

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

D.C., Appellant)

and)

**DEPARTMENT OF THE NAVY, SOUTHWEST)
REGION COMMANDER, Seal Beach, CA,)
Employer)**

**Docket No. 09-157
Issued: July 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 October 20, 2008 appellant filed a timely appeal from the July 18, 2008 merit decision of the Office of Workers' Compensation Programs terminating her compensation and the September 8, 2008 nonmerit decision denying her reconsideration request. 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 the Office met its burden of proof to terminate appellant's compensation effective July 18, 2008 on the grounds that she had no residuals of her July 7, 1986 employment injury; and (2) whether the Office properly denied appellant's request for further review of the merits pursuant to 5 U.S.C. § 8128(a). On appeal, appellant contends that the medical evidence shows a continuous line of disability due to the injuries she sustained on the job.

FACTUAL HISTORY

The Office accepted that on July 7, 1986 appellant, then a 34-year-old pipe fitter and supply clerk, sustained a cervical sprain, right ankle sprain, left elbow abrasion and left knee contusion due to a fall at work. Appellant stopped work on July 8, 1986 and did not return. She received compensation from the Office for periods of total disability.

In a March 18, 2008 report, Dr. Patrick Bays, a Board-certified orthopedic surgeon who served as an Office referral physician, reviewed appellant's medical history, including her accepted employment injuries that resulted from the July 7, 1986 fall at work. He determined that appellant no longer had residuals of the July 7, 1986 employment injuries explaining that they would have long since resolved. Dr. Bays reported findings on examination and specifically found that appellant showed no evidence of residuals of the cervical sprain, right ankle sprain, left elbow abrasion or left knee contusion. He noted that the medical records and physical examination did not substantiate the need for narcotic analgesics. Dr. Bays stated, "[Appellant's] prognosis is good. There is no recommendation for any further treatment. This patient is a [sic] capable for full gainful employment on a reasonably continuous basis..." Therefore, the weight of medical evidence in your file demonstrates that you no longer have any disability or residuals due to your accepted work-related condition.

In a March 20, 2008 report, Dr. Keith J. Wright, an attending Board-certified family practitioner, diagnosed appellant with "leg pain."

In a May 21, 2008 notice, the Office advised appellant that it proposed termination of her compensation based on the report of Dr. Bays. It provided appellant 30 days to submit evidence and argument challenging the termination.

Appellant submitted a May 7, 2008 report in which Dr. Wright diagnosed leg and knee pain and indicated that she had trouble with balance. She also submitted May 21, 2002, October 21, 2003, September 27, 2007 and March 20, 2008 reports of Dr. Wright, a May 6, 2008 report of Dr. Andrew Roy, an attending Board-certified orthopedic surgeon, a May 23, 2008 report of Dr. Rico J. Dotson, an attending Board-certified orthopedic surgeon, a June 15, 2004 x-ray report, work capacity evaluation forms, a notice of merit staffing opportunities, a position description for the position of a pipe fitter and other personnel documents, and a May 30, 2008 personal statement in which she argued that she continued to have residuals of the July 7, 1986 employment injury. None of the medical reports advised that appellant continued to have residuals of the July 7, 1986 employment injury in mid 2008.

In a June 23, 2008 decision, the Office terminated appellant's compensation effective that date. It only mentioned Dr. Wright's May 7, 2008 report.

In a July 18, 2008 decision, the Office set aside the June 23, 2008 termination decision because it had not considered all the evidence submitted by appellant. It terminated appellant's compensation effective July 18, 2008 finding that the weight of the medical evidence rested with the opinion of Dr. Bays. The Office found that the evidence submitted by appellant did not establish that she continued to have residuals of the July 7, 1986 injury.

Appellant requested reconsideration of her claim and submitted a number of factual and medical documents that had previously been submitted to the Office. In a September 8, 2008 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

Under the Federal Employees' Compensation Act,¹ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

ANALYSIS -- ISSUE 1

The Office accepted that on July 7, 1986 appellant sustained a cervical sprain, right ankle sprain, left elbow abrasion and left knee contusion due to a fall at work. It terminated appellant's compensation effective July 18, 2008 based on the opinion of Dr. Bays, a Board-certified orthopedic surgeon who served as an Office referral physician. The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Bays, who determined that appellant ceased to have employment-related residuals.

In a March 18, 2008 report, Dr. Bays described appellant's medical history including her accepted employment injuries that resulted from the July 7, 1986 fall at work. He reported examination findings and specifically stated that appellant showed no evidence of suffering residuals of the cervical sprain, right ankle sprain, left elbow abrasion or left knee contusion. Dr. Bays explained his determination that appellant no longer had residuals of the July 7, 1986 employment injuries by noting the limited examination findings and indicating that these types of injuries would have long since resolved. He indicated that appellant did not have any employment-related restrictions. The Board has carefully reviewed the opinion of Dr. Bays and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case.

Appellant submitted several reports of attending physicians from mid 2008, including reports of Dr. Wright, an attending family practitioner, and reports of Dr. Roy and Dr. Dotson, both attending Board-certified orthopedic surgeons. Although these physicians discussed various medical problems, including leg and knee problems, they did not provide any explanation of how appellant continued to have residuals of her July 7, 1986 employment injury.

¹ 5 U.S.C. §§ 8101-8193.

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

For these reasons, the Office properly terminated appellant's compensation effective July 18, 2008.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁵ 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.⁶ 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.⁷ 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.⁸ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.⁹

ANALYSIS -- ISSUE 2

In support of her reconsideration request, appellant submitted a number of factual and medical documents that had previously been submitted to the Office. This submission of this evidence would not require reopening of appellant's case for merit review as the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case. Appellant has not established that the Office improperly denied her request for further review of the merits of its July 18, 2005 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not to 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 met its burden of proof to terminate appellant's compensation effective July 18, 2008 on the grounds that she had no residuals of her July 7, 1986 employment injury after that date. 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).

⁵ 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).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 8 and July 18, 2008 decisions are affirmed.

Issued: July 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