United States Department of Labor
Employees' Compensation Appeals Board

O.D., Appellant	)	
and	)	**Docket No. 09-707**
	)	**Issued: November 13, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Southeastern, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 14, 2009 appellant filed a timely appeal from the April 21 and July 15, 2008 decisions of the Office of Workers' Compensation Programs denying her claim for wage-loss compensation from January 19 through February 1, 2008 and a nonmerit decision dated November 19, 2008 denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues on appeal are: (1) whether appellant established a recurrence of total disability commencing January 4, 2008 as a result of her accepted employment injury; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 14, 2007 appellant, then a 38-year-old mail processor, injured her left heel as a result of pushing an all-purpose container, which ran up the back of her left heel. She stopped

work on July 14, 2007. The Office accepted the claim for left Achilles tendinitis and paid compensation. Appellant returned to full-time restricted duty as a manual clerk on December 15, 2007. She stopped work on January 4, 2008.

In a January 15, 2008 report, Dr. Kiernan T. Mahan, a podiatrist, advised that appellant was excused from work due to pain. On January 31, 2008 he found that she was unable to resume work due to pain and swelling of the posterior-lateral left ankle.

On February 19, 2008 the Office advised appellant to submit factual and medical information if she claimed a recurrence of disability. It requested a well-rationalized narrative report from her attending physician which contained an opinion regarding the relationship between her current condition and the work injury of July 14, 2007.

On February 24, 2008 appellant filed a Form CA-7 claiming wage loss for the period January 19 through February 1, 2008. She submitted a January 31, 2008 physical therapy report; a copy of a July 14, 2007 x-ray report; and progress notes dated January 10 to March 6, 2008 from Dr. Mahan, who diagnosed conditions other than the accepted left Achilles tendinitis. On March 5, 2008 appellant filed a notice of recurrence (Form CA-2a) claiming that she sustained a recurrence on December 22, 2007 and that she stopped work on January 4, 2008. She had to wear an air cast boot on her left foot, which prohibited her from her job as open footwear was not allowed on the floor. Appellant's supervisor, Robert Wiedman, advised that, following the original injury, appellant was accommodated in a modified-duty assignment in manual letters, where she sat and cased letters. Dr. Wiedman noted that appellant was kept off the main floor and, since she sat casing letters, she was allowed to wear protective boot and air cast while at work.

In a March 13, 2008 statement, appellant stated that the modified assignment allowed her to either sit or stand. She stated, in most cases, she sat on a stool or maybe a chair, which could be uncomfortable with a heavy boot on your foot. Appellant further stated that she was exposed to the hard floor in the work area to get the mail to case or dispatch.

By decision dated April 2, 2008, the Office denied appellant's claim for compensation for the period January 19 through February 1, 2008. It found that she had not submitted medical evidence to support her claim for total disability.

Appellant subsequently filed CA-7 forms, claiming wage-loss compensation for the period February 2 through March 28, 2008.

By decision dated April 21, 2008, the Office denied appellant's claim for a recurrence of disability from February 2 through March 28, 2008. It found that she had not submitted evidence in response to its February 19, 2008 letter.

On June 11, 2008 appellant requested reconsideration of the Office's decisions. She submitted a May 9, 2008 left ankle magnetic resonance imaging (MRI) scan[1]; and progress notes from Dr. Mahan. On March 6, 2008 Dr. Mahan stated: "Ritchie brace left ankle for peroneal

[1] The MRI scan found "minimal, if any achilles tendinisis without tearing or advanced tendinopathy."

tend[i]nitis and pain of unknown etiology." In the other March 6, 2008 medical note, Dr. Mahan stated: "Ritchie brace left ankle for peroneal tend[i]nitis and osteochondral injury." He diagnosed left peroneal tendinitis and left ankle arthritis and noted that appellant continued to have pain.

By decision dated July 15, 2008, the Office denied modification of its prior decisions.

On November 3, 2008 appellant requested reconsideration of the Office's decisions. She submitted duplicates of progress notes from Dr. Mahan. On August 18, 2008 Dr. Mahan diagnosed left talar process fracture, left peroneal tendinitis and left ankle arthritis and noted that appellant continued to have pain. He noted disability paperwork was filled out. In September 19 and October 24 2008 notes, Dr. Mahan diagnosed "left peroneal tend[i]nitis" and referred appellant to physical therapy. She also submitted a February 27, 2008 three-phase bone scan and physical therapy reports.

By decision dated November 19, 2008, the Office denied reconsideration of its April 21, 2008 recurrence decision. It found that appellant had not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted.[2]

LEGAL PRECEDENT -- ISSUE 1

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence establishes that she can perform the limited-duty position, the employee has the burden of proof to establish a recurrence of total disability and that she 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.[3]

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 reduction-in-force (RIF).[4] The Board has

[2] Appellant submitted new evidence with her appeal. The Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and requested reconsideration under 5 U.S.C. § 8128.

