United States Department of Labor
Employees' Compensation Appeals Board

Y.T., Appellant	)	
and	)	**Docket No. 11-1954**
	)	**Issued: July 26, 2012**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Denver, CO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 23, 2011 appellant filed a timely appeal from March 10 and June 3, 2011 merit decisions of the Office of Workers' Compensation Programs (OWCP) denying her claim for disability compensation. She also appeals a June 23, 2011 nonmerit decision, denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the June 23, 2011 nonmerit decision.

ISSUES

The issues are: (1) whether appellant sustained intermittent disability from June 20 to 29, 2010 and January 16 to February 26, 2011 causally related to her accepted employment injury; and (2) whether OWCP properly refused to reopen her case for further review of the merits under 5 U.S.C. § 8128.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 15, 2010 appellant, then a 45-year-old transportation security officer, filed a traumatic injury claim alleging that on that date she injured her left lower back when her chair "bottomed out and hit the floor." OWCP accepted the claim for lumbar sprain and strain at L5-S1 and cervical strain.

On June 15, 2010 Dr. James J. Bachman, Board-certified in family and emergency medicine, diagnosed lumbar radiculopathy and cervical strain. He found that a magnetic resonance imaging (MRI) scan study showed degenerative spondylolisthesis at L4-5, a posteriolateral disc protrusion and foraminal narrowing on the left at L5-S1. Dr. Bachman noted that appellant had a nerve block scheduled for June 23, 2010. He opined that she could perform desk work and provided a duty status report indicating that she could sit eight hours per day.

On June 23, 2010 appellant received a steroid injection to treat right S1 radiculopathy. In disability certificates dated June 20 and 27, 2010, Dr. Jennifer Bajaj, a Board-certified internist, related that she was seen on those dates for back spasms caused by lumbar strain and was excused from work on June 20 and 27 to 29, 2010.[2]

On July 6, 2010 Dr. Bachman related that appellant experienced pain relief after a June 23, 2010 nerve block but had a recurrence of pain four days later. He stated, "[Appellant] went to [a]fter [h]ours and got a three day off work note." Dr. Bachman diagnosed lumbar radiculopathy and cervical strain, found that she could continue with modified duty and that she should obtain changes in work status only through him. He asserted that the "[m]echanism of injury does not match severity" and that he did not agree with her using after hours for time off work.

On July 8, 2010 appellant filed a claim for intermittent compensation for time lost from work from June 20 to 29, 2010. She claimed eight hours of disability compensation on June 20, 21 and 27 to 29, 2010. By letter dated July 9, 2010, OWCP requested that appellant submit medical evidence supporting her claim for disability compensation.

By decision dated August 27, 2010, OWCP denied appellant's claim for compensation for 40 hours of disability from June 20 to 29, 2010. On September 21, 2010 she requested a review of the written record by an OWCP hearing representative.

In a September 21, 2010 report, received by OWCP on October 4, 2010, Dr. Christopher B. Ryan, a Board-certified physiatrist, found that appellant sustained an

[2] In a progress report dated June 20, 2010, a physician's assistant related that appellant had a "flare up of her low back pain" and that she "was taken off work today…." In a report dated June 27, 2010, a physician's assistant related that she had given her a note excusing her from work.

aggravation of cervical spondylosis due to her work injury, "which could also be called a 'cervical strain.'" He stated:

> "One other issue remains and that is the issue of [appellant's] wage[-]loss compensation between June 20 and 29, 2010. As I reviewed in the medical record, she went to the urgent care facility after work, complaining of more pain. Again, [appellant] was sitting for long periods of time and this puts more pressure on the injured disc. She subsequently underwent the epidural steroid injection and this not infrequently results in an early reaction of irritation to the injured structures, while the long-term effect is one of significant anti-inflammatory benefit. However, it is not uncommon that patients will complain of symptom flares. Again, we know that [appellant] has an objectively documented compressed nerve, where she had the epidural steroid injection. I believe that it is reasonable that she be off work during this time and she was given the time by the urgent care facility."

In another report dated September 21, 2010, Dr. Ryan diagnosed an L5-S1 disc herniation with right radiculopathy at L5-S1 and an aggravation of cervical and L4-5 spondylolisthesis. He stated, "With regard to [appellant's] time off work between June 20 and 29, 2010, this is explained by her radiculopathy and an apparent steroid flare." Dr. Ryan asserted that the lost time should be accepted under workers' compensation.

Appellant underwent physical therapy in January and February 2011. On January 25, 2011 she had a physical therapy appointment from 10:00 a.m. to 11:00 a.m. and on February 15, 2011 she had a physical therapy appointment from 11:00 a.m. to 12:00 p.m. On January 24, 2011 Dr. Joseph Fillmore, a Board-certified physiatrist, diagnosed cervical radiculitis, spondylosis and degenerative disc disease and recommended further injections.

