

secretions, reflux and symptoms of peptic ulcer disease. In an undated statement, she further alleged that she was harassed by a supervisor, and that working the midnight shift caused a sleep disturbance and headaches. The employing establishment controverted the claim and submitted a position description showing that the incumbent must be available for shift work and noted that appellant began work on February 5, 1996, worked nights from February 11 to March 5, 1996 and May 29 to July 8, 1996, and that her last day was October 13, 1996. On January 28, 1998 the Office found the fact that appellant worked a rotational shift including night work a compensable factor of employment but that her fear of having to return to a rotational shift after she stopped work was not compensable. It accepted that she sustained an employment-related adjustment disorder, anxiety disorder, gastritis and esophageal reflux for a closed period of time, from February 1 through July 31, 1996 only, due to the one accepted factor of employment. Monetary and medical benefits were denied after July 31, 1996 and she was removed from the employing establishment effective January 9, 1998.

On April 9, 2006 appellant filed a recurrence claim, stating that the recurrence began at midnight on July 31, 1996 and had been unable to work since October 13, 1996 due to ongoing medical and emotional problems. In statements dated December 10, 1996 and March 10, 2007, she indicated she had received an Equal Employment Opportunity (EEO) Commission cash settlement and submitted a notice of personnel action form showing that she had resigned effective January 9, 1998, and a diary of events that occurred from September 20, 1996 to June 2, 1997. Appellant further alleged that she was relentlessly stalked, belittled, humiliated, controlled, bullied, terrorized and frightened by supervisor Robert K. Smith who invaded her space, inappropriately discussed religion and spoke to her in a threatening, sarcastic manner. She submitted medical evidence dated from October 8, 1996 to March 15, 2007.

The medical evidence relevant to the claimed recurrence includes an October 8, 1996 report in which Dr. Stacey Coleman, Board-certified in family medicine, advised that appellant had severe gastric symptoms that occurred when she worked the 11:30 p.m. shift and recommended that she not work the late shift. On November 8, 1996 Dr. Coleman advised that appellant was experiencing significant stress caused by work. He also submitted disability slips dated September 20 to October 15, 1996 in which she advised that appellant should not work the midnight shift due to health concerns and should be excused from work on October 15 and 16, 1996.

In an October 18, 1996 report, Steven Tess, Ph.D., a licensed clinical psychologist, noted that he had seen appellant for five years in family therapy with her daughter and grandchildren and that appellant did not manifest emotional distress until that day when it was apparent she was experiencing considerable stress, depression, gastric reflux, severe headaches and chronic fatigue associated with her midnight work schedule. He diagnosed adjustment disorder with mixed anxiety and depressed mood and recommended that she immediately be taken off the late shift because continuing would jeopardize her condition. On November 19, 1996 Dr. Tess advised that appellant continued under his care and had undesirable side effects from medication and could not drive. In reports dated April 21, June 1 and 2, 1997, he reported that appellant's symptoms continued and they appeared to be work related and that she should not return to work until July 31, 1997.

Dr. Robert J. Santella, Board-certified in obstetrics and gynecology, submitted disability slips dated from December 24, 1996 to January 17, 1997 advising that appellant could not return to work until March 1, 1997 due to abdominal pain, major depression, back pain and because she was caring for her terminally ill mother. In a March 4, 1997 report, Dr. James J. Dickman, II, Board-certified in family medicine, advised that appellant's medical disability was extended until March 31, 1997 for adjustment disorder.

By report dated November 8, 1997, Dr. Ajit Raisinghani, a Board-certified internist who provided a second opinion evaluation for the Office, described appellant's gastrointestinal (GI) symptoms. He advised that, from her history, she had diagnoses of esophageal reflux and possibly gastritis that appeared to be precipitated by a stressful condition at work but that there were no objective findings to confirm this. Dr. Raisinghani noted that she had problems sleeping during the day when working the late shift that her GI symptoms had significantly resolved since she stopped work, and that she was fearful of returning to work. He advised that she should not return to her previous employment with shift rotation as her symptoms would return but could work from 9:00 a.m. to 5:00 p.m. with no limitations.

