United States Department of Labor
Employees' Compensation Appeals Board

G.W., Appellant	)	
and	)	**Docket No. 09-480**
	)	**Issued: June 1, 2009**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, Bremerton, WA, Employer	)	

Appearances:
John E. Goodwin, Esq., for the appellant
No appearance, for the Director

Oral Argument April 1, 2009

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 9, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated December 20, 2007 and July 11, 2008 denying his claim for recurrence of disability and an October 29, 2008 nonmerit decision denying his request for 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 has established that he sustained a recurrence of disability on or about September 20, 2006; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

Appellant's representative argues on appeal that the Office erred in finding that appellant did not sustain a recurrence of disability, in that the employing establishment provided him with only a temporary job and threatened to terminate him if he did not elect disability retirement. He

also contends that the Office erred in denying merit review in its October 29, 2008 decision, as appellant submitted new and relevant evidence in support of his request.

FACTUAL HISTORY

On March 11, 1999 appellant, a 41-year-old insulator, filed an occupational disease claim alleging that he had developed a hearing loss as a result of employment-related noise exposure. His claim was accepted for bilateral hearing loss. On May 4, 2000 appellant received a schedule award for a 22 percent bilateral hearing impairment. He continued to work full time as an insulator.

In a report dated April 3, 2006, Dr. C.W. Rovig, an employing establishment physician, stated that appellant had experienced a steady deterioration of his hearing and was no longer considered fit for work in a hazardous noise environment. On April 7, 2006 he provided work limitations, which restricted appellant from exposure to noise above 84 decibels. Dr. Rovig opined that appellant should not be exposed routinely to hazardous levels of occupational noise, but that short-term, transient exposure would not pose unacceptable risk and was allowed.

The record reflects that, from April 7 to 23, 2006, appellant worked full time with restrictions. On April 26, 2006 he was assigned to the injured workers' program (IWP) in order to accommodate his restrictions. Appellant retired on disability on September 19, 2006.

In a letter to the Office dated November 22, 2006, appellant's representative stated that his employer removed him from his position as an insulator in April 2006, without making an offer of a permanent light-duty employment. Instead, appellant was placed in a temporary light-duty position in a noisy environment.

On November 30, 2006 appellant submitted a recurrence of disability claim commencing September 20, 2006. He stated that he had been placed on permanent light duty on April 6, 2006 due to a severe worsening of his hearing bilaterally. Appellant's supervisor, Barbara Yoshino, reported that appellant was provided a permanent light-duty assignment on April 7, 2006, based on restrictions recommended by his physician. She stated that the employing establishment did not plan to terminate appellant and that he chose to retire on disability retirement.

On February 7, 2007 Supervisor Yoshino informed the Office that appellant worked in his regular job, within his restrictions, from April 7 to 23, 2006, when he was sent to the IWP because his shop could no longer accommodate those restrictions. Appellant was provided a permanent position in the facility maintenance group, where he was not exposed to power tools. Supervisor Yoshino was told that appellant would be provided with the position indefinitely. On February 8, 2007 Mark Sahlberg of the employing establishment stated that, from April through September 2006, appellant was employed by both the Waterfront Support Crew and Alternate Work Assignment (AWA). Job assignments were given to appellant based on, and with consideration for, his hearing limitations.

In a letter dated February 9, 2007, the Office informed appellant's representative that an investigation had established that appellant had worked in his regular position, with restrictions

provided by Dr. Rovig, from April 7 to 23, 2006. Dr. Rovig was referred to the IWP on April 24, 2006 and offered work with the facility maintenance group. He was advised that, if at any time his work did not meet his limitations, the IWP would find alternative work, and that work would be available indefinitely. The investigation revealed that appellant worked in his IWP position until September 19, 2006, when he chose to retire on disability.

In a letter dated February 19, 2007, appellant's representative contended that the employing establishment removed appellant from employment and made no offer of permanent light duty, but rather stated that his light-duty job would conclude. He argued that appellant accepted disability retirement because he was told that his light-duty job would be coming to an end and that he would be involuntarily separated if he did not elect disability retirement.

