United States Department of Labor
Employees' Compensation Appeals Board

T.L., Appellant	)	
and	)	**Docket No. 09-1066**
	)	**Issued: February 17, 2010**
DEPARTMENT OF DEFENSE, NATIONAL SECURITY AGENCY, Fort Meade, MD, Employer	)	

Appearances:
Darnell Lynn, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 17, 2009 appellant, through her representative, filed a timely appeal from a June 5, 2008 merit decision of the Office of Workers' Compensation Programs finding that she did not establish a recurrence of disability. She also appeals August 19 and November 26, 2008 nonmerit decisions denying her requests 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 has established that she sustained a recurrence of disability on January 2, 2006 causally related to her August 6, 1998 work injury; (2) whether the Office, in its August 19, 2008 decision, properly denied her request for further merit review of her claim under 5 U.S.C. § 8128; and (3) whether the Office, in its November 26, 2008 decision, properly denied reopening her case for further merit review under section 8128.

FACTUAL HISTORY

On August 12, 1998 appellant, then a 43-year-old system administrator, filed a claim for an injury occurring on August 6, 1998 in the performance of duty. The Office accepted her claim for back strain and herniated lumbar discs. Appellant underwent a lumbar laminectomy at L4-5. She returned to work with restrictions after sustaining intermittent periods of disability.

On September 6, 2005 Dr. Pavan Sawhney, a neurologist, found that appellant could perform sedentary work walking and standing less than 10 percent of the time.[1] He noted that due to pain she occasionally arrived at work "somewhat later than her expected time, but then she will put in the whole day of work…. If she is late a few days it is genuine, it is because of her back."

On October 7, 2005 the employing establishment notified appellant of her proposed removal for failing to act in a professional manner, failing to be respectful towards management and failing to follow instructions. The notice indicated that on February 18, 2005 she disrupted a meeting of her supervisor and did not report to work at her scheduled time. The notice also described prior instances of misconduct. The employing establishment removed her from employment due to misconduct effective December 30, 2005.

On December 9, 2005 appellant filed a claim requesting compensation for disability beginning January 2, 2006. On January 25, 2006 the Office noted that she was working with restrictions when she was removed from employment for misconduct. It requested that appellant submit any evidence showing that the employing establishment could not accommodate her work restrictions.

In a statement dated January 30, 2006, appellant asserted that the employing establishment terminated her due to her work injury. She advised that she had filed a complaint with the Equal Employment Opportunity Commission (EEOC). Appellant described in detail her disagreement with the specific instances of misconduct cited by the employing establishment in its notification of proposed termination. She noted that the employing establishment terminated her after she filed for disability retirement. Appellant submitted evidence relevant to her EEOC complaint.

In a progress report dated March 17, 2006, Dr. Sawhney noted that appellant had retired from the employing establishment.[2] He diagnosed intermittent chronic radiculopathy.

By decision dated June 29, 2006, the Office denied appellant's claim for compensation beginning January 2, 2006. It found that she was terminated for cause rather than an inability by the employing establishment to accommodate her restrictions. On July 3, 2006 appellant requested a telephone hearing.

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[1] A supervisory assessment form of appellant's job indicated that it was sedentary and required sitting 90 percent of the time, standing 5 percent of the time and walking 5 percent of the time.

[2] On September 26, 2006 Dr. Sawhney diagnosed degenerative osteoarthritis of the lumbosacral spine postsurgery with recurrent sciatica. He noted that she was not working.

At the hearing, held on November 7, 2006, appellant related that she initially injured her back in 1998. She asserted that the employing establishment charged her with misconduct for failing to report on time. Appellant maintained that she required a later start time because of her work injury.

By decision dated January 9, 2007, the hearing representative affirmed the June 9, 2006 decision. She found that there was no evidence showing that appellant's medical restrictions required her to have a later time to arrive at work.

On April 15, 2007 appellant requested reconsideration. She submitted a prehearing statement submitted to the EEOC. Appellant also submitted progress reports dated March through August 2007 from Dr. Sawhney.

