

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

B.B., Appellant)	
)	
and)	Docket No. 09-1858
)	Issued: April 16, 2010
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Gaithersburg, MD, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 13, 2009 appellant filed a timely appeal from a March 6, 2009 merit decision of the Office of Workers' Compensation Programs. The record also contains a June 11, 2009 decision denying further merit review. 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 has established a recurrence of disability commencing March 19, 2008; and (2) whether the Office properly determined that appellant's application for reconsideration was insufficient to warrant review of the merits of the claim.

FACTUAL HISTORY

On May 24, 2000 appellant, then a 49-year-old distribution clerk, filed an occupational disease or illness claim (Form CA-2) alleging that she sustained asthma as a result of dust and poor ventilation in her work area. By letter dated March 15, 2002, the Office advised appellant

that the claim had been accepted for temporary aggravation of asthma, resolved.¹ Appellant returned to work and filed claims for intermittent dates of disability.

On July 15, 2008 appellant submitted claims for compensation (Form CA-7) for March 19 to 21 and June 10 to 12, 2008. On August 18, 2008 she submitted a Form CA-7 for July 16 to 18, 2008. In support of the claims, appellant submitted notes from a nurse. She also submitted a Form CA-7 for the period June 27 to July 6, 2008. In a note dated July 1, 2008, Dr. Leszek Karowlec, an internist, stated that appellant had received treatment for exacerbation of asthma and was unable to work from June 27 to July 5, 2008.

By decision dated September 3, 2008, the Office denied the claims for compensation. It found the medical evidence was not sufficient to establish disability for the periods claimed.

On September 5, 2008 appellant submitted a recurrence of disability claim (Form CA-2a). She did not identify a date of recurrence of disability on the form. Appellant stated that she had an asthma problem when she was in a dusty or very hot environment. In an August 6, 2008 letter, she stated that her condition had been ongoing since 2000 and had worsened. Appellant stated that her condition was aggravated by the amount of dust in her work section.

In a note dated August 7, 2008, Dr. Karowlec stated that appellant averaged three to four asthma attacks per year, the latest on July 25, 2008. He stated the attacks were usually precipitated by dust and hot, humid weather, that asthma was a chronic recurrent condition and avoidance of exposure was essential.

By decision dated December 2, 2008, the Office denied appellant's claim for a recurrence of disability.

In a letter dated December 20, 2008, appellant requested reconsideration of her claim. In a report dated December 12, 2008, Dr. Karowlec stated that appellant had been diagnosed with asthma since 1998 and averaged three to four asthma attacks per year. He reported that appellant had been experiencing severe asthma attacks from her workplace, which has an excessive amount of dust accumulation.

In a decision dated January 23, 2009, the Office denied modification of its prior decision. Appellant requested reconsideration by letter dated February 20, 2009. By report dated February 18, 2009, Dr. Karowlec stated that appellant had been experiencing exacerbation of asthma from her workplace due to the excessive amount of dust accumulation for several years. He further stated, "It is my medical opinion that on [May 3, 2000 appellant's] asthma attacks and the recurrence of her condition are related to high levels of excessive dust accumulation from her workplace which helps to contribute to her flare ups."

By decision dated March 6, 2009, the Office denied modification of the January 23, 2009 decision.

¹ A September 3, 2008 Office decision stated the accepted condition was extrinsic asthma.

Appellant again requested reconsideration of her claim. In an April 6, 2009 letter, she stated that she had sustained a recurrence of asthma from dust exposure in her work environment. Appellant indicated that the “nixie” section was originally located in the rear of the building between two processing machines, and workers use blowers to unclog mail stuck in the machines. She stated that dust blown from the machines would fly into nixie and aggravate her asthma. Appellant noted the machines were now vacuumed, but the dust is still an ongoing problem. She reported that the nixie section was moved into the center of the building in 2008, and dust accumulates on the ceiling and air vents as maintenance personnel do not clean nixie on a regular basis.

In a report dated April 2, 2009, Dr. Karowlec opined that appellant’s asthma attacks were related to the excessive dust accumulations in her work environment. He listed specific dates from December 2000 to January 2009 where appellant had asthma flare-ups requiring treatment.

By decision dated June 11, 2009, the Office determined appellant’s request for reconsideration was insufficient to warrant further merit review of the claim.