By decision dated March 19, 2007, the Office denied appellant's recurrence claim. It found that the evidence was insufficient to establish that he had sustained a recurrence of disability due to a withdrawal of a modified-duty assignment made specifically to accommodate his work injury.

On April 2, 2007 appellant, through his representative, requested an oral hearing, which was held on September 25, 2007. At the hearing, appellant testified that, on April 24, 2006, without a written job offer, he was placed in the IWP, where he worked for 11 months in a noisy environment. He alleged that, within a two-week period, three different foremen told him that his light-duty position would not last more than one year, and that he must "put in for disability retirement" or he was "going to be off the gate." Appellant noted that there were no witnesses to these conversations. Supervisor Heather Parrish allegedly informed him that "the shipyard was unable to accommodate his position within his restrictions," and Gigi Berningham told him to take disability retirement and then apply for workers' compensation benefits. Appellant stated that he was coerced into filing for disability retirement.

In a December 19, 2007 decision, an Office hearing representative affirmed the March 19, 2007 decision. He found that appellant had not shown a change in his light-duty job requirements or a worsening of his condition such that he was unable to perform the duties of his job. The hearing representative also found no evidence that appellant was coerced into retiring on disability, or that the employing establishment had withdrawn or threatened to withdraw his light-duty job. Rather, he determined that appellant's retirement was voluntary.

On May 8, 2008 appellant, through his representative, requested reconsideration. Counsel indicated that he would submit witness statements confirming the fact that appellant worked outside of his work restrictions, as well as a statement from Supervisor Parrish indicating that appellant was performing light-duty work that would eventually conclude. He asserted that the employing establishment "tells injured workers on light duty that the light duty will soon end and they will be terminated and be without income. The shipyard tells the injured worker that they should apply for disability retirement. The shipyard does not tell the injured worker that when he or she is terminated, he or she may apply for time loss benefits from the [Office]."

Appellant submitted statements from coworkers attesting to his exposure to work-related noise in June, July and August 2006, including a March 6, 2008 statement from Jesse Williams;

a March 8, 2008 statement from a Mr. Olson; an April 15, 2008 statement from Jeff Young; and undated statements from Leonard Davis and John C. Rogers. Mr. Williams stated that it was the employing establishment's policy to retain workers in the IWP for one year before firing them. Mr. Young alleged that the employing establishment used scare tactics to lead appellant to take a quick Office of Personnel Management (OPM) retirement.

By decision dated July 11, 2008, the Office denied modification of its previous decisions. It found that, although the employing establishment accommodated his restrictions from April 7, 2006 until he retired in September 2006, appellant retired. The Office found that appellant failed to provide evidence that his light-duty job would expire. Additionally, although the witness statements provided evidence that he was exposed to noisy areas, his medical restrictions indicated that transient exposure to noise would not pose unacceptable risk and was allowed.

On July 25, 2008 appellant again requested reconsideration. He submitted a May 15, 2006 statement from Ms. Parrish, his supervisor in the IWP. Ms. Parrish indicated that appellant was unable to perform full-duty work in his position of record due to his permanent limitations, and that he was currently assigned to perform light-duty work, which would eventually conclude.

By decision dated October 29, 2008, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position, or the medical evidence establishes that he can perform the limited-duty position, the employee has the burden of proof to establish a recurrence of total disability, and that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature or extent of the injury-related condition, or a change in the nature and extent of the light-duty job requirements.[1]

The Office's definition of a recurrence of disability means an 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. The term also means the 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 for when such withdrawal occurs for reasons of misconduct, nonperformance of the job duties, or a RIF.[2] The Board has held that, when a claimant stops work for reasons unrelated to the accepted employment injury, there is not disability within the meaning of the Federal Employees' Compensation Act.[3]

[1] *See John I. Echols*, 53 ECAB 481 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[2] *See* 20 C.F.R. § 10.5(x).

