

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

C.C., Appellant)	
)	
and)	Docket Nos. 10-63 & 10-1685
)	Issued: September 21, 2010
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
Arlington, VA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 7, 2009 appellant filed a timely appeal from a May 27, 2009 merit decision of the Office of Workers' Compensation Programs denying her claim for compensation. On October 26, 2009 she filed a timely appeal from a June 8, 2009 merit decision terminating her compensation and authorization for medical benefits and a September 3, 2009 nonmerit decision denying her request 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 the Office properly adjudicated the issue of appellant's entitlement to compensation from November 29 to December 19, 2008; (2) whether the Office properly terminated her compensation effective June 8, 2009 on the grounds that she had no further disability due to her accepted employment injury; (3) whether the Office properly terminated authorization for medical treatment; and (4) whether the Office properly denied appellant's request for reconsideration under section 8128.

FACTUAL HISTORY

On August 17, 2008 appellant, then a 46-year-old part-time flexible carrier, injured her back on the right side when she slipped while walking down steep stairs. She stopped work on August 15, 2008. The Office accepted the claim for a sprain of the back in the right lumbar region. It paid appellant compensation for total disability based on her submissions of claims for compensation from October 3 to November 22, 2008.

On November 12, 2008 the employing establishment offered appellant a modified part-time city carrier position four hours a day lifting no more than eight pounds intermittently. On November 19, 2008 the Office advised her that it determined the position of part-time flexible city carrier was suitable. It provided appellant 30 days to accept the position or explain her refusal.

In a report dated November 19, 2008, Dr. Natalie Vassall, a Board-certified internist, found that appellant could perform light-duty work lifting no more than eight pounds intermittently in a four-hour period.

On November 22, 2008 appellant accepted the limited-duty position and noted that it appeared to be in accordance with her work limitations. She stated, "I plan on taking it to my 30 days in which I should return to work on December 22, 2008. I need to know exactly what my duties would entail and to insure me that It would not go pass my limitations of no lifting of 8lbs (maximum) over an intermittent period of 4 hours."

Appellant filed claims for compensation (Forms CA-7) requesting compensation for disability from November 22 to December 19, 2008.

On December 8, 2008 the employing establishment again offered appellant the modified part-time flexible city carrier position lifting no more than eight pounds intermittently. In an e-mail message dated December 10, 2008, the employer related that she had accepted the offer but refused to return to work until December 22, 2008.

In a report dated December 15, 2008, Dr. Vassall discussed appellant's work injury when she fell down steps delivering mail. She referred appellant for physical therapy and stated:

"During her evaluation and treatment for this work[-]related injury, [appellant] was restricted in her carry capacity at work-as to not exacerbate her back pain. Her restrictions included no lifting anything more than one pound (maximum) over an intermittent period of no more than four hours. Basically, [appellant] should not be carrying/delivering mail during her period of rehabilitation."

Appellant returned to limited-duty employment on December 27, 2008 working four hours a day. The Office paid wage-loss compensation for four hours a day beginning December 27, 2008.

By letter dated December 22, 2008, the Office requested that appellant explain why she did not return to work after she accepted the limited-duty position on November 22, 2008.

By decision dated January 30, 2009, the Office denied appellant's claim for compensation from November 29 to December 19, 2008.¹ It noted that she had accepted a limited-duty position but did not return to work even though her physician found that she could work four hours a day. The Office found that an employee who refused suitable work under 5 U.S.C. § 8106(c)(2) was not entitled to compensation and concluded that the evidence failed to show that appellant was disabled from November 29 to December 19, 2008.

On February 24, 2008 appellant requested reconsideration of the January 30, 2009 decision.

In a report dated March 5, 2009, Dr. Robert Franklin Draper, Jr., a Board-certified orthopedic surgeon and Office referral physician, diagnosed lumbosacral strain with osteoarthritis of the L4-5 facet joints, degenerative disc disease at L5-S1 and Grade 1 spondylosis at L4-5. He opined that appellant's lumbar strain had resolved and that her continued symptoms resulted from her preexisting conditions. Dr. Draper found that she could perform limited-duty work but that she was not at maximum medical improvement. Appellant required lifting restrictions until approximately April 15, 2009, when she would reach maximum medical improvement.

In a report dated March 12, 2009, Dr. Vassal discussed her treatment of appellant for radiating low back pain after a fall at work. She reiterated that appellant required continued work restrictions.

