

On appeal, appellant asserts that she was disabled for work due to degenerative lumbar disc disease, hearing loss and an emotional condition. She contended that the second opinion physician's tests were "untrue."

FACTUAL HISTORY

The Office accepted that on February 22, 2005 appellant, then a 34-year-old mail clerk, sustained lumbago and a displaced L5-S1 disc without myelopathy when a coworker tossed a heavy box to her, striking her in the chest. She stopped work on February 23, 2005 and sought medical treatment. On March 7, 2005 Dr. Kevin Pettus, an attending Board-certified family practitioner, diagnosed a possible herniated lumbar disc.³

Appellant returned to work on April 15, 2005 as a full-duty family readiness support assistant, a sedentary clerical job in an office setting with no loss of pay. She stopped work again on April 18, 2005 and did not return. The Office accepted a recurrence of disability commencing April 18, 2005.⁴ Appellant received wage-loss compensation on the daily and periodic rolls.

Appellant provided periodic medical reports from her physicians. In a November 22, 2005 report, Dr. Jeffrey A. Lawson, Board-certified in emergency medicine, released her to part-time limited-duty work. Dr. Richard J. Teff, a Board-certified neurosurgeon, submitted reports from July to September 2006 diagnosing lumbago, lumbar spondylosis and sciatica. He restricted appellant to light-duty work. Dr. Shaden Marzouk, a Board-certified neurosurgeon, submitted reports from September 2006 to May 2007 diagnosing back pain. He noted work restrictions. In an August 29, 2007 report, Dr. Jeffrey D. McDonald, a Board-certified neurosurgeon, diagnosed mild L5-S1 degenerative disc disease and sacroiliitis. On January 23, 2008 Dr. John F. Geffen, an attending osteopathic physician Board-certified in psychiatry, diagnosed lumbar pain and functional overlay. Appellant was referred to a pain clinic in January 2008.⁵

On March 3, 2008 the Office obtained a second opinion from Dr. L. David Rutberg, a Board-certified neurologist and Dr. George R. Harper, a Board-certified orthopedic surgeon. Both physicians reviewed the medical record and statement of accepted facts provided by the Office. Dr. Rutberg found a normal neurologic examination and possibly factitious pain on lumbar palpation. Dr. Harper noted pain with hip motion bilaterally. Both physicians noted extensive pain behaviors with positive Waddell's inorganic signs. They diagnosed a lumbar sprain, very minimal L5-S1 disc bulge and chronic depression. Dr. Harper and Dr. Rutberg

³ February 25, 2005 lumbar x-rays were normal.

⁴ The Office initially denied the recurrence of disability by decision dated July 12, 2005. Following additional development, the Office vacated the July 12, 2005 decision and accepted the recurrence of disability by decision dated October 20, 2005.

⁵ Appellant also submitted imaging studies. An October 28, 2005 lumbar magnetic resonance imaging (MRI) scan showed a mild to moderate L5-S1 disc bulge with disc desiccation. A January 11, 2008 MRI scan showed a central L5-S1 disc protrusion. Appellant underwent periodic epidural steroid injections from June 2005 through 2006.

found appellant medically able to perform the full duties of the family readiness assistant position.

Dr. Rutberg and Dr. Harper ordered a functional capacity evaluation, performed on March 26, 2008. Appellant was rated at a light to medium weight handling capacity. Both physicians reviewed the report and reiterated that appellant was medically capable of performing the family readiness assistant position full time.

In a May 7, 2008 letter, the Office requested that Dr. Jay Iyenger, an attending physician, review copies of the second opinion report and functional capacity evaluation and provide a response within 30 days. Dr. Iyenger did not respond.

By notice dated June 11, 2008, the Office advised appellant that it proposed to terminate her wage-loss compensation benefits on the grounds that she was no longer disabled for work due to the accepted lumbar injury. It noted that the second opinion reports and functional capacity evaluation established that she was able to perform the readiness assistant position.

In a July 9, 2008 letter, appellant objected to the proposed termination of compensation. She contended that the Office refused to authorize a new evaluation by Dr. Iyenger. Appellant argued that Dr. Rutberg and Dr. Harper ignored her pain symptoms.