On January 29, 2011 appellant filed a claim for compensation for intermittent time off work from January 16 to 29, 2011. She claimed compensation for four hours of lost time for medical appointments on January 18, 24 and 25, 2011. Appellant also filed claims for compensation for disability from January 30 to February 16, 2011. She requested four hours of compensation for lost time on February 1, 7, 8 and 15, 2011 and eight hours of compensation on February 21, 22, 25 and 26, 2011 for disability after a steroid injection. The employing establishment challenged the four hours claimed on January 24 and February 8, 2011 as appellant's medical appointments were at 10:00 a.m. and her shift began at 12:30 p.m.

In a report dated February 8, 2011, Dr. Ryan noted that appellant's symptoms had improved after a cervical epidural but that she was experiencing incontinence. In a work restriction evaluation of the same date, he found that she could work with restrictions on pushing, pulling and lifting up to 10 pounds.

By decision dated March 10, 2011, the hearing representative affirmed the August 27, 2010 decision denying appellant's claim for intermittent compensation from June 20 to 29, 2011. She found, however, that further development was required to determine whether appellant had additional employment-related diagnoses. The hearing representative determined that, if OWCP

accepted S1 radiculopathy as employment related, it should again adjudicate whether appellant had disability for work after the June 23, 2011 injection at S1.[3]

In letters dated March 10, 2011, OWCP informed appellant that it had reviewed her request for compensation from January 16 to 29, 2011 and found that she was entitled to compensation for 12 hours. It deferred her request for an additional two hours of compensation on January 24 and 25, 2011 after finding it was for time before she began work. OWCP requested further information supporting disability for those hours.

Regarding time claimed from January 30 to February 12, 2011, OWCP found that appellant was entitled to compensation for four hours of lost time from work on February 1 and 7, 2011 and two hours of lost time on February 8, 2011. It determined that she had not submitted sufficient evidence to show that she was entitled to an additional two hours on February 8, 2011 as her medical appointment was outside her scheduled work hours.

For time claimed from February 13 to 26, 2011, OWCP paid appellant compensation for three hours on February 15, 2011 and eight hours on February 21 and 22, 2011. It deferred a finding on whether she was entitled to compensation for an additional hour on February 15, 2011 as she was not scheduled to work until 12:00 p.m. and whether she was entitled to compensation for eight hours claimed on February 25 and 26, 2011. OWCP requested additional information for the remaining time claimed.

In a report dated February 28, 2011, received by OWCP on March 17, 2011, Dr. Fillmore reported appellant experienced a severe headache one week after her epidural injection. He noted that the headache recurred over the next few days and she had trouble going to work. Dr. Fillmore diagnosed cervical radiculitis, spondylosis and degenerative disc disease. He related, "[Appellant's] headaches appeared to be more muscular and certainly not spinal. My initial thought was that she may have had a reaction to the dose of Fentanyl, which can sometimes cause headaches, but it will be unlikely that several days later she will have the headache."

In a report dated March 15, 2011, Dr. Ryan related that near the end of February 2011 appellant underwent a cervical steroid injection and "had an adverse reaction from this and missed a week of work. She was seen in follow up by Dr. Fillmore, who wrote a note to take [her] off work." He related that it appeared that she "had severe enough worsening of her cervical symptoms that she should not have returned to work. However, I did not see [appellant] at the time and need to leave this declaration to Dr. Fillmore."

By decision dated June 3, 2011, OWCP denied appellant's claim for 23 hours of wage-loss compensation from January 24 to February 26, 2011. It found that the medical evidence submitted supporting entitlement to compensation was insufficient to meet her burden of proof.

On June 7, 2011 appellant requested reconsideration of OWCP's denial of 40 hours claimed from June 20 to 29, 2010. She resubmitted Dr. Ryan's September 21, 2010 reports in support of her request for reconsideration.

[3] OWCP undertook development of the evidence based on the hearing representative's instructions.

By decision dated June 23, 2011, OWCP denied appellant's request for reconsideration of its February 14, 2011 decision after finding that the evidence submitted was insufficient to warrant reopening her case for further merit review. It found that Dr. Ryan's reports had been previously submitted.

On appeal, appellant argues that OWCP had not previously examined the evidence submitted on reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The term disability as used in FECA[4] means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.[5] Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[6] 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.[7] The Board will not require OWCP 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.[8]

An injured employee may be entitled to compensation for lost wages incurred while obtaining authorized medical services.[9] This includes the actual time spent obtaining the medical services and a reasonable time spent traveling to and from the medical provider's location.[10] As a matter of practice, OWCP generally limits the amount of compensation to four hours with respect to routine medical appointments.[11]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained lumbar strain at L5-S1 and cervical strain due to a March 15, 2010 employment injury. Appellant claimed compensation for intermittent disability and time lost from work due to medical treatment from June 20 to 29, 2010 and

[4] *Supra* note 1; 20 C.F.R. § 10.5(f).

[5] *Paul E. Thams*, 56 ECAB 503 (2005).

[6] *Id*.

[7] *Id*.

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

[9] *See* 5 U.S.C. § 8103(a); *Gayle L. Jackson*, 57 ECAB 546 (2006).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.16a (October 2009).

