



## **FACTUAL HISTORY**

On July 9, 2003 appellant, then a 44-year-old distribution clerk, filed an occupational disease claim alleging that she developed right shoulder impingement with degenerative arthritis due to factors of her federal employment. The Office accepted her claim for degenerative joint disease of the right shoulder. Appellant accepted a limited-duty position on September 3, 2003. The Office awarded her compensation for the period January 26 to February 7, 2004. Appellant returned to full duty on June 21, 2004.

Appellant requested wage-loss compensation from July 23 through 27, 2007. In a note dated July 25, 2007, Dr. Robert Numata, a Board-certified family practitioner, indicated that she could return to work on July 27, 2007. He completed a form report on July 25, 2007 and indicated that appellant was totally disabled from July 23 to 27, 2007 due to a cervical strain which “related to the injury of April 20, 2003.” In a letter dated July 27, 2007, the Office informed her that her claim was not payable and requested additional information. On August 10, 2007 it resent the letter to appellant’s current address and informed her that she had 30 days to submit the necessary documentation.

Appellant filed a second claim for compensation on October 24, 2007 requesting wage-loss compensation from September 24 through October 24, 2007. Dr. Allen R. Seely, a Board-certified family practitioner, completed a note dated October 2, 2007 and stated that appellant was “off work” from September 24 to October 2, 2007 and that she could resume “full-work activity” on October 3, 2007. In a note dated October 15, 2007, he stated that appellant was off work on October 11, 12, 15 and 16 and that she could return to work on October 17, 2007. Dr. Seely completed an attending physician’s report on September 27, 2007 diagnosing right shoulder arthritis and indicating with a checkmark “yes” that this condition was caused or aggravated by an employment activity. He indicated that appellant could return to work on September 28, 2007.

By decision dated November 2, 2007, the Office denied appellant’s claim for compensation from July 23 to 27, 2007. Appellant requested an oral hearing on December 5, 2007. By decision dated January 11, 2008, the Branch of Hearings and Review denied her December 5, 2007 request for an oral hearing as untimely and stated that the November 2, 2007 decision of the Office could be “equally well addressed by requesting reconsideration....”

Dr. Seely completed a report on November 4, 2007 and diagnosed chronic right shoulder pain, fibromyalgia and chronic depression. He stated that appellant requested modification of her workstation and part-time work.

Appellant filed a claim for compensation for the dates November 1 and 2, 2007. Dr. Seely completed a form report on November 2, 2007 and diagnosed chronic right shoulder pain. He indicated that appellant required treatment from October 16 through November 2, 2007.

In a letter dated November 30, 2007, the Office informed appellant that she must submit additional medical evidence to meet her burden of proof to establish disability from work from

September 24 to October 24, 2007 and November 1 and 2, 2007. It allowed 30 days for a response.

By decision dated February 6, 2008, the Office denied appellant's claim for compensation benefits finding that she had not met her burden of proof in establishing entitlement to compensation for wage loss from September 24 through October 24, 2007 and November 1 through 2, 2007.

Appellant requested reconsideration on March 12, 2008. In support of her request, she submitted medical evidence including her records from 2003 through 2005. In a February 15, 2008 report, Dr. Seely diagnosed chronic right shoulder pain, fibromyalgia and chronic depression. He stated that appellant was incapacitated due to right shoulder pain from July 23 to 27, 2007, from September 24 to October 24, 2007 and from November 1 to 2, 2007. Dr. Seely stated that appellant could work part time from February 6, 2008. Dr. Numata completed a note on July 25, 2007 and stated that appellant had cervical muscular pain and that she should be able to return to work on July 27, 2007. In a note dated March 2, 2008, Dr. P.Z. Pearce, a Board-certified family practitioner, diagnosed fibromyalgia as the cause of appellant's shoulder pain.

Appellant filed a notice of recurrence of disability on April 3, 2008 alleging that on July 23, 2007 she sustained a recurrence of disability causally related to her April 30, 2003 employment injury. The Office accepted this claim for recurrence on July 23, 2007.

By decision dated April 21, 2008, the Office denied appellant's March 12, 2008 reconsideration request.

### **LEGAL PRECEDENT -- ISSUES 1 AND 2**

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 (RIF)) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>1</sup>

Appellant for each period of disability claimed, 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 provide by preponderance of the reliable probative and substantial medical evidence.<sup>2</sup>

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<sup>1</sup> 20 C.F.R. § 10.5(x).

<sup>2</sup> *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

Appellant alleged that she was totally disabled from July 23 through 27, 2007 due to her accepted employment injury of degenerative joint disease of the right shoulder. In support of her claim, she submitted a report dated July 25, 2007 from Dr. Numata, a Board-certified family practitioner, who indicated that appellant could return to work on July 27, 2007. Dr. Numata completed a form report on July 25, 2007 finding that appellant was totally disabled from July 23 to 27, 2007 due to a cervical strain and that this condition was "related to the injury of April 20, 2003.

As noted above, appellant has the burden to establish she is disabled for work as a result of her employment injury of degenerative joint disease of the right shoulder by the preponderance of the reliable probative and substantial medical evidence.<sup>4</sup> Dr. Numata's reports are not sufficient to meet appellant's burden of proof in establishing work-related disability from July 23 to 27, 2007 as he failed to attribute her disability to her accepted employment-related condition. Instead, he diagnosed a new condition, cervical strain. As the Office has not accepted this condition as resulting from appellant's employment activities, the mere diagnosis of this condition and a brief opinion from Dr. Numata that the condition is related to appellant's employment is not sufficient to meet appellant's burden of proof.

The Board finds that appellant has not submitted the required medical findings, an accepted diagnosis and medical reasoning needed to establish that her disability from July 23 to 27, 2007 was due to her employment and that the Office properly denied this claim.

