

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

M.S., Appellant

and

**DEPARTMENT OF HOUSING & URBAN
DEVELOPMENT, Seattle, WA, Employer**

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**Docket No. 09-199
Issued: July 8, 2009**

Appearances:

Alan J. Shapiro, Esq., for the appellant
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 October 27, 2008 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated July 7, 2008 and a nonmerit decision dated September 22, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over 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 was totally disabled on May 12, 2008 as alleged; and (2) whether the Office properly refused to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 13, 2007 appellant, then a 44-year-old paralegal specialist, filed a traumatic injury claim alleging that she injured her neck, shoulder and back moving, packing and bending while preparing material for shredding and transporting. The Office accepted her claim for

temporary aggravation of herniated disc at L5-S1 on May 3, 2007. It authorized compensation benefits from March 13 through September 21, 2007.

Dr. B. Daniel Chilezuk, appellant's physician, opined that she required surgery due to her employment-related injury. The Office referred appellant for a second opinion evaluation with Dr. Richard Hall, a Board-certified orthopedic surgeon, who agreed that she required surgery to correct a preexisting condition. Dr. Mark C. Reminton, a Board-certified orthopedic surgeon, performed a right L5-S1 microdiscectomy on August 7, 2007. The Office referred appellant for an impartial medical examination with Dr. Donald Hubbard, a Board-certified orthopedic surgeon, on October 31, 2007. In a report dated December 4, 2007, Dr. Hubbard stated that appellant's accepted employment injury caused or contributed to her need for back surgery. In a letter dated February 11, 2008, the Office accepted a permanent aggravation of displaced lumbar intervertebral disc without myelopathy at L5-S1 and the resulting surgery.

On May 13, 2008 appellant filed a claim for compensation and requested wage-loss compensation for eight hours on May 12, 2008. She stated that she had an appointment with a physician and that a prescribed medication caused drowsiness. In a letter dated May 29, 2008, the Office noted receiving appellant's claim for compensation, but advised that she had not submitted sufficient medical opinion evidence to establish that her disability on the date in question was due to her accepted employment injury. The Office requested that appellant submit additional evidence within 30 days.¹

By decision dated July 7, 2008, the Office denied appellant's claim for compensation on May 12, 2008 finding that she failed to submit any medical evidence in support of her request.

Appellant submitted a magnetic resonance imaging (MRI) report from Dr. Remington dated July 1, 2008. In a report dated July 7, 2008, Dr. Remington found appellant's symptoms had worsened due to progressive disc space collapse, marked endplate changes and edema. Appellant requested reconsideration of the July 7, 2008 decision on August 27, 2008. In a report dated August 25, 2008, Dr. Remington noted her recurrent symptoms on July 7, 2008 and stated, "[I]t is reasonable to anticipate that she will at times have limitations with her back...."

By decision dated September 22, 2008, the Office declined to reopen appellant's claim for consideration of the merits finding that she failed to submit relevant new evidence in support of her request for reconsideration.²

¹ In a decision dated June 13, 2008, the Office waived an overpayment in the amount of \$1,882.33 on the grounds that appellant was not at fault in the creation of the overpayment and that collection would be against equity and good conscience. The Board will not review this decision on appeal as it is not adverse to appellant's interests. 20 C.F.R. § 501.2(c).

² By decision dated January 26, 2009, the Office denied appellant's claim for compensation for September 9, 2008. As this decision was issued after appellant's appeal to the Board on October 27, 2008 and pertains to a separate issue, the Board will not review this decision in this appeal.

LEGAL PRECEDENT -- ISSUE 1

For each period of disability claimed, a claimant has the burden of proving by a preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of her employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provided by the preponderance of the reliable probative and substantial medical evidence.³

ANALYSIS -- ISSUE 1

Appellant filed a claim for compensation requesting eight hours of wage-loss compensation for May 12, 2008. She did not submit any medical evidence addressing her total disability for this date. The Office informed appellant that medical evidence was required to support her disability, but she did not submit the requested information. It denied her claim by decision dated July 7, 2008.

Appellant submitted a brief statement alleging that she had a doctor's appointment and was drowsy from medication on May 12, 2008. She did not submit any evidence confirming her statements. Appellant is not a physician, and her statements cannot be considered medical evidence. It is well established that, to constitute competent medical opinion evidence, the medical evidence submitted must be signed by a qualified physician.⁴ As appellant has submitted no medical evidence in support of her claimed disability on May 12, 2008, she has failed to meet her burden of proof and the Office properly denied her claim.

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,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 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.⁷

³ *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001)

⁴ *Vickey C. Randall*, 51 ECAB 357, 360 (2000); *Arnold A. Alley*, 44 ECAB 912, 921 (1993); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁵ 5 U.S.C. §§ 8101-8193, § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

Appellant requested reconsideration of the Office's July 7, 2008 decision on August 27, 2008. In support of her request, she submitted a report dated August 25, 2008 from Dr. Remington, a Board-certified orthopedic surgeon, noting her recurrent symptoms on July 7, 2008 and stating, "[I]t is reasonable to anticipate that she will at times have limitations with her back...." Appellant also submitted an MRI scan report dated July 1, 2008.

While appellant submitted additional new medical evidence in support of her claimed period of disability, the medical evidence did not address the issue of her disability on May 12, 2008 and whether appellant was in fact totally disabled on that date. As the evidence submitted was not relevant or pertinent to the issue of appellant's ability to work on May 12, 2008, the Office properly declined to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that appellant failed to submit the necessary medical opinion evidence to establish that she was totally disabled on May 12, 2008, as alleged. The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the September 22 and July 7, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 8, 2009
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