By decision dated September 19, 2007, the Office denied modification of its June 9, 2007 decision. On September 23, 2007 appellant requested reconsideration. She described her pain and difficulty performing activities. Appellant also alleged that her supervisor perjured himself in claiming that she was absent without leave instead of acknowledging her schedule accommodation. She submitted electronic mail messages from 2003 discussing her scheduled work hours.

In a report dated October 12, 2007, Dr. N. Christopher Urban, a Board-certified orthopedic surgeon, discussed appellant's 1998 work injury and June 2000 lumbar decompression. He noted her complaints of increased pain in her back and legs since March 2007. Dr. Urban diagnosed postlaminectomy syndrome, bilateral radiculopathy greater on the right and mild foraminal narrowing at L3-4 and L4-5. He recommended physical therapy.

By decision dated December 12, 2007, the Office denied modification of its September 19, 2007 decision. It determined that appellant did not establish that the employing establishment terminated her due to her work injury and further found that the medical evidence submitted did not address whether she sustained a recurrence of disability.

On March 8, 2008 appellant requested reconsideration. In an order dated March 4, 2008, a circuit court judge reversed a decision by the State Board of Appeals of Licensing and Regulation for the Department of Labor. The judge found that the Board of Appeals did not have jurisdiction to consider the appeal because the employing establishment's appeal of a lower decision was not timely filed and as the record did not support a finding that appellant was terminated for gross misconduct under state law. The judge determined that her actions on February 18, 2005 did not constitute gross misconduct under state law either alone or considered with prior disciplinary actions. Appellant also submitted December 4, 2007 and March 4, 2008 progress reports from Dr. Sawhney, who diagnosed chronic lumbosacral pain from L4-5 surgery and osteophytes and scar tissue at L4-5 resulting in pain along the sciatic nerve. In December 14, 2007 and March 14, 2008 progress reports, Dr. Urban diagnosed L4-5 spondylolisthesis and L3 through L5 severe spinal stenosis. In a December 17, 2007 report, Dr. Zvezdomir Zamfirov, a Board-certified physiatrist, discussed his treatment of appellant with epidural injections.[3]

[3] On November 28, 2007 Dr. Zamfirov treated appellant with an epidural injection.

By decision dated June 5, 2008, the Office denied modification of its December 12, 2007 decision. On July 22, 2008 appellant again requested reconsideration. She argued that the medical evidence from Dr. Urban, Dr. Sawhney and Dr. Zamfirov established that she was disabled after December 30, 2005 due to her work injury. Appellant also asserted that she submitted evidence showing that she applied for disability retirement because the employing establishment did not accommodate her work restrictions prior to her termination from work. She argued that the March 4, 2008 state circuit court decision showed that she was not terminated for misconduct. Appellant noted that she received her notice of proposed termination from employment while applying for disability retirement.

In a report dated July 16, 2008, Dr. Urban noted appellant's history of a work injury in 1998 and surgery in June 2000. He diagnosed postlaminectomy syndrome with bilateral radiculopathy. Dr. Urban stated, "It does appear that [appellant's] continued ongoing pain is related to the work injury that she had back in 1998."

By decision dated August 19, 2008, the Office denied appellant's request to reopen her case for further merit review. It found that Dr. Urban's report was not relevant to the issue of whether appellant sustained a recurrence of disability and that the arguments she raised were substantially similar to those previously considered.

On August 22, 2008 appellant requested reconsideration. She argued that Dr. Urban's report established that she was totally disabled after December 30, 2005. Appellant resubmitted his July 16, 2008 report. She also submitted a progress report dated September 3, 2008 from Dr. Sawhney, who diagnosed chronic lumbosacral pain at L4-5 and sciatic nerve pain from osteophytes and scar tissue at L4-5.

By decision dated November 26, 2008, the Office denied appellant's request for reconsideration as the evidence submitted was insufficient to warrant reopening her case under section 8128 for further review of the merits.

