United States Department of Labor
Employees' Compensation Appeals Board

S.O., Appellant	)	
and	)	**Docket No. 09-1553**
	)	**Issued: June 17, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Indianapolis, IN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 26, 2009 appellant filed a timely appeal of a January 21, 2009 nonmerit decision of the Office of Workers' Compensation Programs and a December 5, 2008 decision denying her request for disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she was disabled for 198.27 hours for the period July 17, 2006 to November 8, 2007 as a result of her employment-related conditions; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 9, 2005 appellant, then a 49-year-old mail carrier, filed a traumatic injury claim alleging that on March 1, 2005 she sustained an injury to her neck in the performance of duty. She stopped work on March 2, 2005. On August 2, 2005 the Office accepted the claim for

aggravation sprain/strain of neck.[1] It expanded appellant's claim to include aggravation of cervical spondylosis, aggravation of radiculopathy and left shoulder impingement. Appellant received appropriate compensation benefits.

In a June 20, 2006 report, Dr. M. Hytham Rifai, a Board-certified neurosurgeon, noted that appellant's sharp neck pain had significantly subsided. He indicated that, in two weeks, she could return to work for four hours daily with a 15-pound weight limit. Dr. Rifai indicated that, two weeks after appellant returned to part-time work, she could work full time. The record reflects that appellant was released to work for four hours a day on July 10, 2006. In a July 11, 2006 report, Dr. Rifai noted that she had started working and was "quite enthusiastic about that." He recommended two weeks of physical therapy.

On July 11, 2006 an Office field nurse confirmed with appellant and the employing establishment that she would increase her hours to eight hours daily on July 25, 2006 but that she would be on vacation that date. On July 17, 2006 the employing establishment offered her a full-time job within listed restrictions. On July 19, 2006 appellant accepted the job offer.

The Office received physical therapy notes from July 18 and 19 and August 16, 2006. Also received were a nurse practitioner's prescriptions for physical therapy dated August 25 and September 8, 2006. The nurse practitioner indicated that appellant should undergo work conditioning with a 40-pound work restriction for four hours a day, three times a week for four weeks.

An August 22, 2006 progress report from the Office field nurse reflected that appellant was on vacation from July 14 through August 6, 2006. She noted that appellant began to work an eight-hour day on August 7, 2007, despite being released by her physician on July 24, 2006.

In an August 22, 2006 treatment note and report of the same date, Dr. Rifai recommended that appellant continue her restrictions. On August 29, 2006 he prescribed a 40-pound weight restriction and advised that her goal was to return to work without restrictions.

On September 15, 2006 the Office authorized 12 units of work hardening (four hours a day, three times a week) from September 20 through October 18, 2006.

Dr. Rifai record indicates that he saw appellant for treatment on January 25, March 22 and June 21, 2007 and recommended that she continue working with restrictions.

In a letter dated September 16, 2008, appellant indicated that she was enclosing several CA-7 forms for intermittent disability compensation for the years from 2006 through 2008. The CA-7 forms requested wage-loss compensation for disability for intermittent periods from July 17, 2006 to November 8, 2007.

[1] The record reflects that appellant has an earlier claim under claim file number xxxxxx917, which is accepted for left shoulder strain. The Office also authorized arthroscopy and left rotator cuff tear repair on September 11, 1999. On August 2, 2005 it combined case file numbers xxxxxx917 and xxxxxx870 under master file number xxxxxx917. On May 17, 2006 the Office authorized a cervical discectomy. Appellant returned to work on July 10, 2006 in a limited-duty position, which gradually increased to full-time duty for eight hours a day on July 25, 2006.

In a letter dated October 21, 2008, the Office advised appellant that it had received her claim for compensation for intermittent periods, informed her of the type of evidence needed to support her claim and requested that she submit such evidence within 30 days.

In an August 22, 2008 report, Dr. Rodolfo L. Jao, an internist, noted that he saw appellant on that date for chronic pains in the left shoulder and neck. He also indicated that he saw her on September 5 and 26, 2008. Appellant also submitted a note from the Office manager, who advised that she was seen on various dates from January 7 to July 11, 2008.

By decision dated December 5, 2008, the Office denied appellant's claim for compensation for certain hours during the period July 17, 2006 to November 8, 2007. It found that the evidence did not establish disability for the claimed period. The Office listed the dates on which compensation was claimed and found that the medical evidence established that she was seen on July 18 and August 7, 9, 11, 16 and 22, 2006, March 22 and June 21, 2007 for a total of 23.26 hours lost. It found that the medical evidence did not support that the other 198.27 hours claimed was lost due to treatment for her injury.

On December 30, 2008 the Office received appellant's undated request for reconsideration. Appellant requested assistance obtaining the information to process her claim for her lost time in 2008. She also noted that she had resubmitted several forms and questioned how her claim was handled. Appellant also alleged that she had submitted the proper documentation to support her missed time from work.

Appellant also enclosed copies of previously received reports from Dr. Jao dated August 22, September 5 and 26, 2008. She also enclosed reports from Dr. Jao dated October 24, November 10, 28 and December 10, 2008, in which he noted that appellant was seen on those dates for neck and shoulder pains.

In a January 21, 2009 decision, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence and argument was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under the Federal Employees' Compensation Act[2] ("Act") has the burden of proof to establish the essential elements of her claim by the weight of the evidence,[3] including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[4]

[2] 5 U.S.C. §§ 8101-8193.

