United States Department of Labor
Employees' Compensation Appeals Board

E.T., Appellant	)	
and	)	**Docket No. 07-1694**
	)	**Issued: January 18, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Dallas, TX, Employer	)	

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 11, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 13, 2006 and March 21, 2007 merit decisions concerning the termination of her compensation and the Office's May 21, 2007 nonmerit decision denying her request for further review of the merits of her claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective October 1, 2006 on the grounds that she neglected to work after suitable work was offered; and (2) whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted that on January 3, 2005 appellant, then a 39-year-old nursing assistant, sustained a lumbar strain and right hip contusion/strain when she was hit by a patient's motorized scooter and fell to the ground. Appellant stopped work on January 3, 2005. The Office paid her appropriate compensation for periods of disability.

On June 27, 2005 appellant returned to limited-duty work for the employing establishment on a full-time basis. The findings of the August 9, 2005 magnetic resonance imaging (MRI) scan of appellant's pelvis showed no evidence of "significant hip pathology or abnormality in the region of the lumbosacral plexus roots." The test also showed a large intramural right fundal fibroid of the uterus and a left ovarian cyst. Appellant complained of increased back and leg pain and on August 29, 2005 she stopped work.

On October 13, 2005 Dr. Austin I. Ogwu, an attending Board-certified internist, determined that appellant could return to limited-duty work for eight hours per day beginning October 19, 2005. On November 7, 2005 Dr. Marvin Van Hal, an attending Board-certified orthopedic surgeon, indicated that appellant could only perform limited-duty work for four hours per day.[1]

On December 18, 2005 appellant underwent a myomectomy to remove fibroid matter from her uterus.[2] On January 10, 2006 Dr. Lisa A. King, an attending Board-certified gynecologist, stated that she did not believe that appellant's back pain and leg weakness were related to her gynecological problems because her symptoms continued after her surgery. On January 9, 2006 appellant's right leg gave way and she fell and fractured the fifth finger of her left hand. The Office accepted that she sustained an employment-related oblique fracture with displacement to the left of the metacarpal shaft of her left fifth finger. On January 10, 2006 Dr. Olayinka Ogunro, an attending Board-certified orthopedic surgeon, performed an open reduction and internal fixation on appellant's left fifth finger. The procedure was authorized by the Office.

On February 8, 2006 Dr. Van Hal indicated that appellant's back and leg condition did not prevent her from performing limited-duty work for four hours per day with a gradual increase to eight hours per day. He indicated that appellant could walk, stand, twist, push, pull, squat and kneel for one to two hours per day and could lift or climb for four hours per day.[3] Dr. Val Hal stated that Dr. Ogunro would have to release appellant to work with respect to her left fifth finger fracture.

On June 12, 2006 Dr. Ogunro indicated that appellant could perform limited-duty work for eight hours per day. He stated that appellant could sit, walk, stand, twist, squat, kneel and climb for eight hours per day, could reach (including above the shoulders) for six hours per day,

[1] Appellant did not return to work during this period.

[2] The Office has not accepted that her gynecological condition was employment related

[3] Appellant could push, pull or lift up to 10 pounds.

repetitively move her hands or wrists for five hours per day, and push, pull or lift up to 20 pounds for eight hours per day. Dr. Ogunro indicated that appellant should take a 10-minute break every 2 hours.

The Office referred appellant to Dr. Robert M. Chouteau, a Board-certified surgeon, for a second opinion regarding her ability to work. On July 25, 2006 Dr. Chouteau examined her back, hips and legs. Appellant complained of some lumbosacral tenderness but Dr. Chouteau noted that she had a normal examination with negative findings upon straight leg raising, Lasegue and Fabere testing. He stated that her left hand had full and active motion and that her surgical incision was well-healed. Dr. Chouteau determined that appellant had no residuals of her January 3 and 9, 2005 employment injuries and indicated that she could work for eight hours per day without restrictions other than lifting no more than 10 pounds.

On August 1, 2006 the employing establishment offered appellant a full-time job as a modified nursing assistant. The job required lifting up to 10 pounds for four hours per day, pushing or pulling up to 10 pounds for two hours per day, reaching (including above the shoulders) for six hours per day, standing, walking, kneeling, squatting, or twisting for two hours per day, and climbing for one hour per day. The job also required repetitively moving her hands or wrists for five hours per day and allowed a 10-minute break every two hours. The job offer directed appellant to report to work on August 21, 2006.