On appeal, appellant, through her representative, contends that the March 4, 2008 finding by the circuit court judge established that she was not terminated due to conduct. She also argued that Dr. Urban's June 5, 2008 report established that she was disabled due to her work injury.[4]

LEGAL PRECEDENT -- ISSUE 1

Where 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 establishes that the employee 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 to show that he or she cannot perform such light duty. As part of this burden, the

[4] It appears that appellant is referring to Dr. Urban's July 16, 2008 report.

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.[5]

Office regulations provide that 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 to the work environment that caused the illness.[6] 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, 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.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained back strain and herniated lumbar discs due to an August 6, 1998 work injury. She returned to work with restrictions to a sedentary position. The employing establishment terminated appellant for employment effective December 30, 2005 and she filed a claim for compensation beginning January 2, 2006.

Appellant related that the employing establishment dismissed her on December 30, 2005 due to her work-related condition. The notice of termination, however, indicates that the employing establishment terminated her for failing to act professionally, failing to be respectful to management and failing to follow instructions. The notice indicated that on February 18, 2005 appellant disrupted a meeting of her supervisor and did not report to work at her scheduled time. Section 10.5(x) of the Office's regulations specifically provides that the withdrawal of a light-duty assignment for reasons of misconduct or nonperformance of job duties does not constitute a recurrence of disability.[8] While the employing establishment effectively withdrew appellant's limited-duty assignment, under the circumstances of this case, it does not establish a recurrence of disability. She maintained that she was terminated because she did not report to work on time. Appellant alleged that she needed a later start time because of her work injury and that her supervisor had agreed to a change in hours. The medical evidence, however, does not show that she had restrictions in work hours. On September 6, 2005 Dr. Sawhney noted that appellant may occasionally arrive at work later due to pain but did provide any restrictions on work hours.

Appellant also submitted a finding by a circuit court judge that her actions on February 18, 2005 did not constitute gross misconduct under state law. This finding, however, does not establish under the Federal Employees' Compensation Act that the employing establishment terminated her due to her disability. The judge found that under state law

[5] *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[6] 20 C.F.R. § 10.5(x).

[7] *Id*.

[8] *Id*.

appellant did not commit gross misconduct on February 18, 2005. It is well established that decisions by other federal agencies or governmental bodies are not dispositive to issues raised under the Act. Decisions made by such tribunals are pursuant to different statutes which have varying standards for establishing disability and eligibility for benefits.[9]

Appellant also maintained that the medical evidence established that she was unable to perform her limited-duty employment beginning December 2005. She may establish a recurrence of disability by demonstrating a change in the nature and extent of her injury-related condition such that she was unable to perform her work duties.[10] The record contains numerous progress reports from Dr. Sawhney as well as reports from Dr. Urban and Dr. Zamfirov. None of these physicians, however, addressed the relevant issue of whether appellant was disabled from performing her modified duties beginning January 2, 2006 due to her accepted employment injury. Dr. Sawhney diagnosed chronic pain after surgery at L4-5 and osteophytes and scar tissue causing pain along the sciatic nerve. He provided treatment recommendations. Dr. Urban diagnosed L4-5 spondylolisthesis and severe spinal stenosis at L3 through L5. He recommended physical therapy and epidurals. Dr. Zamfirov discussed his treatment of appellant with epidurals. The record is devoid of any medical evidence supported by medical rationale supporting that appellant was unable to perform her duties subsequent to her termination from employment. The issue of whether an employee has disability from performing a modified position is primarily a medical question and must be resolved by probative medical evidence.[11] Appellant failed to submit such evidence and consequently, has failed to meet her burden of proof.

On appeal, appellant argues that Dr. Urban's report establishes that she was disabled from work. She also maintains that the March 4, 2008 circuit court judge's finding shows that the employing establishment did not terminate her for cause. As discussed, however, neither the medical evidence nor the circuit court decision are sufficient to establish a recurrence of disability under the Act.

LEGAL PRECEDENT -- ISSUES 2 & 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[12] the Office's regulations provide that 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) submit 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

[9] *Andrew Fullman*, 57 ECAB 574 (2006); *Dianna L. Smith*, 56 ECAB 524 (2005).