[3] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[4] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

As used in the Act, the term "disability" means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[5] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[6]

Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.[7] Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[8] The Board has held that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[9] The Board, however, will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[10]

An employee is entitled to disability compensation for any loss of wages incurred during the time she receives authorized treatment and for the loss of wages for times spent incidental to such treatment. The rationale for this entitlement is that during such required examinations and treatment and during the time incidental to undergoing such treatment, an employee did not receive his or her regular pay.[11]

ANALYSIS -- ISSUE 1

Appellant claimed intermittent disability for the period July 17, 2006 to November 8, 2007. The record contains several medical reports and documents for this period. They included reports from Dr. Rifai dated June 20 and July 11, 2006. These reports do not support appellant's claim for intermittent disability for the period July 17, 2006 to November 8, 2007. Dr. Rifai merely noted that she had started working. He did not offer any opinion that appellant was disabled on or after July 17, 2006. In August 29, 2006 prescription

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[5] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f).

[6] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

[7] *Edward H. Horton*, 41 ECAB 301 (1989).

[8] *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

[9] *John L. Clark*, 32 ECAB 1618 (1981).

[10] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[11] *Sean O'Connell*, 56 ECAB 195 (2004); *Henry Hunt Searles, III*, 46 ECAB 192 (1994).

notes, Dr. Rifai prescribed a 40-pound weight restriction and advised that appellant's goal was to return to work without restrictions but there is no indication that he actually saw appellant that date.

The record does show that Dr. Rifai saw appellant on January 25, 2007 and provided working with restrictions. The Board notes that this report falls within the time frame for which appellant is requesting wage-loss compensation. It appears that he was treating her for the effects of her work injury, as he was trying to reduce her restrictions and that she took time off from work to attend a medical appointment on this date.[12] Thus, the Board will find that this report supports that any time missed from work on January 25, 2007 to attend this appointment would be compensable.

Appellant also submitted reports dated September 5 and 26, 2008 from Dr. Jao, but these reports do not indicate that she was seen during any of the aforementioned time frames and would not support her disability claims.

The Office also received physical therapy notes dating from July 18 to August 16, 2006. The record reflects that appellant was compensated for these dates. Additionally, the record contains prescriptions from a nurse dated August 25 and September 8, 2006. There is no indication that appellant was seen or missed work on these dates. While the Office authorized physical therapy from September 20 through October 18, 2006, appellant has not submitted evidence substantiating that she attended therapy on these dates.

Although appellant alleged that she was disabled for the period July 17, 2006 to November 8, 2007 due to her accepted employment injury, the medical evidence of record does not establish that her claimed disability during the timeframe was related to her accepted employment injuries. The Board finds that, with the exception of January 25, 2007, appellant has not submitted sufficient medical evidence establishing that her disability from July 17, 2006 to November 8, 2007 was causally related to her accepted employment injury and thus, she has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[13] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(1) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

[12] *Id.*

[13] 5 U.S.C. § 8128(a).

"(2) Advances a relevant legal argument not previously considered by [the Office]; or

"(3) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[14]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[15]

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of her claim for disability for the period July 17, 2006 to November 8, 2007 and requested reconsideration on December 30, 2008. The underlying issue on reconsideration was whether appellant established that she was disabled for the period July 17, 2006 to November 8, 2007 and is essentially medical in nature. Appellant, thorough, did not provide any relevant or pertinent new evidence to the issue of whether she was disabled for the period from July 17, 2006 to November 8, 2007.

In her undated request for reconsideration appellant requested assistance obtaining the information to process her claim for her lost time in 2008. The present claim is for dates in 2006 and 2007 and these arguments would not be relevant for time claimed for this period. Appellant also noted that she had resubmitted forms, questioned how her claim was handled and argued that she had submitted the proper documentation to support her missed time from work. This general allegation regarding the submission of forms does not show that the Office erroneously applied or interpreted a specific point of law and it does not advance a relevant legal argument not previously considered by the Office.

Appellant also submitted copies of previously submitted reports from Dr. Jao dated August 22, September 5 and 26, 2008. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.[16]

Additionally, appellant submitted new reports from Dr. Jao dated October 24, November 10, 28 and December 10, 2008. However, the Board notes that these reports are not relevant as they postdate the period in question and do not contain any information to support the claimed periods of disability. Thus, appellant did not provide any relevant and pertinent new evidence to establish that she sustained an emotional condition in the performance of duty.

Consequently, the evidence submitted by appellant on reconsideration does not satisfy any of the three regulatory criteria for reopening a claim for merit review.

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[14] 20 C.F.R. § 10.606(b).

[15] *Id*. at § 10.608(b).

[16] *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

On appeal, appellant alleged that she had supported the claimed dates of disability. However, as noted above, the evidence does not support compensable disability beyond that which the Office has paid with the exception of January 25, 2007.[17]

CONCLUSION

The Board finds that, with the exception of January 25, 2007, appellant failed to establish that she was disabled for the period commencing from July 17, 2006 to November 8, 2007 as a result of her employment-related injuries. The Board also finds that the Office properly refused to reopen her case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2009 decision of the Office of Workers' Compensation Programs is affirmed. The December 5, 2008 decision is affirmed as modified.

Issued: June 17, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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[17] Appellant also submitted additional evidence on appeal. However, the Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell,* 5 ECAB 35 (1952).