In an August 8, 2006 notice, the Office advised appellant of its determination that the modified nursing assistant position offered by the employing establishment was suitable. The Office provided appellant with 30 days to provide reasons for not working in the offered position. The Office advised appellant that her compensation would be terminated if she did not provide justification for her failure to accept the offered position. Appellant reported to work on August 21, 2006 but did not work the entire day. She did not provide any reasons within the allotted time period for neglecting to work after suitable work was offered.

In a September 13, 2006 decision, the Office terminated appellant's compensation effective October 1, 2006 on the grounds that she neglected to work after suitable work was offered.

Appellant requested reconsideration of her claim and submitted additional medical evidence. In an August 28, 2006 note, Dr. Ogwu indicated that appellant reported that she sustained an unspecified trauma two days prior and that she needed a walker in order to ambulate. He indicated that appellant had gait instability but that her back and lower extremities did not exhibit motor or sensory deficits. In an August 29, 2006 note, Dr. Ogwu indicated that appellant reported being unable to walk due to right hip pain. He stated that she had normal sensory and motor examinations of the back and lower extremities but that she appeared to have an abnormal gait without any obvious sign of trauma. In an August 29, 2006 form report, Dr. Ogwu indicated that appellant could not engage in walking or standing and that sitting was limited to one or two hours at a time. He stated that she could not operate a motor vehicle at work, that there were limits on twisting, and that she could bend or stoop "only as possible." In treatment notes dated between September 19, 2006 and January 10, 2007, Dr. Ogwu noted that appellant reported back and leg pain and weakness in her legs.

In a March 21, 2007 decision, the Office affirmed its September 13, 2006 decision. The Office indicated that the reports of Dr. Ogwu did not show that the modified nursing assistant position was not suitable.

Appellant requested reconsideration of her claim on April 9, 2007. She submitted notes of Dr. Ogwu dated March 23, 28 and April 2, 2007. Dr. Ogwu noted that appellant reported back, right hip and right leg pain and right leg weakness and provided varying diagnoses including low back pain, right leg parethesias and right hip weakness.

In a May 21, 2007 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who: ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[4] However, to justify such termination, the Office must show that the work offered was suitable.[5] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[6]

ANALYSIS -- ISSUE 1

The Office accepted that on January 3, 2005 appellant sustained a lumbar strain and right hip contusion/strain when she was hit by a patient's motorized scooter and fell to the ground. The Office also accepted that on January 9, 2006 she sustained an employment-related oblique fracture with displacement to the left of the metacarpal shaft of her left fifth finger. On August 1, 2006 the Office offered appellant a full-time job as a modified nursing assistant with a starting date of August 21, 2006. Appellant reported to work on August 21, 2006 but did not work the entire day. In a September 13, 2006 decision, the Office terminated appellant's compensation effective October 1, 2006 on the grounds that she neglected to work after suitable work was offered.

The evidence of record shows that appellant was capable of performing the modified nursing assistant position offered by the employing establishment and determined to be suitable by the Office in August 2006. The record does not reveal that the modified nursing assistant position was temporary or seasonal in nature.[7]

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[4] 5 U.S.C. § 8106(c)(2).

[5] *David P. Camacho*, 40 ECAB 267, 275 (1988); *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981).

[6] 20 C.F.R. § 10.124; *see Catherine G. Hammond*, 41 ECAB 375, 385 (1990).

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4b (July 1997).

The modified nursing assistant position offered to appellant on August 1, 2006 was a full-time job which required lifting up to 10 pounds for four hours per day, pushing or pulling up to 10 pounds for two hours per day, reaching (including above the shoulders) for six hours per day, standing, walking, kneeling, squatting, or twisting for two hours per day, and climbing for one hour per day. The job also required repetitively moving the hands or wrists for 5 hours per day and allowed a 10-minute break every 2 hours. The Board finds that the duties of the modified nursing assistant position were within the most limiting work restrictions available around the time of the job offer as they were within the June 12, 2006 work restrictions of Dr. Ogunro, an attending Board-certified orthopedic surgeon.[8]

The Board finds that the Office has established that the modified nursing assistant position offered by the employing establishment is suitable. As noted above, once the Office has established that a particular position is suitable, an employee who refuses or neglects to work after suitable work has been offered to her has the burden of showing that such refusal to work was justified. Prior to the Office's September 13, 2006 decision terminating her compensation effective October 1, 2006 appellant did not provide any reasons for her failure to perform the suitable work despite being provided an opportunity to do so.