On March 18, 2009 the Office referred appellant to Dr. Robert Collins, a Board-certified orthopedic surgeon, for an impartial medical examination. On April 24, 2009 Dr. Collins discussed her history of injury and noted that she currently worked four hours a day with restrictions. He listed findings on examination of no loss of sensation or reflex in the legs and straight leg raising without pain. Dr. Collins noted that appellant's "main complaint at this time is low back pain with minimal findings. She does have degenerative changes in her back which are a preexisting problem as noted on the [magnetic resonance imaging] (MRI) [scan] from the osteoarthritis of the facet joints and degenerative disc disease." He diagnosed lumbar strain with preexisting lumbar spine changes unrelated to her work injury. Dr. Collins stated:

"[Appellant] has had an adequate course of physical therapy and treatment for this and should be able to return to work on a full-time basis. She is now [nine] months post lumbar strain with no other injuries. [Appellant] did have preexisting degenerative changes which are still present but her lumbar strain is now resolved. She is at maximum medical improvement as far as her injury is concerned. [Appellant] should be able to return to full duty at this time to her work as a mail carrier. She is not disabled at this time from her lumbar strain. The lumbar strain has resolved. [Appellant] had adequate treatment for this. She does have underlying degenerative changes but this should not prevent her from returning to her preinjury job. There are no current findings as far as any

¹ In another decision dated January 30, 2009, the Office determined that appellant was not entitled to augmented compensation based on having custody of her nieces and nephews.

contusions or bruises are concerned. [Appellant] has now had sufficient time for this lumbar strain to resolve and she can return to work to regular duty at this time.”

On May 4, 2009 the Office notified appellant of its proposed termination of her compensation and authorization for medical benefits. On May 23, 2009 appellant informed the Office that she disagreed with the proposed termination because she continued to have restrictions due to her work injury. She maintained that Dr. Draper and Dr. Collins did not perform physical examinations.

By decision dated May 27, 2009, the Office denied modification of its January 30, 2009 decision. It noted that appellant had not submitted any evidence to establish that the job offered by the employing establishment was not suitable and available within her restrictions.

In a decision dated June 8, 2009, the Office finalized the termination of appellant’s compensation and authorization for medical treatment effective June 8, 2009 on the grounds that the weight of the medical evidence established that she had no further employment-related disability or condition requiring further medical treatment.

On July 21, 2009 appellant requested reconsideration. She submitted a July 20, 2009 report from Dr. Vassall diagnosing an exacerbation of chronic low back pain and indicating that the residuals of appellant’s work injury had not resolved. Dr. Vassall listed work restrictions and found that she could work four hours a day.

In a form report dated July 21, 2009, a physician diagnosed chronic low back pain and found that appellant was totally disabled from July to October 2008.² He noted that she experienced chronic low back pain after a fall in August 2008 and found that she could work with restrictions.

In a medical clearance form dated July 21, 2009, Dr. Vassal opined that appellant could work four hours a day with restrictions.

By decision dated September 3, 2009, the Office denied appellant’s request for reconsideration under section 8128 on the grounds that the evidence submitted was irrelevant and insufficient to warrant reopening her case for further review of the merits.

On appeal, appellant argues that she continues to have problems due to her work injury. She contends that Dr. Draper and Dr. Collins did not perform a complete evaluation. Appellant related that she was unable to perform her work duties. She additionally argues that she was unable to work from November 29 to December 19, 2008 and that the job offered by the employing establishment was not within her restrictions.

² The name of the physician is not legible.

LEGAL PRECEDENT -- ISSUE 1

The term disability as used in the Federal Employees' Compensation Act³ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁴ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.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 the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁶ The Board 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 employee's to self-certify their disability and entitlement to compensation.⁷

ANALYSIS -- ISSUE 1

The Board finds that the Office improperly adjudicated appellant's claim for compensation for the period November 29 to December 19, 2008. The Office found that she was not entitled to compensation during that period because she did not go back to work even though the employing establishment offered her part-time employment within her restrictions. It cited section 8106(c)(2) of the Act, relevant to terminating compensation for claimants who refuse or neglect an offer of suitable employment. The Board notes that the process for terminating compensation for failure to accept suitable work is a discrete process and is governed by specific rules and regulations.⁸ The Office did not follow its procedures to terminate appellant's compensation under section 8106(c) and thus improperly cited the provision in denying her claim for compensation from November 29 to December 19, 2008.

The Office further determined that the evidence did not establish that appellant was disabled from the part-time work during the period in question. At the time it had paid her compensation from October 3 to November 22, 2008 based on her submission of CA-7 forms. Office regulations provide that compensation for wage loss due to disability is available for any period during which an employees' work-related medical condition prevents him or her from

³ 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f).

⁴ *Paul E. Thams*, 56 ECAB 503 (2005).

⁵ *Id.*

⁶ *Id.*

⁷ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *See Maggie Moore*, 42 ECAB 484 (1991); *reaff'd on recon.*, 43 ECAB 818 (1992) (holding that when the Office makes a preliminary determination of suitability and extends the employee 30-day period either to accept or to give reasons for not accepting, the Office must consider any reasons given before it can make a final determination on the issue of suitability. Should the Office find the reasons unacceptable, it may finalize its preliminary determination of suitability, but it may not invoke the penalty provision of section 8106(c) without first affording the employee the opportunity to accept or refuse the offer of suitable work with notice of the penalty provision).

earning the wages earned before the work-related injury.⁹ The disability may be partial or total.¹⁰ The Office denied appellant's claim after finding that the medical evidence did not show that she was unable to perform part-time employment for the period in question. It, however, did not determine whether the medical evidence established that she was partially disabled due to her employment injury. Accordingly, the Board will remand the case for the Office to properly adjudicate appellant's claim for compensation from November 29 to December 19, 2008.