[11] *Id*. at Part 3 -- Medical, *Administrative Matters*, Chapter 3.900.8 (November 1998).

January 16 to February 26, 2011. She has the burden to establish through probative medical evidence that she was disabled during this period or undergoing authorized medical treatment causally related to her accepted injury.

For the period June 20 to 29, 2010, appellant requested compensation for eight hours on June 20, 21 and 27 to 29, 2010 due to disability from work. In a disability certificate dated June 20 and 27, 2010, Dr. Bajaj indicated that appellant received treatment on those dates for back spasms related to lumbar strain. She asserted that appellant could not work on June 20 and from June 27 to 29, 2010. Dr. Bajaj, however, did not address the cause of appellant's disability or attribute it to her accepted employment injury. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[12]

Appellant underwent an epidural nerve block on June 23, 2010. On July 6, 2010 Dr. Bachman noted that she experienced pain three days after the nerve block and obtained a note from a clinic taking her off work. He determined that her type of injury did not match the severity of symptoms and disagreed with her use of the clinic to remain off work. As Dr. Bachman did not find that appellant was unable to work for the time in question, his report is insufficient to meet her burden of proof.

In reports dated September 21, 2010, Dr. Ryan diagnosed an employment-related aggravation of cervical spondylolysis. He related that he had reviewed the medical records from an urgent care clinic, which found that appellant was unable to work from June 20 to 29, 2010. Dr. Ryan asserted that it was "reasonable that she be off work during this time" and explained that a steroid injection could cause irritation from the injection. He indicated that appellant's time off was "explained by her radiculopathy and apparent steroid flare." Dr. Ryan did not, however, provide a specific opinion that she was totally disabled from work but instead opined that it was reasonable to be off and that she could have experienced irritation and radiculopathy. 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.[13]

Regarding the time period claimed from January 16 to February 26, 2011, OWCP denied appellant's claim for four hours of compensation on January 24 and 25 and February 8 and 15, 2011 after finding that she obtained medical treatment on those dates outside her scheduled work hours. Appellant had medical appointments on January 24 and February 8, 2011 at 10:00 a.m. On January 25 and February 15, 2011 she underwent physical therapy from 11:00 a.m. to 12:00 p.m. Appellant started work at 12:30 p.m. OWCP thus properly found that she was entitled to compensation for two hours of compensation on January 24 and 25 and February 8, 2011 and three hours of compensation on February 15, 2011 rather than the four hours of compensation claimed on those dates as the appointments were before her scheduled start time.

[12] *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

[13] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

OWCP also denied compensation for eight hours on February 25 and 26, 2011. On February 28, 2011 Dr. Fillmore indicated that appellant had experienced a headache a week after a February 21, 2011 steroid injection such that she had problems working. He asserted that the headache appeared muscular rather than a reaction to the steroid injection, noting that it was unlikely she would have a headache begin several days after the injection. As Dr. Fillmore did not specifically find any dates of disability or that appellant's headache was related to her work injury or treatment, his opinion is of little probative value.

On March 15, 2011 Dr. Ryan related that around the end of February 2011 appellant missed a week of work after a reaction to a steroid injection. He noted that Dr. Fillmore took her off work. Dr. Ryan stated that Dr. Fillmore should address whether she was able to work during this time. As he did not address disability, his opinion is insufficient to meet appellant's burden of proof.

Appellant may submit new evidence or argument regarding the denied dates of disability with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[14] OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[15] To be entitled to a merit review of an OWCP 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.[16] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[17]

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.[18] 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.[19] While the reopening of a case may be predicated

[14] *Supra* note 1. Section 8128(a) of FECA 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."

[15] 20 C.F.R. § 10.606(b)(2).

[16] *Id*. at § 10.607(a).

[17] *Id*. at § 10.608(b).

[18] *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

[19] *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

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.[20]

ANALYSIS -- ISSUE 2

On June 7, 2011 appellant requested reconsideration of OWCP's denial of 40 hours claimed from June 20 to 29, 2010. She resubmitted reports from Dr. Ryan dated September 21, 2010. OWCP, however, previously considered Dr. Ryan's reports. 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.[21]

In her request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument, nor did she submit pertinent new and relevant evidence not previously submitted. The Board accordingly finds that she did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2).

On appeal, appellant argues that OWCP had not previously examined the evidence she submitted with her reconsideration request. The hearing representative, however, considered Dr. Ryan's September 21, 2010 report in the March 10, 2011 decision.

CONCLUSION

The Board finds that appellant has not established her claim for compensation for intermittent disability from June 20 to 29, 2010 and January 16 to February 26, 2011 causally related to her accepted work injury. The Board further finds that OWCP properly refused to reopen her case for further review of the merits under section 8128.

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

[21] *C.N.*, Docket No. 08-1569 (issued December 9, 2008); *Richard Yadron*, 57 ECAB 207 (2005).

ORDER

IT IS HEREBY ORDERED THAT the June 23 and 3 and March 10, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 26, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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