Jillian Daly, Ph.D., a licensed psychologist, performed psychological testing on November 13, 1997 and diagnosed depressive disorder, not otherwise specified, and anxiety disorder, not otherwise specified. In a November 14, 1997 report, Dr. Gary R. Hudak, a Board-certified psychiatrist, noted appellant's history of difficulty working the night shift that caused lack of sleep and GI problems, and that her symptoms had continued even though she stopped work on October 13, 1996. He diagnosed adjustment disorder with depressed and anxious mood and anxiety disorder, not otherwise specified and, as a psychosocial stressor, required routine shift work. Dr. Hudak opined that appellant underwent a physical reaction to shift work resulting in GI problems and sleep deprivation associated with poor concentration and emotional lability and that her anticipation of returning to shift work resulted in an exacerbation of her anxiety and depression and, as such, her current symptoms were not caused or aggravated by her physical reaction to working rotational shifts. He stated that there were no periods of total disability to the work-related condition and that she could return to work in a position that did not require rotational shifts but that a return to rotational work would trigger a recurrence. Dr. Hudak concluded that there were no residuals of the employment-related injury and that all symptoms were secondary to anticipation of having to return to shift work.

In numerous reports dated from August 12, 2002 to March 15, 2007, Dr. Catherine A. Whitehouse, a Board-certified psychiatrist, noted a history that since July 1996 appellant had been in a dispute with her former employer regarding her need to work a different shift and because a supervisor was stalking her and that she was stressed due to problems with her workers' compensation case. She reported that appellant described her former work area as scary, that she worked the night shift, and that the supervisor would do odd things such as make her pray with him. Dr. Whitehouse noted that appellant showed Bichon-Frise dogs and had problems tolerating various medications. She diagnosed major depressive disorder, chronic since 1996, post-traumatic stress disorder (PTSD) from being stalked by a supervisor, history of ulcer and GI reflux disease (GERD) and job-related stress. In letters dated April 25, 2006 and February 28 and March 15, 2007, Dr. Whitehouse noted treating appellant since July 12, 2002 for chronic and severe PTSD "after being exposed to intense trauma at her previous employment" that caused symptoms of intense fear, feelings of helplessness and horror,

nightmares and flashbacks causing insomnia, irritability, anger outbursts, severe hypervigilance, exaggerated startle response and problems with concentration, and an inability to function on a day-to-day basis. She advised that as long as appellant's case continued, she would continue to feel traumatized and victimized. Dr. Whitehouse continued to diagnose depression and PTSD caused by appellant's work experience and reliving the experience through the paperwork required for her claim. Appellant also submitted medical reports with illegible signatures and other reports signed by social workers and nurse practitioners.

By decision dated May 3, 2007, the Office denied appellant's claim that she sustained a recurrence of disability on the grounds that the medical evidence submitted did not establish that her psychiatric condition was caused by the accepted employment factor. Appellant timely requested a review of the written record and submitted evidence previously of record and a statement in which she disagreed with the May 3, 2007 decision and reiterated her allegations that she had been harassed and was totally disabled. In a May 10, 2007 report, Dr. Whitehouse stated that, while night shift work had been associated with poor sleep, poor functioning and GI symptoms it in "no way" caused PTSD. She stated that Mr. Smith's behavior at work caused appellant's PTSD, noting that she had nightmares, flashbacks, intrusive thoughts and difficulty functioning day to day.

In an October 25, 2007 decision, an Office hearing representative affirmed the May 3, 2007 decision. The hearing representative found that the medical evidence did not establish that appellant's current medical condition was caused by the accepted employment factor, and that she submitted no evidence, such as an EEO settlement agreement, to substantiate that she was harassed by Mr. Smith.

On March 28, 2008 appellant requested reconsideration and submitted medical publications, the first page of an EEO complaint, and minutes dated September 12, 2003 from the United States District Court for the Southern District of California stating that on September 10, 2003 an evaluation conference was held, that on September 11, 2003 a settlement conference was held, and that the parties reached agreement and the key terms were placed on the record. In a November 30, 2007 report, Dr. Whitehouse again advised that appellant's PTSD was caused by being harassed by Mr. Smith and described appellant's report of incidents that occurred at work. He concluded that appellant could not return to work as a border patrol "agent" but could return to work eight hours a day in an occupation commensurate with her level of education. In a July 13, 2009 merit decision, the Office denied modification of the prior decisions.

On September 11, 2009 appellant again requested reconsideration arguing that a December 19, 1997 work capacity evaluation submitted by Dr. Hudak supported that she could not return to her previous employment. By decision dated October 30, 2009, the Office denied appellant's reconsideration request finding the evidence submitted duplicative as the report had previously been evaluated.