[3] *See John I. Echols, supra* note 1; *John W. Normand*, 39 ECAB 1378 (1988). Disability is defined to mean the incapacity because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total. See 20 C.F.R. § 10.5(f).

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for bilateral hearing loss. From April 7 to 23, 2006, appellant worked full time with restrictions provided by Dr. Rovig. On April 26, 2006 appellant was assigned to the IWP, in order to accommodate his restrictions. He retired on disability on September 19, 2006. On November 30, 2006 appellant filed a claim for a recurrence of disability as of September 20, 2006. He did not claim an inability to work due to a worsening of his accepted condition. Rather, appellant contended that he was entitled to compensation for total disability due to the withdrawal of his limited-duty job. He also alleged that he was required to work in a noisy environment, in violation of his work restrictions. The Board finds that appellant has failed to meet his burden to establish that he was disabled during the claimed period, and the Office properly denied his recurrence claim.

The record reflects that, from April 7 to 23, 2006, appellant worked full time with restrictions. On April 26, 2006 he was assigned to IWP, where he worked until he accepted disability retirement on September 19, 2006. Appellant alleged that his employer removed him from his position as an insulator in April 2006 and placed him in a temporary light-duty position in a noisy environment. He further claimed that he accepted disability retirement because he was told that his light-duty job would be coming to an end, and that he would be involuntarily separated if he did not elect disability retirement. However, the evidence of record is insufficient to support appellant's claim.

The Board finds that appellant has not established that the employing establishment terminated or threatened to terminate, him. At the oral hearing, he testified that, within a two-week period, three different foremen told him that his light-duty position would not last more than one year, and that he must "put in for disability retirement" or he was "going to be off the gate." Appellant stated that Supervisor Parrish informed him that the employing establishment was unable to accommodate his position within his restrictions, and that Ms. Berningham told him to take disability retirement and then apply for workers' compensation benefits. However, appellant has provided no corroborative evidence, in the form of witness statements or otherwise, to support these allegations. The record contains a statement from Mr. Williams, a coworker, indicating that it was the employing establishment's policy to retain workers in the IWP for one year before firing them. However, the record is devoid of evidence reflecting an employing establishment policy terminating employees after one year in the IWP. In another statement, Mr. Young alleged that the employing establishment used scare tactics to lead appellant to take a quick OPM retirement. However, he did not provide a factual basis for his conclusion; therefore, his statement lacks probative value.

On the other hand, appellant's supervisor stated that appellant worked in his regular job, within his restrictions, from April 7 to 23, 2006, when he was provided a permanent position through the IWP in the facility maintenance group, and that appellant was told that he would be provided with the position indefinitely. A claimant may be considered disabled when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn, except when such withdrawal occurs for reasons of misconduct, nonperformance of the job duties or a RIF.[4] The Board has held that, when a

[4] *See* 20 C.F.R. § 10.5(x).

claimant stops working for reasons unrelated to the accepted employment injury, there is not disability within the meaning of the Act.[5] In this case, appellant's absence from work was due to his decision to accept disability retirement, rather than to a withdrawal of his light-duty position by the employing establishment. Therefore, the work stoppage in this case did not constitute a recurrence of disability.[6]

The Board also finds the evidence insufficient to establish that appellant was required to work outside of his work restrictions. Appellant alleged that he was exposed to excessive noise in his light-duty position in the IWP. He submitted statements from coworkers attesting to his exposure to work-related noise in June, July and August 2006. However, the record does not contain evidence reflecting that appellant was exposed to work-related noise in excess of his medical restrictions. On April 7, 2006 Dr. Rovig provided work limitations, which restricted appellant from exposure to noise above 84 decibels. He opined that appellant should not be exposed routinely to hazardous levels of occupational noise, but that short-term, transient exposure would not pose unacceptable risk and was allowed. Although appellant's coworkers opined that his exposure to noise was excessive, the evidence is insufficient to establish exposure to noise above 84 decibels. The Board notes that appellant was assigned to the IWP in order to accommodate his restrictions. His supervisors stated that he was not exposed to power tools or other high frequency noise in his position in the facility maintenance group, and that job assignments were given to him based on, and with consideration for, his hearing limitations. He was advised that, if at any time his work did not meet his limitations, the IWP would find alternative work.