LEGAL PRECEDENT -- ISSUE 2

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹¹ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹²

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹³ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁴ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁵

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained right lumbar sprain due to an August 7, 2008 work injury. It paid compensation for total disability from October 3 to November 22, 2008. Appellant returned to part-time work on December 27, 2008. The Office paid her wage-loss compensation for four hours a day beginning that date.

⁹ *Judith A. Cardiddo*, 55 ECAB 348 (2004).

¹⁰ *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

¹¹ *J.M.*, 58 ECAB 478 (2007); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹² *T.P.*, 58 ECAB 524 (2007); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

¹³ 5 U.S.C. § 8123(a).

¹⁴ 20 C.F.R. § 10.321.

¹⁵ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

The Office determined that a conflict arose between Dr. Vassall, appellant's attending physician, and Dr. Draper, an Office referral physician, regarding whether she had continuing residuals and disability due to her accepted work injury. Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁶ The Board finds that the opinion of Dr. Collins, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Collins accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.¹⁷ In a report dated April 24, 2009, he reviewed the medical evidence of record, including the results of diagnostic studies. On examination, Dr. Collins found no loss of sensation in the legs or pain with straight leg raising. He found that appellant's accepted condition of lumbar strain had resolved and that she could resume her usual employment. Dr. Collins provided rationale for his opinion by noting that she had minimal findings on examination without any evidence of contusions or bruises. He determined that appellant had a preexisting degenerative lumbar condition by MRI scan study unrelated to her work injury. As Dr. Collins' report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.¹⁸ The Office thus met its burden of proof to terminate appellant's compensation benefits for the accepted condition of right lumbar sprain.

On appeal, appellant argued that she requires work restrictions due to her employment injury. She further questioned the thoroughness of the evaluations by Dr. Draper and Dr. Collins. As noted, however, Dr. Collins opinion is entitled to the special weight represented the impartial medical examiner and establishes that appellant has no further disability due to her accepted work injury.

LEGAL PRECEDENT -- ISSUE 3

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹⁹ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.²⁰

¹⁶ *Id.*

¹⁷ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁸ *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁹ *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Pamela K. Guesford*, 53 ECAB 727 (2002).

²⁰ *Id.*

ANALYSIS -- ISSUE 3

The Office met its burden of proof to terminate authorization for medical benefits through the opinion of Dr. Collins, the impartial medical examiner, who found that appellant had no residuals of her accepted condition. Dr. Collins explained that, based on his physical examination and the diagnostic studies, she had no further findings of lumbar strain and opined that she had received sufficient medical treatment. As his opinion is detailed and well rationalized, it is entitled to the special weight accorded an impartial medical examiner and establishes that appellant has no further residuals of her accepted employment injury.²¹

LEGAL PRECEDENT -- ISSUE 4

To require the Office to reopen a case for merit review under section 8128(a) of the Act,²² 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) constitute relevant and pertinent new evidence not previously considered by the Office.²³ 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 within one year of the date of that decision.²⁴ 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.²⁵

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.²⁶ 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.²⁷ 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.²⁸

ANALYSIS -- ISSUE 4

On July 21, 2009 appellant requested reconsideration of the Office's June 8, 2009 decision terminating her compensation and authorization for medical benefits. In support of her

²¹ See *Darlene R. Kennedy*, *supra* note 18.

²² 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."

²³ 20 C.F.R. § 10.606(b)(2).

²⁴ *Id.* at § 10.607(a).

²⁵ *Id.* at § 10.608(b).

²⁶ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

²⁷ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

²⁸ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

request for reconsideration, she submitted a July 20, 2009 report from Dr. Vassall, who diagnosed an exacerbation of chronic low back pain and found that she had continued residuals of the need for work restrictions due to her accepted employment injury. In a medical clearance form dated July 21, 2009, Dr. Vassall opined that appellant could work four hours a day with restrictions. Her reports, however, are substantially similar to her prior reports considered by the Office. Evidence which is cumulative in nature is insufficient to warrant reopening the case for merit review.²⁹

In a form report dated July 21, 2009, a physician diagnosed chronic low back pain exacerbated by lifting over 25 pounds and found that appellant was totally disabled from July to October 2009. He noted that she experienced chronic low back pain after a fall in August 2008 and found that she could work with restrictions. The physician did not directly relate appellant's need for work restrictions to her accepted work injury and thus his report has little relevance to the issue at hand.

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.³⁰

CONCLUSION

The Board finds that the Office improperly adjudicated the issue of appellant's entitlement to compensation from November 29 to December 19, 2008. The Board further finds that the Office properly terminated her compensation and authorization for medical treatment effective June 8, 2009 on the grounds that she had no further disability or condition due to her accepted employment injury. The Board finds that the Office properly denied appellant's request for reconsideration under section 8128.

²⁹ *F.R.*, 58 ECAB 607 (2007); *Patricia Aiken*, 57 ECAB 441 (2006).

³⁰ Appellant submitted new evidence on appeal. The Board has no jurisdiction to review new evidence on appeal; see 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 3 and June 8, 2009 are affirmed. The decision dated May 27, 2009 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 21, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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