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

[4] *See* 20 C.F.R. § 10.5(x).

held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of the Federal Employees' Compensation Act.[5]

Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.[6] Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[7] The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.[8] To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[9]

ANALYSIS -- ISSUE 1

Appellant claimed a recurrence of total disability commencing January 4, 2008 and claimed wage-loss compensation from January 19 through March 28, 2008. After her July 14, 2007 injury, she returned to work in a modified-duty assignment where she sat and cased letters. Appellant's supervisor noted that appellant was allowed to wear protective boot and air cast while at work. Appellant has not alleged that there was a change in the nature and extent of her light-duty job requirements. She noted that the pain in her foot increased to the point she could no longer work. Appellant has the burden to establish that her disability commencing January 4, 2008 is due to the accepted injury.[10] The Board finds that she has not met her burden of proof to establish total disability beginning January 4, 2008 due to her July 14, 2007 work injury.

Appellant submitted numerous reports from Dr. Mahan, who diagnosed conditions other than the accepted left Achilles tendinitis. Dr. Mahan failed to provide any medical rationale as to how or why these other medical conditions were causally related to the accepted employment injury.[11] While his progress notes of March 31 and April 21, 2008 indicate that appellant had pain and that disability paperwork was filled out, he did not provide a well-reasoned medical opinion addressing her disability for the period claimed due to the accepted left heel condition.

---

[5] *See John I. Echols, supra* note 3; *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).

[6] *Edward H. Horton*, 41 ECAB 301 (1989).

[7] *See Dean E. Pierce*, 40 ECAB 1249 (1989).

[8] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[9] *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[10] *See John I. Echols, supra* note 3.

[11] *See T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009) (for a condition not accepted by the Office as being due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence). *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

Thus, Dr. Mahan's opinion is insufficient to support appellant's claim of a recurrence of disability.

Dr. Mahan's January 15, 2008 report requested excusal from work. It does not provide any objective findings which identify the medical condition for which he treated appellant or address whether her disability was due to the July 14, 2007 work injury. On January 31, 2008 Dr. Mahan merely noted that appellant could not resume work. However, he did not provide any physical findings to support his conclusion or any medical rationale as to how the swelling and pain from appellant's left posterior-lateral ankle was causally related to the work-related injury. The two March 6, 2008 notes do not specifically address whether appellant had any disability causally related to the work injury. Because Dr. Mahan fails to provide a reasoned medical opinion causally relating the claimed disability to the July 14, 2007 employment injury, his opinion is of diminished probative value and insufficient to establish appellant's claim for disability.

The diagnostic studies of record are insufficient to establish appellant's claims as they do not provide any opinion addressing the issue of causal relation. Appellant also submitted physical therapy records; however, a physical therapist is not a "physician" as defined under the Act.[12] The opinions of such health care professionals are not considered competent medical evidence for purposes of determining disability or entitlement to benefits.[13]

Appellant has failed to establish by the weight of the reliable, probative and substantial evidence, a change in the nature and extent of the injury-related condition resulting in her inability to perform the duties of her modified employment or provide rationalized opinion evidence establishing that she was physically disabled as of January 4, 2008 due to her accepted left Achilles tendinitis condition. She has also failed to provide a well-reasoned medical opinion supporting total disability for the periods claimed as a result of the accepted condition. Accordingly, appellant has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

The Act provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[14] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[15]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or

[12] *See* 5 U.S.C. § 8101(2).

[13] *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006).

[14] 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[15] 20 C.F.R. § 10.605.

interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[16]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[17] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[18]

ANALYSIS -- ISSUE 2

Appellant's June 11, 2008 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also did not submit relevant and pertinent new evidence not previously considered by the Office. Dr. Mahan's progress notes of January 10 and March 31, 2008 were previously reviewed by the Office and were duplicative in nature. The Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.[19]

In September 19 and October 24 and 2008 treatment notes, Dr. Mahan diagnosed "left peroneal tend[i]nitis" and referred appellant to physical therapy. These notes are not relevant and pertinent, as he did not provide any opinion addressing whether appellant's employment caused any disability commencing on January 4, 2008 due to her accepted employment-related condition. On May 15 and September 18, 2008 Dr. Mahan diagnosed left talar process fracture, left peroneal tendinitis and left ankle arthritis and noted that appellant had pain. In an August 18, 2008 progress note, he noted disability paperwork was filled out. However, these notes are not relevant, as Dr. Mahan did not address the issue of disability for the period claimed due to the accepted left heel condition. The record also contains a February 27, 2008 three-phase bone scan, which does not address disability. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[20] Appellant did not

[16] *Id*. at § 10.606. *See Susan A. Filkins*, 57 ECAB 630 (2006).

[17] *Id*. at § 10.607(a); *see Joseph R. Santos*, 57 ECAB 554 (2006).

[18] 20 C.F.R. § 10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

[19] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

[20] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

provide any relevant and pertinent new evidence to establish that she was disabled from January 4, 2008 due to her accepted employment-related condition. As noted, physical therapists are not physicians under the Act and their opinions cannot be considered competent medical evidence.[21] The addressed reports are not relevant since the underlying issue is medical in nature. The evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her June 11, 2008 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish a recurrence of disability on or after January 4, 2007. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated November 19, July 15 and April 21, 2008 are affirmed.

Issued: November 13, 2009
Washington, DC

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

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

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

[21] *See supra* notes 12, 13. *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).