

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

M.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Coppell, TX, Employer**

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**Docket No. 09-637
Issued: October 7, 2009**

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 6, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated July 22, 2008, finding that she had not established a recurrence of disability. She also appealed a December 17, 2008 nonmerit decision from the Branch of Hearings and Review. 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 sustained a recurrence on May 7, 2008 causally related to her February 16, 2002 employment injury; and (2) whether the Branch of Hearings and Review properly denied her request for an oral hearing as untimely.

FACTUAL HISTORY

On February 16, 2002 appellant, then a 39-year-old sales and service associate, injured her back while lifting mail in the performance of duty. The Office accepted her claim for lumbar sprain/strain on April 25, 2002.

On May 9, 2008 appellant filed a recurrence of disability claim alleging that on May 7, 2008 she sustained a recurrence of disability due to her February 16, 2002 employment injury. She had returned to limited-duty work after her February 16, 2002 employment injury with restrictions on repetitive bending, lifting from the floor, standing, pushing or pulling.¹ On the reverse of the form, appellant's supervisor, Kevin Stephenson, stated that on May 7, 2008 appellant performed the duties of her assignment with no notification of injury. He stated that she returned to work on May 10, 2008 with no limitations.

Dr. Charles E. Willis, a physician Board-certified in pain management, completed a note on December 28, 2007. He stated that appellant reported increased low back pain after prolonged work. Dr. Willis found lumbar paraspinal tenderness with fair range of motion, negative sensory deficits and negative motor deficits. He diagnosed acute exacerbation of pain. On February 12, 2008 Dr. Willis stated that appellant reported that her pain had improved. On April 29, 2008 he reported that she had increased pain with paraspinal tenderness and decreased range of motion. Dr. Willis opined that appellant's condition had worsened. He recommended lumbar epidural steroid injections.

The Office requested additional factual and medical evidence in support of appellant's claim by letter dated May 19, 2008. It allowed 30 days for a response.

On May 22, 2008 appellant contended that she was forced to work outside of her restrictions including repetitive stooping, bending, lifting and pushing. On May 7, 2008 she was preparing mail located in buckets on the floor and pushing containers of mail which required excessive stooping, bending, lifting and pushing when she developed pain in her lower back and shoulders. Appellant submitted a statement dated May 22, 2008 from Beverly Miller, a coworker, who stated that on May 7, 2008 appellant informed her that the employing establishment instructed her to perform mail dispatch and that she appeared to be in pain while performing these duties. She also submitted a document dated May 7, 2008, which included the instructions to pull out, start mail prep dispatch and close-out at 6:15. This document has the name of appellant's supervisor, Mr. Stephenson, written on it.

Dr. Willis examined appellant on May 9, 2008 and found numbness in her left lower extremity. He opined that her condition was worsening.

Dr. Willis performed a lumbar epidural steroid injection at L5-S1 on May 23, 2008. In a note dated May 30, 2008, he found negative lumbar paraspinal tenderness with good range of motion, negative sensory deficits and negative motor deficits.

¹ Appellant filed a second recurrence of disability on September 22, 2008 and alleged that she sustained a recurrence of disability on May 7, 2008 due to her February 16, 2002 employment injury.

By decision dated July 22, 2008, the Office denied appellant's claim for recurrence of disability on May 7, 2008 finding that she failed to submit the necessary medical opinion evidence.

In a letter dated September 22, 2008, appellant requested reconsideration of the July 22, 2008 decision. She also submitted a form which indicated that she wished to request reconsideration. On November 20, 2008 appellant requested a review of the written record. In a letter dated November 20, 2008, she stated that she indicated the wrong appeal right and requested a review of the written record.

By decision dated December 17, 2008, the Office denied appellant's request for review of the written record was untimely and stated that she could pursue her claim through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

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) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.² 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 of record establishes that she can perform the limited-duty position, the employee has the burden of establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.³

ANALYSIS -- ISSUE 1

Appellant filed a notice of recurrence of disability alleging on May 7, 2008 she sustained a recurrence of disability due to her February 16, 2002 employment injury. She indicated that following her back injury on February 16, 2002 she had returned to limited-duty work. Appellant alleged a recurrence of disability, as she was required to work beyond her limitations. She stated that on May 7, 2008 she was required to perform excessive stooping, bending, lifting and pushing and developed pain in her lower back and shoulders.

Appellant has not submitted any evidence corroborating her statements that her light-duty job requirements had changed. The record does not contain her light-duty job requirements or a

² 20 C.F.R. § 10.5(x).

³ *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

copy of her position description. The record contains only appellant's allegations that she was required to work beyond her restrictions. The statement from Ms. Miller indicates that appellant stated that she was required to perform duties that caused her pain. She does not allege that she was aware that these activities exceeded appellant's work restrictions. Appellant also submitted a statement which appears to be a work assignment for May 7, 2008. However, this statement does not appear to be signed by Mr. Stephenson and is most accurately described as appellant's recollection of her job duties. This evidence is not sufficient to meet appellant's burden of proof to establish a change in the nature and extent of her light-duty job requirements resulting in a recurrence of disability.

Appellant also failed to submit sufficient medical opinion evidence to establish a change in the nature and extent of her employment-related condition. Appellant's attending physician, Dr. Willis, a physician Board-certified in pain management, examined her on May 9, 2008 and found numbness in her left lower extremity. He opined that appellant's condition was worsening. While Dr. Willis opined that her condition was worsening on May 9, 2008, his note of April 29, 2008 just prior to the alleged recurrence of disability on May 7, 2008 also reported that appellant had increased pain with paraspinal tenderness and decreased range of motion and included the opinion that her condition had worsened. Dr. Willis did not clearly attribute appellant's worsening condition to February 16, 2002 injury. He did not offer any opinion explaining how her current condition was due to her accepted employment injury of February 16, 2002. Without any medical opinion evidence, Dr. Willis' reports are not sufficient to establish that appellant sustained a recurrence of disability on or after May 7, 2008 causally related to her accepted employment injury.

LEGAL PRECEDENT -- ISSUE 2

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.”⁴

The claimant can choose between two formats: an oral hearing or a review of the written record.⁵ The requirements are the same for either choice.⁶ 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

⁴ 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

⁵ 20 C.F.R. § 10.615.

⁶ *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

or other carrier's date marking⁷ and before the claimant has requested reconsideration.⁸ 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.⁹

ANALYSIS -- ISSUE 2

The Office issued a decision on July 22, 2008, denying appellant's claim for a recurrence of disability. Appellant requested a review of the written record by letter dated November 20, 2008. She made her request for a review of the written record more than 30 days after the Office's July 22, 2008 decision. The Board finds that appellant is not, therefore, entitled to a review of the written record as a matter of right. The Board further finds that the Branch of Hearings and Review then properly proceeded to exercise its discretion by finding that she could pursue her claim through the reconsideration process. The Board concludes that the Branch of Hearings and Review properly denied appellant's request for a review of the written record.

CONCLUSION

The Board finds that appellant has not submitted the necessary factual evidence to establish a change in the nature and extent of her light-duty job requirements. The Board further finds that she has not submitted the necessary medical opinion evidence to establish a change in the nature and extent of her injury-related condition. Appellant's claim for a recurrence of disability on May 7, 2008 must be denied. The Board further finds that the Branch of Hearings and Review properly denied her request for a review of the written record as untimely.

⁷ 20 C.F.R. § 10.616(a). *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁸ *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

⁹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 17 and July 22, 2008 are affirmed.

Issued: October 7, 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