The Board finds that appellant failed to establish that the employing establishment improperly withdrew, or threatened to withdraw, his light-duty assignment. The Board also finds that appellant has failed to establish that his work requirements exceeded his established physical limitations.[7] Therefore, the Office properly denied his recurrence claim.

[5] *See John I. Echols, supra* note 1; *John W. Normand, supra* note 3. Disability is defined to mean the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total. *See* 20 C.F.R. § 10.5(f).

[6] At the oral argument held before the Board, appellant's representative argued that appellant's limited-duty job was effectively withdrawn when the employing establishment assigned him to the IWP without a written job offer. In support of his position, he cited several cases, all of which are distinguishable from the instant case. In *C.S.*, Docket No. 07-2233 (issued March 19, 2008), the Board found that the Office improperly determined that appellant's limited-duty position was suitable under 5 U.S.C. § 8106. In *S.J.*, Docket No. 06-2135 (issued August 21, 2007), the Board reversed the Office decision, which found that the claimant had refused an offer of suitable work when he was assigned to the IWP. In the instant case, appellant did not refuse his assignment to the IWP, but rather worked in his assigned position for approximately four months before voluntarily retiring on disability. In *Marvin C. Knolls*, Docket No. 04-1748 (issued June 8, 2005), the Board found that appellant established a recurrence of disability, where the employing establishment withdrew appellant's limited-duty assignment and informed him that there was no position available for reassignment. In the instant case, the employing establishment did not withdraw appellant's limited-duty assignment, but rather assured him that his position would remain available indefinitely.

[7] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

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,[8] 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.[9] 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.[10] 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.[11]

ANALYSIS -- ISSUE 2

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits, as the evidence submitted by appellant in support of his June 12, 2007 reconsideration request is relevant and pertinent new evidence not previously considered.[12] In support of his request for reconsideration, appellant submitted a May 15, 2006 statement from Ms. Parrish, his supervisor in the IWP. Ms. Parrish indicated that appellant was unable to perform full-duty work in his position of record due to his permanent limitations, and that he was currently assigned to perform light-duty work, which would eventually conclude. In its October 29, 2008 decision, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant merit review. The Board disagrees.

In its July 11, 2008 decision, the Office denied modification of its previous decisions, finding that appellant retired due to his perception that his light duty would end and he would be terminated. It found that appellant failed to provide evidence that his light-duty job would expire. Ms. Parrish's May 15, 2006 statement confirming that appellant was unable to perform full-duty work in his position of record due to his permanent limitations, and that his current light-duty work would eventually conclude, directly addresses the issue that was before the Office in its July 11, 2008 decision, namely, whether appellant's light-duty job would terminate.

The Board finds that Supervisor Parrish's statement constitutes relevant and pertinent new evidence not previously considered by the Office; therefore, it is sufficient to require further review of the case on its merits. The case will therefore be remanded for consideration of the May 15, 2006 statement, together with the previously submitted evidence of record, and a

[8] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

[9] 20 C.F.R. § 10.606(b)(2).

[10] *Id.* at § 10.607(a).

[11] *Id.* at § 10.608(b).

[12] *Id.* at § 10.606(b)(2).

decision on the merits as to whether appellant sustained a recurrence of disability on or about September 20, 2006.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability. The Board further finds that the Office improperly denied appellant's request for a merit review pursuant to section 8128(a) of the Act in its October 29, 2008 decision.

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2008 and December 20, 2007 decisions of the Office of Workers' Compensation Programs are affirmed. It is further ordered that the October 29, 2008 decision is set aside, and the case is remanded for action consistent with the terms of this decision.

Issued: June 1, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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