United States Department of Labor
Employees' Compensation Appeals Board

N.B., Appellant	)	
and	)	**Docket No. 08-1925**
	)	**Issued: March 3, 2009**
U.S. POSTAL SERVICE, CLEBURNE POST OFFICE, Cleburne, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 30, 2008 appellant filed a timely appeal from a July 27, 2007 merit decision and an April 30, 2008 nonmerit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant established a recurrence of total disability from February 2 through 28, 2007 causally related to her accepted work injury; and (2) whether the Office properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 3, 1988 appellant, then a 27-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 29, 1988 she sustained a low back strain while lifting heavy flats over her head and turning to stack them. The Office accepted her claim for

closed dislocation of the lumbar vertebra. Appellant continued to work modified duty and in 2006 accepted a position within her physical restrictions as a sales service associate.

On February 9, 2007 appellant filed a claim for compensation (Form CA-7) for the period February 6 through 28, 2007. In a letter dated February 8, 2007, she contended that, due to the continuous standing and lifting required by her position, her back occasionally gave out. Appellant also stated that she developed arthritis due to her January 29, 1988 employment injury, limiting her ability to work, and that her doctor took her off work until February 28, 2007.

In a February 7, 2007 progress report, Dr. Bruce Bollinger, an attending Board-certified orthopedic surgeon, relayed appellant's complaints that she experienced a flare-up of lower back pain, which radiated into her right hip. Appellant reported that she did not have a new injury but that her prior injury was aggravated by her activities at work. Dr. Bollinger prescribed medication and a lumbar sacral support brace and took appellant off work until the resolution of her pain, estimating two to three weeks. He completed a duty status report (Form CA-17), stating that appellant experienced increased low back pain and should not resume work until her next appointment in three weeks.

In a letter dated February 16, 2007, the Office requested that appellant provide additional information supporting her claimed period of disability, including medical evidence and a detailed narrative from her attending physician.

On February 23, 2007 appellant filed a recurrence of disability claim (Form CA-2a) alleging that she became disabled due to her January 29, 1988 injury on February 2, 2007. She contended that she first noticed lower back pain on February 1, 2007 and her pain progressively worsened due to standing and repetitive lifting and carrying packages. Appellant alleged that she suffered continuous low back pain since her accepted work injury, which has worsened due to hard work.

In an attending physician's report (Form CA-20) dated March 9, 2007, Dr. Bollinger diagnosed degenerative disc disease at L4-5 and L5-S1 and chronic low back pain. He checked a box marked "yes" when asked whether he believed appellant's condition was caused or aggravated by an employment activity. Dr. Bollinger further noted that appellant could work with physical limitations. He repeated the work restrictions on April 6, 2007.

In an April 23, 2007 letter, the Office requested that appellant provide additional information in support of her recurrence claim.

In a decision dated July 27, 2007, the Office denied appellant's recurrence claim on the grounds that she did not submit sufficient factual and medical evidence establishing that she was disabled from the accepted work injury.

On April 21, 2008 appellant requested further merit review. She also submitted additional evidence including reports dated October 3, 2007 and April 2, 2008 from Dr. Bollinger who diagnosed chronic low back pain secondary to the January 29, 1988 injury and repeated work restrictions. In an October 3, 2007 progress note, Dr. Bollinger diagnosed lumbar spine disease. In the progress note dated April 2, 2008, he mentioned that appellant sustained occasional back spasms and is self-limiting most of the time.

In an April 30, 2008 decision, the Office denied further merit review finding that appellant did not raise any substantive legal questions or submit any new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."[1] A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[2] Where no such rationale is present, medical evidence is of diminished probative value.[3]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[4] To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[5]

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[1] *R.S.*, 58 ECAB ___ (Docket No. 06-1346, issued February 16, 2007); 20 C.F.R. § 10.5(x).

[2] *I.J.,* 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008)*; Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[3] *See Ronald C. Hand,* 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[4] *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); 20 C.F.R. § 10.5(x) provides, "*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 to the work environment that caused the illness. This 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, non-performance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."