In a July 18, 2008 decision, the Office terminated appellant's monetary compensation benefits effective that day on the grounds that she was no longer disabled for work due to the accepted lumbar injury. It accorded the weight of medical opinion to Dr. Rutberg and Dr. Harper, who found that she was capable of full duty as a readiness assistant. The Office noted that appellant remained entitled to medical benefits for treatment of the accepted lumbar injury.⁶

In a letter postmarked on July 18, 2009, appellant requested reconsideration, asserting that she remained totally disabled for work. She submitted a July 16, 2009 form report (Form CA-20) from Dr. Mary Wyman, an attending Board-certified family practitioner, who opined that the February 22, 2005 incident and unspecified work from November 2008 to February 2009 exacerbated a preexisting post-traumatic stress disorder (PTSD) and lumbar pain. Dr. Wyman diagnosed chronic low back pain, left cubital tunnel syndrome, bipolar disorder and PTSD. She checked a box "yes" indicating that the conditions were related to work factors. Dr. Wyman found appellant totally disabled from February 2005 onward but noted that appellant had two trials of work and might be able to telecommute.

By decision dated August 7, 2009, the Office denied appellant's July 18, 2009 request for reconsideration on the grounds that she failed to submit relevant evidence warranting further merit review of the July 18, 2008 decision terminating her compensation. It found that Dr. Wyman's report, while new was irrelevant as it did not address whether the accepted lumbar injury disabled appellant for work on and after July 18, 2009.

⁶ In late 2008, appellant's family relocated from Germany to Tacoma, Washington, then to Virginia.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁷ section 10.606(b)(2) of Title 20 of the Code of Federal 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) constitute relevant and pertinent new evidence not previously considered by the Office.⁸ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁹

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹⁰ The claimant need only submit relevant, pertinent evidence not previously considered by the Office.¹¹ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹²

ANALYSIS

The Office accepted that appellant sustained lumbago and a displaced lumbar disc on February 22, 2005. Following a brief return to work in a full-duty, sedentary clerical position, appellant stopped work on April 18, 2005 and did not return. She received compensation for total disability based on periodic medical reports from her attending physicians. The Office terminated appellant's wage-loss compensation by July 18, 2008 decision, based on a second opinion report by Dr. Rutberg, a Board-certified neurologist, and Dr. Harper, a Board-certified orthopedic surgeon, who opined that she was able to work full time in the sedentary clerical position she held in April 2005.

Appellant requested reconsideration on July 18, 2009, asserting that a July 16, 2009 report from Dr. Wyman, an attending Board-certified family practitioner, established continuing total disability for work. Dr. Wyman found appellant totally disabled for work from February 2005 onward due to chronic low back pain, cubital tunnel syndrome, PTSD and bipolar disorder. She checked a box "yes" indicating that these conditions were related to the February 22, 2005 lumbar injury. However, the Office did not accept any of the conditions diagnosed by Dr. Wyman as work related. To be relevant, the evidence submitted supporting the

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ *Id.* at § 10.608(b). See also *T.E.*, 59 ECAB ____ (Docket No. 07-2227, issued March 19, 2008).

¹⁰ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹¹ See 20 C.F.R. § 10.606(b)(3). See also *Mark H. Dever*, 53 ECAB 710 (2002).

¹² *Annette Louise*, 54 ECAB 783 (2003).

request for reconsideration must address whether the accepted February 22, 2005 lumbar injury disabled appellant for work on and after July 18, 2008. Dr. Wyman's attributed appellant's disability for work to conditions not accepted by the Office. Therefore, her July 16, 2009 report is irrelevant to the claim. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.¹³

Appellant has not established that the Office improperly refused to reopen her claim for a review of the merits under section 8128(a) of the Act. She 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 relevant and pertinent new evidence not previously considered by the Office.

On appeal, appellant asserts that she remained disabled for work due, in part, to the accepted lumbar injury. As noted she did not submit sufficient medical evidence establishing that this injury disabled her for work on and after July 18, 2008. Appellant also contended that the second opinion report was "untrue." The Board notes that she did not submit medical evidence relevant to establishing any defect in the second opinion report. As noted, the merits of the case are not presently before the Board.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration.

¹³ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 7, 2009 is affirmed.

Issued: July 12, 2010
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