United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 09-705**
	)	**Issued: September 29, 2009**
DEPARTMENT OF THE ARMY, U.S. ARMY DENTAL ACTIVITY, Fort Drum, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 16, 2009 appellant filed a timely appeal from the February 13 and June 6, 2008 merit decisions of the Office of Workers' Compensation Programs denying her recurrence of disability claim and a December 8, 2008 decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of disability on or after November 14, 2007 due to her October 27, 2005 employment injury; and (2) whether the Office properly denied further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted that on October 27, 2005 appellant then a 52-year-old information technologies specialist, sustained acquired spinal stenosis of her cervical region due to moving

boxes. Appellant stopped work on April 21, 2006 and was paid compensation for wage loss. On May 4, 2006 Dr. Michael P. Owen, an attending Board-certified neurosurgeon, performed an anterior cervical decompression, discectomy and interbody fusion at C5-6. The surgery was authorized by the Office.

In a December 8, 2006 report, Dr. Owen released appellant to resume full-time light-duty work with restrictions of no pushing, pulling or lifting more than 15 pounds, no crawling more than four times per day and no crawling for more than five minutes at a time. Appellant had to be able to change positions from sitting to standing as needed and required use of an ergonomic workstation. She returned to modified work for the employing establishment on January 22, 2007.

On November 15, 2007 appellant filed a claim alleging that she sustained a recurrence of disability on November 14, 2007. She submitted a November 13, 2007 work release slip in which Dr. William Stewart, an attending Board-certified neurosurgeon, noted that she was totally disabled for all employment. Dr. Stewart diagnosed degenerative disc disease of the cervical spine and C6 radiculopathy. Appellant also submitted a November 21, 2007 treatment note from an attending nurse practitioner.

On December 28, 2007 the Office requested that appellant submit additional factual and medical evidence in support of her claim. Appellant submitted notes of a registered physician's assistant from early 2008 and the results of a January 25, 2008 magnetic resonance imaging (MRI) scan. It noted no significant interval change in comparison with previous MRI scan results dated January 3, 2007.

In an undated statement, appellant discussed the progress of her medical condition since her return to work on January 22, 2007. On January 26, 2007 she fell backwards in a broken chair at work. Appellant indicated that she managed to prevent herself from falling backwards onto the floor, but felt a severe stabbing pain through her neck and an ache between her shoulder blades. She experienced continuous pain thereafter and stated:

> "I was continuously changing positions, sitting, standing upright, bending over, squatting and stretching exercises, anything to relieve pain while trying to concentrate on resolving a computer problem, researching and compiling automation equipment reports and/or training an employee. Pain became so unbearable that I developed the habit of rocking back and forth when standing in an attempt to minimize the pain....
>
> "Dr. Stewart placed me out of work pending MRI scan results. He told me he believed further injury to the cervical area had occurred possibly even breakage of the cervical fusion of C5, 6 and/or 7."

In a January 25, 2008 statement, Mitchell Stewart, an administrative officer with the employing establishment, advised that appellant returned to work for approximately 47 to 50 percent of the time until she was directed by her physician to stop working as of November 14, 2007. Appellant appeared to be in discomfort throughout the period after she returned to work in January 2007, although she did not attribute any discomfort to a January 26,

2007 accident. Mr. Stewart stated that appellant was provided with a ergonomic chair and she advised him that the chair was fine. He indicated that the broken chair appellant referred to was not located in her regular worksite. Mr. Stewart indicated that appellant's regular worksite was ergonomically sound and asserted that she was not required to work beyond her restrictions.

In a February 13, 2008 decision, the Office denied appellant's claim finding that she did not submit sufficient medical evidence to establish that she sustained a recurrence of disability on or after November 14, 2007 due to her October 27, 2005 employment injury.

Appellant requested a review of the written record by an Office hearing representative. She submitted a March 18, 2008 report from Dr. Gerald Amatucci, an attending Board-certified internist, who provided findings on physical examination, diagnosed neck pain and cervical radiculopathy and indicated that she was totally disabled for all employment.

In a June 6, 2008 decision, the Office hearing representative affirmed the February 13, 2008 decision.

Appellant, through her attorney, requested reconsideration of her claim. Counsel asserted that she sustained a more serious injury on October 27, 2005 than the stenosis condition, which was accepted by the Office. He contended that appellant sustained a recurrence of disability because she was forced to work beyond her restrictions. In an August 25, 2008 report, Dr. Amatucci provided an update of appellant's condition and indicated that she was disabled. In an October 6, 2008 report, Dr. John Krawchenko, an attending Board-certified neurosurgeon, indicated that appellant was partially disabled.