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 had resulted from a

previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.”¹ 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 an employee 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.² Where no such rationale is present, medical evidence is of diminished probative value.³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that she sustained a recurrence of disability on or after July 31, 1996 caused by the accepted employment conditions. The issue of whether a claimant’s disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.⁴ Medical opinion evidence must be of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁵

The Office accepted that appellant sustained an employment-related adjustment disorder, anxiety disorder, gastritis and esophageal reflux due to one compensable employment factor that she worked a rotational shift and the claim was accepted for a closed period February 1 through July 31, 1996. Monetary and medical benefits were denied after July 31, 1996. Appellant filed a recurrence claim on April 9, 2006, stating that the recurrence began at midnight on July 31, 1996, and is now claiming that she was harassed by her supervisor, Mr. Smith, causing PTSD. When an employee claims a recurrence of or continuing disability causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed period of disability is causally related to the accepted injury.⁶ The Office has not, however, accepted harassment as a compensable factor, and has not accepted that she sustained employment-related PTSD.⁷

¹ 20 C.F.R. § 10.5(x); *R.S.*, 58 ECAB 362 (2007).

² *I.J.*, 59 ECAB 408 (2008); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

³ See *Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁴ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

⁵ *Roy L. Humphrey*, 57 ECAB 238 (2005).

⁶ *Kenneth R. Love*, 50 ECAB 193 (1998).

⁷ To the extent appellant claims harassment or other factors may be the cause of her emotional condition, she would have to first have filed such a claim with the Office and have it adjudicated by the Office. As there is no such adjudication, the Board is without jurisdiction to rule on the matter. 20 C.F.R. § 501.2(c).

With regard to whether appellant established a recurrence of disability due to the accepted conditions, Dr. Coleman, Dr. Santella and Dr. Dickman did not relate her diagnosed conditions to the accepted employment factor of other accepted conditions, and the issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.⁸ Dr. Tess couched his opinion in equivocal terms, stating that it appeared that appellant's symptoms were work related.⁹ Dr. Whitehouse was very clear that appellant's emotional condition was not caused by the accepted employment factor of working a rotating schedule. Furthermore, the Board has long held that fear of future injury is not compensable.¹⁰ The record in this case does not contain a medical report providing a rationalized medical opinion that appellant's claimed recurrence of disability was caused by the accepted condition.¹¹ As she did not submit sufficient medical evidence, she did not meet her burden of proof to establish that she sustained a recurrence of disability, and the Office properly denied her recurrence claim.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act¹³ vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹⁴ Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹⁵ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (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.¹⁶

⁸ *Sandra D. Pruitt*, *supra* note 4.

⁹ *See Patricia J. Glenn*, 53 ECAB 159 (2001).

¹⁰ *I.J.*, *supra* note 2.

¹¹ *Cecelia M. Corley*, 56 ECAB 662 (2005). Appellant submitted reports with illegible signatures that would not constitute competent medical evidence, and other reports signed by social workers and nurse practitioners. However, neither a social worker nor a nurse practitioner is a "physician" as defined by section 8101(2) of the Act. Thus, these reports also would not constitute competent medical evidence. 5 U.S.C. § 8101(2); *K.W.*, 59 ECAB 271 (2007); *L.D.*, 59 ECAB 648 (2008).

¹² *Tammy L. Medley*, 55 ECAB 183 (2003).

¹³ 5 U.S.C. §§ 8101-8193.

¹⁴ *Id.* at § 8128(a).

¹⁵ 20 C.F.R. § 10.608(a).

¹⁶ *Id.* at § 10.608(b)(1) and (2).

Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁷

ANALYSIS -- ISSUE 2

With her September 11, 2009 reconsideration request, appellant merely argued that a work capacity evaluation provided by Dr. Hudak on December 19, 1997 established that she could not return to her usual work. The Office had considered Dr. Hudak's report in its merit decision of January 28, 1998, which appellant did not appeal and its merit decisions following the filing of her recurrence claim. Appellant did not show that the Office erroneously applied or interpreted a specific point of law, and argument, such as this, that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹⁸ Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁹

With respect to the third above-noted requirement under section 10.6069b(2), appellant submitted no additional medical evidence and thus did not submit relevant and pertinent new evidence not previously considered by the Office. The Office properly denied her reconsideration request.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability causally related to the accepted employment conditions and that the Office properly refused to reopen her case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁷ *Id.* at § 10.608(b).

¹⁸ *M.E.*, 58 ECAB 694 (2007).

¹⁹ 20 C.F.R. § 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 30 and July 13, 2009 be affirmed.

Issued: October 20, 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