pain, stating that she had a preexisting back condition for which she had multiple back surgeries in the past. He advised that she had reached maximum medical improvement, that she could continue to work light duty with permanent restrictions and discharged her from his care. On June 16, 2005 Dr. Chowdhury noted that appellant was not working and on July 19, 2005 Dr. Horvath noted appellant's complaints of back and neck pain and advised that she could perform light duty. He stated that he explained to her that she was at maximum medical improvement and that she could apply for Social Security disability.

By letter dated June 28, 2005, the employing establishment informed the Office that light duty had been provided since the inception of appellant's claim and that she stopped work on April 25, 2005 and had not returned. On August 4, 2005 appellant filed a Form CA-7, claim for compensation, for April 23, 2005 and by letter dated August 22, 2005, the Office informed her that she needed to furnish medical evidence establishing disability for work on the date claimed. In a second August 22, 2005 letter, the Office accepted the additional condition of lumbar radiculopathy.

Dr. Chowdhury continued to submit reports, additionally diagnosing cervical and lumbar root injury. In an October 12, 2005 treatment note, he advised that appellant was temporarily totally disabled from a physical and psychiatric standpoint. On December 8, 2005 Dr. Chowdhury noted that she was working one hour a day and on February 6, 2006 that she had increased her work to two hours daily. He advised that appellant could perform 15 hours of light duty weekly.

By decision dated February 28, 2006, the Office denied appellant's claim for wage-loss compensation on April 23, 2005 on the grounds that the medical evidence did not support that she was disabled from work on that day. Dr. Chowdhury continued to advise that appellant could work 15 hours of light duty a week. On July 14, 2006 appellant filed a Form CA-7, claim for compensation, for the period April 21, 2005 to April 4, 2006. In a July 26, 2006 letter,

¹ Appellant's job duties were described as general clerical support such as filing, answering the telephone and follow-up telephone calls, making appointments with intermittent lifting of up to 10 pounds, no climbing, kneeling, stooping, pulling or pushing.

the Office informed her of the type evidence needed to support her claim and by decision dated December 8, 2006, denied her claim for compensation for the period April 21, 2005 to April 4, 2006.

In a request postmarked January 12, 2007, appellant requested a hearing. By decision dated February 21, 2007, the Office denied appellant's hearing request on the grounds that it was untimely filed and that the issue in the case could be addressed by requesting reconsideration. On August 7, 2007 appellant requested reconsideration, stating, "I had Dr. Chowdhury remove me from work because the VA lab supervisor wasn't following the light duty orders," and that she was doing more walking, lifting, bending and sitting than she did in her regular position. She submitted a July 12, 2007 report in which Dr. Chowdhury noted appellant's complaint of radiating low back pain aggravated by any type of activity. Dr. Chowdhury advised that she was wearing a back brace, was not working and had undergone hand surgery.

By letter dated September 11, 2007, the employing establishment advised that appellant was hired on temporary appointments, not to exceed September 30, 2005, that she worked on an as needed basis and that, following her March 31, 2004 employment injury, she worked modified duty. The employing establishment further stated that appellant did not complain that she was made to work outside her restrictions. In a merit decision dated November 7, 2007, the Office denied appellant's claim for disability after April 21, 2005. On December 14, 2007 appellant requested reconsideration and submitted correspondence with her Congressional representative, including a November 30, 2007 letter from Meghan Kincaid, a mental health case manager, asking that the Congressman help appellant with her workers' compensation claim. In a January 22, 2008 decision, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act² the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.³ Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act.⁴

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁵ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the

² 5 U.S.C. §§ 8101-8193.

³ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁴ *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁵ *Amelia S. Jefferson*, 57 ECAB 183 (2005).

employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁶ 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 employees to self-certify their disability and entitlement to compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof to establish that she was entitled to wage-loss compensation for the period April 21, 2005 to April 4, 2006 causally related to her accepted lumbar condition. The issue of whether a claimant's disability is related to an accepted condition is a medical question, which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.⁸

On May 10, 2005 Dr. Horvath advised that appellant should continue to work light duty and dismissed her from his care. His opinion therefore does not establish that appellant was totally disabled beginning April 21, 2005. While Dr. Chowdhury noted appellant's report that she was forced to work outside her restrictions and advised on October 12, 2005 that she was temporarily totally disabled from both physical and psychiatric standpoints, appellant stated on August 7, 2007 that she had Dr. Chowdhury remove her from work because her supervisor was not honoring her restrictions. The employing establishment advised, however, that light duty was always available. The accepted condition in this case is lumbar strain and appellant had preexisting back conditions with multiple surgeries. Dr. Chowdhury did not exhibit specific knowledge of appellant's job duties, did not explain why she could not perform her light-duty position and did not address the period of claimed disability. Medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relation.⁹ The Board therefore finds that his reports are insufficient to establish that appellant was disabled from April 21, 2005 to April 23, 2006.¹⁰ As there is no rationalized medical evidence contemporaneous with the period of claimed disability to support that appellant was disabled from her light-duty job for the April 21, 2004 to April 4, 2006, she did not meet her burden of proof.¹¹

⁶ *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008); see *Huie Lee Goal*, 1 ECAB 180, 182 (1948).

⁷ *Amelia S. Jefferson*, *supra* note 5.

⁸ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

⁹ *Albert C. Brown*, 52 ECAB 152 (2000).

¹⁰ *Paul E. Thams*, 56 ECAB 503 (2005).

¹¹ *Conard Hightower*, 54 ECAB 796 (2003).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹² Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹³ This section provides that the application for reconsideration must be submitted in writing and 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.¹⁴ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁵

ANALYSIS -- ISSUE 2

In her December 14, 2007 request for reconsideration, appellant merely checked a form that she was requesting reconsideration. She therefore did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁶

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted correspondence with her Congressional representative's office in which she asked for help regarding her workers' compensation and Social Security claims and a November 30, 2007 letter from Ms. Kincaid, also asking the representative's help. Ms. Kincaid is a mental health case manager. Section 8101(2) of the Act provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.¹⁷ Lay individuals, such as a case manager, are not competent to render a medical opinion under the Act.¹⁸ The merit issue in this case is whether appellant established that she was disabled from her light-duty position for the period April 21, 2005 to April 4, 2006. This requires the submission of competent medical

¹² 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.608(a).

¹⁴ *Id.* at § 10.608(b)(1) and (2).

¹⁵ *Id.* at § 10.608(b).

¹⁶ *Id.* at § 10.606(b)(2).

¹⁷ *Thomas O. Bouis*, 57 ECAB 602 (2006).

¹⁸ *See David P. Sawchuk*, 57 ECAB 316 (2006).

evidence that addresses the specific dates of claimed compensation.¹⁹ No such evidence was submitted with appellant's December 14, 2007 reconsideration request. As appellant did not submit relevant and pertinent new evidence not previously considered by the Office, it properly denied her reconsideration request by its January 22, 2008 decision.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she was totally disabled for the period April 21, 2005 to April 4, 2006 causally related to her accepted lumbar condition and that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 22, 2008 and November 7, 2007 are affirmed

Issued: December 8, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁹ *Amelia S. Jefferson, supra* note 5.