In a December 8, 2008 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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 light-duty position or the medical evidence of record establishes that 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 she cannot perform such light duty. 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 light-duty job requirements.[1]

ANALSIS -- ISSUE 1

The Office accepted that on October 27, 2005 appellant sustained acquired spinal stenosis of her cervical region due to moving boxes. On November 15, 2007 appellant filed a claim alleging that she sustained a recurrence of disability on November 14, 2007. The Board finds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of disability on or after November 14, 2007 due to her October 27, 2005 employment injury.

[1] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

Appellant submitted a November 13, 2007 work release slip from Dr. Stewart, an attending Board-certified neurosurgeon, who advised that she was totally disabled for all employment. He diagnosed degenerative disc disease of the cervical spine and C6 radiculopathy. This report, however, is of diminished probative value as Dr. Stewart did not provide an opinion on causal relationship.[2] Dr. Stewart did not address whether appellant's disability was related to her October employment injury. In a March 18, 2008 report, Dr. Amatucci, an attending Board-certified internist, provided findings on physical examination, diagnosed neck pain and cervical radiculopathy and indicated that appellant was totally disabled for all employment. He did not provide any medical opinion addressing whether appellant sustained a recurrence of disability on or after November 14, 2007 due to her October 27, 2005 work injury.[3] Appellant submitted reports of a physician's assistant and a nurse. However, causal relationship is a medical question that can only be resolved by medical opinion evidence. The reports of these lay individuals cannot be considered by the Board in adjudicating that issue.[4]

On appeal, appellant contends that she sustained a more serious injury on October 27, 2005, than the stenosis condition which was accepted by the Office. However, she did not submit medical evidence to support this assertion. Prior to the denial of her claim, appellant claimed that she sustained a recurrence of disability because she was forced to work beyond her restrictions.[5] She claimed that she had to work in a nonergonomic environment, but the employing establishment denied this contention. Appellant has not submitted evidence to establish that her workplace was nonergonomic or that she otherwise had to work beyond her restrictions. For these reasons, she did not establish her claimed work-related recurrence of disability.

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,[6] 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

[2] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[3] Appellant appears to have attributed her condition in late 2007 to falling backwards in a broken chair on January 26, 2007 while at work. Neither physician included this incident in their report. This allegation would be suggestive of a possible traumatic injury occurring on January 26, 2007 and not a recurrence of the accepted injury of October 27, 2005.

[4] *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

[5] Counsel also made a similar argument on appeal to the Board.

[6] 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).

considered by the Office.[7] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[8] 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.[9] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[10] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[11]

ANALYSIS -- ISSUE 2

Appellant reiterated that she sustained a more serious injury on October 27, 2005 than the stenosis condition which was accepted by the Office. This argument does not require reopening of her claim because it is not relevant to the main issue of the present case.[12] The issue is whether appellant submitted sufficient medical evidence to establish a work-related recurrence of disability. It can only be resolved through the submission of probative medical evidence. Appellant also argued that she sustained a recurrence of disability because she was forced to work beyond her restrictions. However, she previously made this argument and the Board has held that the submission of an argument previously raised does not require reopening of a claim.[13] Appellant submitted an August 25, 2008 report from Dr. Amatucci, who provided an update of her condition and indicated that she was disabled. An October 6, 2008 report from Dr. Krawchenko, an attending Board-certified neurosurgeon, indicated that appellant was partially disabled. However, these reports are not relevant to the issue in this case because neither physician provided an opinion that appellant sustained a work-related recurrence of disability on or after November 14, 2007.

Appellant has not established that the Office improperly denied her request for further review of the merits of its June 6, 2008 decision under section 8128(a) of the Act, because the evidence and argument she submitted did not to show that it erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

[7] 20 C.F.R. § 10.606(b)(2).

[8] *Id.* at § 10.607(a).

[9] *Id*. at § 10.608(b).

[10] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[11] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[12] *See supra* note 11 and accompanying text.

[13] *See supra* note 10 and accompanying text.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability on or after November 14, 2007 due to her October 27, 2005 employment injury. The Board further finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 8, June 6 and February 13, 2008 decisions are affirmed.

Issued: September 29, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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