[5] *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack* 50 ECAB 498, 503 (1999).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a closed dislocation of her lumbar vertebra. The issue is whether appellant met her burden of proof in establishing that she sustained a recurrence of total disability from February 2 through 28, 2007. The Board finds that appellant did not meet her burden of proof in establishing a recurrence.

As part of her burden of proof appellant must submit rationalized medical evidence relating the present disabling condition to the accepted employment injury. Appellant submitted the medical reports of Dr. Bollinger dated February 7 through April 6, 2007. However, only in a March 9, 2007 report did Dr. Bollinger provide an opinion on causation. Dr. Bollinger checked "yes" where asked whether appellant's condition was caused by her employment. The Board has held that opinion on causal relationship limited to checking "yes" to a form question, without accompanying medical rationale, has little probative value.[6] These medical reports are of diminished probative value and do not establish appellant's claim.

A recurrence of disability is defined as a "spontaneous change" in a medical condition absent an intervening injury or exposure to new work factors.[7] In her February 8, 2007 letter, appellant noted that her back occasionally gave out due to the continuous standing and lifting required by her current position as a distribution sales associate. She repeated this contention in her recurrence claim form, alleging that her back pain progressively worsened due to standing and repetitive lifting and carrying of packages. Dr. Bollinger also noted that appellant did not sustain a new injury but that her prior back injury was aggravated by her activities at work. Appellant does not attribute her current back condition to a spontaneous worsening of her original injury, but rather contends that her exposure to new work activities, including lifting, carrying and prolonged standing, caused the current aggravation. These new work factors constitute an intervening cause and, therefore, her claim does not meet the definition of a spontaneous recurrence but rather asserts a new injury.[8]

The Board finds that appellant did not establish that she sustained a recurrence of total disability for the period February 2 through 28, 2007.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act[9] 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

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[6] *Gary J. Watling*, 52 ECAB 278 (2001).

[7] *See supra* note 1.

[8] 20 C.F.R. § 10.5 defines the terms traumatic injury and occupational disease or illness. Traumatic injury is defined by section 10.5(e) as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Occupational disease or illness is defined by 20 C.F.R. § 10.5(q) as a condition produced by the work environment over a period longer than a single workday or shift.

[9] 5 U.S.C. §§ 8101-8193.

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 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.[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]

ANALYSIS -- ISSUE 2

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered. The issue is whether she submitted relevant and pertinent new evidence not previously considered by the Office.

In support of her claim for reconsideration, appellant submitted reports dated October 3, 2007 and April 2, 2008 from Dr. Bollinger who reported a diagnosis of chronic low back pain secondary to the January 29, 1988 injury and reiterated prior work restrictions. This evidence is duplicative of that already contained in the record and does not constitute new evidence.[16] Further, the progress notes do not address the claimed period of disability from February 2 through 28, 2007, thus they are not relevant to appellant's claim.[17]

The Board finds that appellant has not submitted relevant and pertinent new evidence not previously considered by the Office and therefore the Office properly denied further merit review.

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[10] 5 U.S.C. § 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).

[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] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case. *Daniel Deparini*, 44 ECAB 657 (1993).

CONCLUSION

The Board finds that appellant did not establish that she sustained a recurrence of disability for the period February 2 through 28, 2007 due to her accepted work injury. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits.

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2007 and April 30, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.[18]

Issued: March 3, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[18] The Board notes that appellant submitted additional evidence subsequent to the April 30, 2008 decision of the Office. The Board cannot consider this evidence as its review is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board also notes that the record contains a decision dated July 2, 2008 in which the Office denied modification of the July 27, 2007 decision. The Office and the Board, however, may not have simultaneous jurisdiction over the same issue in the same case. Following the filing of an appeal with the Board, which in the instant case was on June 30, 2008, the Office did not retain jurisdiction to render a further decision regarding an issue on appeal until after the Board relinquishes its jurisdiction. Any decision rendered by the Office on the same issues for which an appeal is filed is null and void. Thus, the July 2, 2008 decision is null and void. *Noe L. Flores*, 49 ECAB 344, 346, n.1 (1998); *Douglas E. Billings*, 41 ECAB 880, 895 (1990).