### **ANALYSIS -- ISSUE 2**

Appellant filed claims for compensation on October 24 and November 2, 2007 requesting wage-loss compensation from September 24 through October 24, 2007 and November 1 and 2, 2007. In support of her claims for periods of total disability, her submitted reports from Dr. Seely, a Board-certified family practitioner, were stating that she was totally disabled from September 24 to October 2, 2007 and October 11, 12, 15 and 16, 2007. In a report September 27, 2007, Dr. Seely diagnosed right shoulder arthritis and indicated with a checkmark "yes" that this condition was caused or aggravated by an employment activity. He did not provide any physical findings in support of his disability determination. Furthermore, the Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's condition was related to the history

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<sup>3</sup> *Id.*

<sup>4</sup> *Supra* note 2.

given is of little probative value. Without any explanation or rationale for the conclusion reached, such a report is insufficient to establish causal relationship.<sup>5</sup> Dr. Seely's reports are not sufficient to establish that appellant was totally disabled from September 24 through October 24, 2007 due to the lack of physical findings, definite opinion on causal relationship and the lack of medical reasoning. Therefore appellant has not met her burden of proof in establishing entitlement to compensation for these periods and the Office properly denied her claim.

In regard to appellant's claim for compensation for the dates November 1 and 2, 2007, Dr. Seely completed a form report on November 2, 2007 and diagnosed chronic right shoulder pain. He completed an additional report on November 4, 2007 and diagnosed chronic right shoulder pain, fibromyalgia, and chronic depression. Dr. Seely stated that appellant requested modification of her workstation and part-time work. His statements regarding appellant's ability to work consist only of a repetition of her complaints of pain with no objective signs of disability. Based on Board precedent, Dr. Seely has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>6</sup> As appellant has not submitted the necessary detailed medical opinion evidence, the Board finds that the Office properly denied her claim for compensation for the period September 24 through October 24, 2007 and November 1 through 2, 2007.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part as follows:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary.”<sup>7</sup>

The claimant can choose between two formats: an oral hearing or a review of the written record.<sup>8</sup> The requirements are the same for either choice.<sup>9</sup> The Board has held that section 8124(b)(1) is “unequivocal” in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking<sup>10</sup> and before the claimant has requested reconsideration.<sup>11</sup>

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<sup>5</sup> *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

<sup>6</sup> *Fereidoon Kharabi*, *supra* note 2.

<sup>7</sup> 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

<sup>8</sup> 20 C.F.R. § 10.615.

<sup>9</sup> *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

<sup>10</sup> 20 C.F.R. § 10.616(a). *Tammy J. Kenow*, 44 ECAB 619 (1993).

<sup>11</sup> *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record, and must exercise this discretion.<sup>12</sup>

### **ANALYSIS -- ISSUE 3**

The Office issued a decision on November 2, 2007 denying appellant's claim for compensation for total disability for the period July 23 to 27, 2007. Appellant requested an oral hearing from the Branch of Hearings and Review regarding this decision on December 5, 2007. As her request for an oral hearing was postmarked more than 30 days after the date of the Office's decision, she is not entitled to an oral hearing as a matter of right.

In the January 11, 2008 decision, the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely and further found that her claim for compensation could be addressed through the reconsideration process. The Board finds that this finding by the Branch of Hearings and Review constitutes a proper exercise of the discretion to deny appellant's request for an oral hearing. As appellant's request for an oral hearing was untimely and as the Branch of Hearings and Review properly exercised its discretion in denying her untimely request, the Board finds that the January 11, 2008 decision of the Branch of Hearings and Review is affirmed.

### **LEGAL PRECEDENT -- ISSUE 4**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

### **ANALYSIS -- ISSUE 4**

Appellant requested reconsideration of the Office's February 5, 2008 decision on March 12, 2008. She submitted medical reports in support of her reconsideration request including a report dated February 15, 2008 from Dr. Seely diagnosing right shoulder pain, fibromyalgia and chronic depression and supporting appellant's disability for work from July 23 to 27, September 24 to October 24 and November 1 and 2, 2007. This report is repetitive of evidence already in the record. Dr. Seely previously opined that appellant was totally disabled on the dates in question and attributed this disability to right shoulder pain. Therefore this report

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<sup>12</sup> *Id.*

<sup>13</sup> 5 U.S.C. §§ 8101-8193, § 8128(a).

<sup>14</sup> 20 C.F.R. § 10.606(b)(2).

<sup>15</sup> *Id.* at 10.608(b).

is not relevant and pertinent new evidence and is not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

Appellant also submitted a note dated July 25, 2007 diagnosing cervical muscular pain from Dr. Numata, a Board-certified family practitioner, and a note dated March 2, 2008 from Dr. Pearce, a Board-certified family practitioner, attributing her shoulder pain to fibromyalgia. As these physician's did not attribute appellant's current condition and any resulting disability to her accepted employment condition of degenerative joint disease of the right shoulder, these reports are not relevant to the decision issued by the Office finding that appellant had not established periods of disability due to her accepted injury. As these reports are not relevant, they are not sufficient to require the Office to reopen appellant's claim for consideration of the merits.

In support of her request for reconsideration, appellant submitted medical records from 2003 and 2005. As these records predate the alleged periods of disability, these records cannot establish that she was totally disabled beginning in July 2007 and the records are not relevant to the February 6, 2008 decision of the Office. As the records are not relevant, the Office properly declined to reopen appellant's claim for consideration of the merits.

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof in establishing that she was totally disabled for the periods July 23 to 27, September 24 to October 24 and November 1 and 2, 2007. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely and that the Office properly declined to reopen appellant's claim for consideration of the merits.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 21, February 5 and January 11, 2008 and November 2, 2007 are affirmed.

Issued: June 10, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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