In connection with a request for reconsideration of the Office's September 13, 2006 decision, appellant submitted several notes dated between August 28, 2006 and January 10, 2007 of Dr. Ogwu, an attending Board-certified internist, who indicated in these notes that appellant reported back and leg pain and weakness in her legs. In an August 28, 2006 note, Dr. Ogwu stated that appellant reported that she sustained an unspecified trauma two days prior and that she needed a walker in order to ambulate. He indicated that appellant had gait instability but that her back and lower extremities did not exhibit motor or sensory deficits.[9]

The Board notes that these medical reports do not show that the modified nursing assistant position was not suitable because they do not describe appellant's medical condition at the time that she neglected to work in the modified nursing assistant position. Moreover, Dr. Ogwu's August 29, 2006 work restrictions are of limited probative value because he did not explain how they were justified by objective findings on examination and diagnostic testing.[10] Rather, the restrictions appear to be based on appellant's own belief that she could not walk.

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[8] On June 12, 2006 Dr. Ogunro stated that appellant could perform limited-duty work for eight hours per day. He noted that appellant could sit, walk, stand, twist, squat, kneel and climb for eight hours per day, could reach (including above the shoulders) for six hours per day, repetitively move her hands or wrists for five hours per day, and push, pull or lift up to 20 pounds for eight hours per day. Dr. Ogunro indicated that appellant should take a 10-minute break every 2 hours. The record contains February 8, 2006 work restrictions of Dr. Van Hal, an attending Board-certified orthopedic surgeon, but these restrictions were less current and did not take into account appellant's entire physical condition. Appellant had previously suffered from gynecological problems but there is no indication that they caused disability in mid 2006.

[9] In an August 29, 2006 form report, Dr. Ogwu indicated that appellant could not engage in walking or standing and that sitting was limited to one or two hours at a time. He stated that she could not operate a motor vehicle at work, that there were limits on twisting, and that she could bend or stoop "only as possible."

[10] *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on a given medical matter if it is unsupported by medical rationale).

For these reasons, the Office properly terminated appellant's compensation effective October 1, 2006 on the grounds that she neglected to work after suitable work was offered.[11]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[12] the Office's regulations provide that the evidence or argument submitted by 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.[13] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[14] 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.[15] The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[16]

ANALYSIS -- ISSUE 2

In support of her April 2007 reconsideration request, appellant submitted March 23, 28 and April 2, 2007 notes in which Dr. Ogwu indicated that she reported back, right hip and right leg pain and right leg weakness. Dr. Ogwu provided varying diagnoses including low back pain, right leg parethesias and right hip weakness. The submission of these notes would not require reopening of appellant's claim for merit review because they are not relevant to the main issue of the present case, *i.e.*, whether appellant neglected to work after suitable work was offered in August 2006.[17] These notes do not describe appellant's medical condition at the time that she neglected to work in the modified nursing assistant position and they do not contain an opinion on her ability to work.

Appellant has not established that the Office improperly denied her request for further review of the merits of its March 21, 2006 decision under section 8128(a) of the Act, because the

[11] The Board notes that the Office complied with its procedural requirements prior to terminating appellant's compensation, including providing appellant with an opportunity to provide reasons for not accepting the modified nursing assistant position; *see generally Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

[12] Under section 8128 of the Act, "[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." 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.606(b)(2).

[14] 20 C.F.R. § 10.607(a).

[15] 20 C.F.R. § 10.608(b).

[16] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[17] *See supra* note 16 and accompanying text.

evidence and argument she submitted 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 constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective October 1, 2006 on the grounds that she neglected to work after suitable work was offered. The Board further finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 21 and March 21, 2007 and September 13, 2006 decisions are affirmed.

Issued: January 18, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board