[10] *See Bryant F. Blackmom*, 56 ECAB 752 (2005).

[11] *Cecelia M. Corley*, 56 ECAB 662 (2005).

[12] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

[13] 20 C.F.R. § 10.606(b)(2).

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]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[16] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[17] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[18]

ANALYSIS -- ISSUE 2

The Office found that appellant failed to establish a recurrence of disability beginning January 2, 2006 as the employing establishment terminated her for cause and as the medical evidence did not establish that she was unable to perform her work duties. Appellant requested reconsideration on July 22, 2008. She argued that the medical evidence from Dr. Urban, Dr. Sawhney and Dr. Zamfirov was sufficient to establish that she was disabled after December 30, 2005, the date that she was terminated for cause, due to her employment injury. The reports from these physicians, however, do not address the relevant issue of whether she sustained a recurrence of disability and thus are insufficient to warrant reopening the claim for merit review. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[19] Further, the Office previously considered and weighed the reports from these physicians. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[20]

In his July 16, 2008 report, Dr. Urban discussed appellant's 1998 employment injury and subsequent surgery. He diagnosed postlaminectomy syndrome with radiculopathy of the bilateral extremities. Dr. Urban found that appellant's continued pain was related to her 1998 work injury. He did not, however, address the relevant issue of whether she was disabled from her work duties beginning January 2, 2006 and thus his report is insufficient to warrant reopening her claim for further merit review.[21]

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[14] *Id*. at § 10.607(a).

[15] *Id*. at § 10.608(b).

[16] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[17] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[18] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[19] *Freddie Mosley*, 54 ECAB 255 (2002).

[20] *Richard Yadron*, 57 ECAB 207 (2005).

[21] *E.M.*, 60 ECAB ___ (Docket No. 09-39, issued March 3, 2009); *C.N.*, 60 ECAB ___ (Docket No. 08-1569, issued December 9, 2008).

Appellant contended that she requested disability retirement due to her work injury prior to her termination for cause. This argument is not relevant to the issue of whether she sustained a recurrence of disability either because the employing establishment withdrew her limited duty or because she was unable to perform the duties of her position. As discussed, evidence or argument that does not address the particular issue involved does not constitute a basis for reopening a case.[22]

Appellant also maintained that the March 4, 2008 circuit court decision established that she was not terminated for misconduct. The Office, however, previously considered this argument. As discussed, an argument that repeats that previously of record has no evidentiary value.[23] Consequently, the Office, in its August 19, 2008 decision, properly denied reopening her case for further merit review.

ANALYSIS -- ISSUE 3

Appellant again requested reconsideration on August 22, 2008. She contended that Dr. Urban's July 16, 2008 report established that she was totally disabled subsequent to December 30, 2005. Appellant resubmitted Dr. Urban's July 16, 2008 report. She also again argued that the March 4, 2008 circuit court judge ruling showed that she was not terminated due to misconduct. The Office, however, already considered this evidence and her arguments and thus appellant has not established that her case should be reopened for further merit review.[24]

Appellant further submitted September 3, 2008 progress report from Dr. Sawhney; however, he did not address relevant issue of whether she was disabled for work beginning January 2, 2006; thus his opinion is not pertinent to the issue at hand.[25]

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability on January 2, 2006 causally related to her August 6, 1998 work injury. The Board further finds that the Office, in its August 19 and November 26, 2008 decisions, properly denied her request for further merit review of her claim under 5 U.S.C. § 8128.

[22] *A.L.*, 60 ECAB ___ (Docket NO. 08-1730, issued March 16, 2009).

[23] *Id*.

[24] *Candace A. Karkoff*, 56 ECAB 622 (2005); *Brent A. Barnes*, 56 ECAB 336 (2005).

[25] *Betty A. Butler*, 56 ECAB 545 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 26, August 19 and June 5, 2008 are affirmed.

Issued: February 17, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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