

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cincinnati, OH Employer**

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**Docket No. 08-2035
Issued: February 24, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 17, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 21, 2007 finding that she had not established a recurrence of disability and an April 15, 2008 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merit and nonmerit issues of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on December 6, 2005; and (2) whether the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 25, 2005 appellant, then a 43-year-old mail handler, filed an occupational disease claim and alleged that she developed bilateral avascular necrosis due to her accepted condition of

dermatitis. The Office accepted appellant's claim for aggravated bilateral avascular necrosis of the hips on October 6, 2006. Appellant worked four hours a day until her retirement on December 5, 2005. She received compensation for partial disability from June 24, 2005 through November 30, 2005.

Appellant filed a recurrence of disability claim alleging that on December 6, 2005 she became disabled due to her accepted employment injuries. She submitted a note dated July 15, 2005 from Dr. Dirk T. Prius, a Board-certified orthopedic surgeon, indicating that appellant could work 20 hours a week in the early hours only. On November 1, 2005 appellant completed a request for accommodation form and asked to work from 2:00 to 6:00 p.m. In a letter dated April 19, 2007, the Office requested additional factual and medical evidence from appellant.

The employing establishment responded to a request for information and stated that appellant requested early hours for her limited-duty assignment and that the employing establishment was unwilling to change her work schedule as requested. Appellant then elected disability retirement. The employing establishment stated that had appellant not retired the limited-duty assignment would still be available.

By decision dated June 25, 2007, the Office denied appellant's claim for recurrence of disability. It found that there was no medical evidence establishing a change in appellant's employment-related condition or that she stopped work due to a change in the nature and extent of her light-duty job requirements.

Appellant requested an oral hearing on July 3, 2007. She testified at the oral hearing on November 5, 2007 that she worked from 2:00 to 6:00 p.m. until her retirement. By decision dated December 21, 2007, the hearing representative affirmed the Office's June 25, 2007 decision, finding that appellant had not met her burden of proof in establishing a recurrence of disability.

In a letter dated February 28, 2008, appellant requested reconsideration, contending that the employing establishment improperly interpreted and weighed medical evidence. She submitted documentation regarding her Family Medical Leave Act (FMLA) benefits. By decision dated April 15, 2008, the Office declined to reopen appellant's claim for consideration of the merits.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability is the 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 which caused the illness. The 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.¹ When an employee who is disabled from the job held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-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 she cannot perform such limited-duty work. 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 limited-duty job requirements.²

ANALYSIS -- ISSUE 1

Appellant worked in a light-duty position four hours a day from 2:00 to 6:00 p.m. from June 24, 2005 through her retirement on December 5, 2005. She then stopped work and received benefits from the Office of Personnel Management (OPM). Appellant has failed to submit any medical evidence in support of her claim that she experienced a change in the nature and extent of her accepted employment-related condition on or after December 5, 2005. Dr. Prius' note that appellant should work only early hours was conclusory with no supporting rationale for the change. Therefore appellant has failed to establish this aspect of her recurrence claim.

Further, appellant has alleged that the employing establishment attempted to change her light-duty job requirements by requiring her to report to work for the second half of her shift. The employing establishment stated that it was not able to accommodate appellant's request to work the first four hours of her shift. The Board notes, however, that appellant never actually worked the alternative work schedule. As appellant retired while still working from 2:00 to 6:00 p.m., the change in her employment duties never took place. Therefore she has not established a change in the nature and extent of her light-duty job requirements.³

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office 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.⁵ 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.⁶

¹ 20 C.F.R. § 10.5(x).

² *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

³ *Cecilia M. Corley*, 56 ECAB 662, 669 (2005).

⁴ 5 U.S.C. §§ 8101-8193, § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

Appellant filed a request for reconsideration on February 28, 2008 and argued that the employing establishment improperly attempted to interpret and weigh medical evidence. She also submitted documentation regarding her FMLA benefits.

The Office reviewed appellant's argument and evidence and found that she failed to comply with the requirement of relevance. The evidence regarding appellant's FMLA benefits does not bear on the central issue in this case, whether appellant sustained a recurrence of disability due to a change in the nature and extent of her injury-related condition or light-duty job requirements. Furthermore, appellant's arguments that the employing establishment improperly weighed the medical evidence and found that it did not support her request for reasonable accommodation is not relevant to the issue of whether there was a change in the nature and extent of her light-duty job requirements. As she failed to submit pertinent new evidence or argument, the Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that appellant has failed to submit the necessary factual and medical evidence to meet her burden of proof in establishing a recurrence of disability on December 5, 2005. The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits on April 15, 2008.

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2008 and December 21, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 24, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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