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.”²

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 a claimant 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.³

ANALYSIS -- ISSUE 1

In the present case, the Office did accept an asthma condition causally related to dust exposure in her work environment prior to the filing of her claim in May 2000. Commencing in July 2008, appellant filed claims for compensation for the following periods: March 19 to 21, June 10 to 12, June 27 to July 6 and July 16 to 18, 2008. On September 5, 2008 appellant filed a recurrence of disability claim. She did not provide specific dates, but presumably she was claiming compensation for the same periods.

The claim was accordingly developed as a recurrence of disability claim. Appellant’s statements generally referred to exposure to dust accumulation in her work area, without

² 20 C.F.R. § 10.5(x).

³ *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

discussing the time frame. To the extent appellant is claiming that continued exposure to dust during the years after 2000 caused disability for work for claimed periods in 2008, this would be a claim for a new injury.⁴ Even if it involves a prior accepted condition, renewed exposure is a new injury.⁵ It is not clear whether appellant has filed a claim for a new injury, but on this appeal the Board is reviewing the merit decisions dated March 6 and January 23, 2009, which denied a recurrence of disability.

The issue on appeal, therefore, is whether appellant has established a recurrence of disability for any of the claimed periods commencing on March 19, 2008. The medical evidence of record does not contain a rationalized medical opinion establishing a spontaneous change in the accepted medical condition resulting in an inability to work. Dr. Karowlec provided a brief note dated July 1, 2008 stating appellant was disabled from June 27 to July 5, 2008. He did not provide a complete history or support an opinion with medical rationale. In a February 18, 2009 report, Dr. Karowlec refers to both May 2000 asthma attacks “and the recurrence of her condition” as being related to dust accumulation at work, but he appears to be referring to dust exposure over several years after 2000. The issue here is a recurrence of disability, and Dr. Karowlec does not provide a report establishing a spontaneous change in the accepted employment-related condition for the periods claimed. As to the nurse’s reports, these are of no probative medical value as nurses are not physicians under the Federal Employees’ Compensation Act.⁶

The Board finds that appellant did not meet her burden of proof to establish a recurrence of disability on or after March 19, 2008. On appeal, she cites a number of Board cases regarding the general burden of proof for establishing occupational claims as well as a recurrence of disability. Appellant stated that her condition on March 19, 2008 was related to the initial injury on May 3, 2000, as both were caused by excessive dust accumulation. As noted, if she is relating her disability as of March 19, 2008 to her continuing exposure to dust, this is the basis for a new claim even if it involves the same underlying asthma condition. Appellant filed a Form CA-2a and did not provide a detailed factual statement regarding her claim. The Office developed the claim as a recurrence of disability and for the reasons stated in this decision, appellant did not meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁷ the Office’s regulations provide that a claimant may obtain review of the merits of the claim by

⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997).

⁵ *Id.* This section provides that a recurrence of disability does not include: “A condition which results from a new injury, even if it involves the same part of the body previously injured, or by renewed exposure to the causative agent of a previously suffered occupational disease. If a new work-related injury or exposure occurs, Form CA-1 or CA-2 should be completed accordingly.”

⁶ See *Vincent Holmes*, 53 ECAB 468 (2002).

⁷ 5 U.S.C. § 8128(a) (providing that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

submitting a written application for reconsideration that sets forth arguments and contains evidence that either: “(i) shows that [the Office] erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by [the Office]; or (iii) constitutes relevant and pertinent new evidence not previously considered by [the Office].”⁸ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁹

ANALYSIS -- ISSUE 2

In her application for reconsideration, appellant discusses her work environment and states that she has been exposed to dust at work over the past several years. This is, as noted above, a claim for a new injury that must be developed in an appropriate manner. With respect to a recurrence of disability, the reconsideration request did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered, or constitute relevant and pertinent new evidence not previously considered by the Office.

The April 2, 2009 report from Dr. Karowlec reiterated his general statement that asthma attacks were caused by dust exposure, but again he referred to a condition from continuing exposure, rather than a change in the accepted condition without any new exposure. It is not pertinent new and relevant evidence regarding the specific issue presented in this case. The Board finds that appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2) and the Office properly declined to reopen the case for merit review.

CONCLUSION

The Board finds that appellant did not establish a recurrence of disability on or after March 19, 2008. The Board further finds that appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2) and the Office properly denied merit review of the claim.

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 11, March 6 and January 23, 2009 are affirmed.

Issued: April 16, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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