

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

L.T., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
OVERTON BROOK VETERANS MEDICAL
CENTER, Shreveport, LA, Employer**

)
)
)
)
)
)
)
)
)
)

**Docket No. 08-2415
Issued: July 15, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2008 appellant filed a timely appeal from the March 21 and April 29, 2008 merit decisions of the Office of Workers' Compensation Programs denying disability compensation and the August 4, 2008 decision denying merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant established that she was totally disabled during the period January 10 through 22, 2008 due to her November 2, 2007 employment injury; and (2) whether the Office properly denied her request for reconsideration of the merits of her claim pursuant to 20 C.F.R. § 8128(a).

FACTUAL HISTORY

On November 2, 2007 appellant sustained injury to her lower back and left leg when a confused patient became violent and attacked a nurse. She was injured while helping to restrain the patient. The Office accepted appellant's claim for aggravation of lumbosacral radiculitis.¹

On January 2, 2008 appellant underwent a left S1 joint injection for treatment of her lumbosacral radiculitis. In a January 4, 2008 operative report, a treating physician noted that appellant tolerated the procedure well, that there were no postoperative complications and that she was to follow up as scheduled. On January 22, 2008 appellant filed a claim for lost wages (Form CA-7) for the period January 10 through 22, 2008.

By letter dated February 20, 2008, the Office requested that appellant submit medical documentation supporting her total disability from work for the period claimed.

Appellant submitted employee medical worksheets dated December 10 through 17, 1999 and November 14, 2007 through January 18, 2008 providing work restrictions. On December 28, 2007 Dr. Justine Dela Rosa DeCastro, a family practitioner, evaluated appellant's lower back and left leg injuries from November 2, 2007. She provided work restrictions effective until January 18, 2008, including full restrictions on all lifting, pushing and pulling, carrying, reaching and working above the shoulder and pushing and pulling with her hands. Dr. DeCastro stated that appellant should not sit, stand or walk for prolonged periods and that she should not drive because her pain medications may cause dizziness, drowsiness or blurred vision. On January 18, 2008 a physician's assistant indicated that appellant did not have any work restrictions due to the November 2, 2007 injury.

Appellant also submitted a notice for a January 2, 2008 medical procedure with a follow-up appointment on January 18, 2008. A medication assessment history report dated January 2, 2008 stated that she should not participate in any strenuous activity for 24 hours.

By decision dated March 21, 2008, the Office denied appellant's claim for total disability compensation from January 10 to 22, 2008 on the grounds that she did not submit sufficient medical evidence supporting total disability.

On March 24, 2008 appellant filed a request for reconsideration. She stated that she submitted the wrong medical documents due to administrative error. Appellant resubmitted medical evidence previously of record.

By decision dated April 29, 2008, the Office denied modification, finding that the medical records did not address the claimed period of disability and were not signed by a physician.

On June 9 and 26, 2008 appellant filed requests for reconsideration. She again provided duplicate copies of the medical evidence of record.

¹ By decision dated January 23, 2008, the Office initially denied appellant's claim on the grounds that there was no medical evidence containing a firm diagnosis that could be connected to the accepted work events.

By decision dated August 4, 2008, the Office denied further merit review on the grounds that appellant did not raise a substantive legal question or include new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.³

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.⁴ 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 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.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an aggravation of lumbosacral radiculitis on November 2, 2007. The issue is whether appellant established that she was totally disabled from January 10 through 22, 2008 due to this employment injury. The Board finds that she did not meet her burden of proof in establishing disability.

The record shows that appellant underwent a left S1 joint injection for treatment of her lumbosacral radiculitis on January 2, 2008. The operative report noted that she tolerated the procedure well and that there were no postoperative complications. The medication assessment history report of January 2, 2008 stated that appellant should not participate in any strenuous activity for 24 hours, but did not provide any continuing restrictions or indicate that she could not return to work. The notice noted that she was scheduled for a follow-up appointment on January 18, 2008. This medical evidence does not establish that appellant was totally disabled from January 2 to 18, 2008. There is no medical report from an attending physician addressing

² 5 U.S.C. §§ 8101-8193.

³ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁵ *Id.*

⁶ *Id.*

her disability during this period. As this evidence does not explain why appellant was totally disabled from January 10 through 22, 2008, it is insufficient to establish her claim for disability.⁷

In an employee medical worksheet dated December 28, 2007, Dr. DeCastro evaluated appellant's lower back and left leg injuries. She prescribed full restrictions until January 18, 2008 on all lifting, pushing, pulling and carrying, reaching and working above the shoulder and that she should not stand, walk or sit for prolonged periods. While Dr. DeCastro noted that appellant was restricted during part of the period of disability claimed she did not state that she found appellant totally disabled from performing any work. The Board finds that this worksheet is insufficient to establish total disability from January 10 through 18, 2008.⁸

Appellant did not submit any other evidence addressing her claimed period of disability. Therefore, the Board finds that she did not establish that she was totally disabled as claimed.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act⁹ does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.¹⁰ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹¹

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 show: (1) 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 his or 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

⁷ *Id.*

⁸ *See G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008).

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ *Id.* at § 8128(a).

¹¹ *Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹² 5 U.S.C. §§ 8101-8193. 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 *Id.* at § 10.607(a).

¹⁵ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

In support of her reconsideration request, appellant submitted duplicate copies of her January 2, 2008 medication assessment history report, the notice for her January 2, 2008 procedure and the January 18, 2008 employee medical worksheet from the physician's assistant. As this evidence was previously submitted and considered by the Office, it does not constitute relevant and pertinent new evidence.¹⁶ Appellant did not submit any other evidence, nor did she advance a relevant legal argument or show that the Office erroneously interpreted or applied a specific point of law. Therefore, the Board finds that the Office properly denied her request for reconsideration of the merits.¹⁷

CONCLUSION

The Board finds that appellant did not establish that she was totally disabled during the period January 10 through 22, 2008 due to her November 2, 2007 employment injury. The Board also finds that the Office properly denied her request for reconsideration pursuant to 20 C.F.R. § 8128(a).

¹⁶ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case. *Richard Yadron*, 57 ECAB 207 (2005); *Eugene Butler*, 36 ECAB 393 (1984).

¹⁷ The Board notes that, on appeal, appellant provided additional evidence and contended that she was not submitting new evidence but rather supporting medical documents not included with her reconsideration request. Pursuant to 20 C.F.R. § 501.2(c), the Board is precluded from reviewing evidence for the first time on appeal. However, appellant may resubmit evidence to the Office with a written request for reconsideration under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

ORDER

IT IS HEREBY ORDERED THAT the August 4, April 29 and March 21, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 15, 2009
Washington, DC

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

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

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