

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

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**D.B., Appellant**

**and**

**U.S. RAILROAD RETIREMENT BOARD,  
Chicago, IL, Employer**

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**Docket No. 11-1058  
Issued: March 19, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 24, 2011 appellant filed a timely appeal from a December 16, 2010 merit decision and a March 16, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant met her burden of proof to establish entitlement to wage-loss compensation for total disability for the period December 22, 2006 to July 31, 2007; and (2) whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the issuance of the March 16, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal appellant contends that her claim for wage-loss compensation should not be denied on the basis that her doctors will not state the time of her disability as she is currently under their care.

### **FACTUAL HISTORY**

On November 28, 2006 appellant, then a 56-year-old computer specialist, filed an occupational disease claim (Form CA-2) alleging that she sustained pneumonia, pulmonary congestion, bronchitis, persistent coughing and lower back conditions due to factors of her federal employment, including exposure to fumes from the roof at her workplace over a two-month period.

On November 30, 2006 Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon, indicated that appellant was unable to work from November 30, 2006 to January 8, 2007. In subsequent progress notes, he continued to report that appellant was totally disabled for work.

On February 15, 2007 appellant filed a claim for wage-loss compensation (Form CA-7) for the period November 27, 2006 to February 12, 2007.

In a March 19, 2007 report, Dr. Muhammad A. Hamadeh, a Board-certified internist, critical care medicine and pulmonary diseases, stated that appellant had been his patient for over five years. He indicated that appellant was under his care due to her asthma condition which was triggered by strong fumes.

In a June 11, 2007 report, Dr. Hamadeh stated that he first saw appellant in his office in September 2005. Appellant was doing well until November 2006 after she was exposed to asphalt fumes and started complaining of a cough for which he gave multiple treatments. Dr. Hamadeh performed a pulmonary function test including methacholine which was negative ruling out asthma. He opined that it was difficult to prove that the asphalt fumes were the direct cause of the cough, although different fumes could sometimes cause airway irritation and cough.

By decision dated June 22, 2007, OWCP denied the claim for compensation finding that the medical evidence submitted was not sufficient to establish fact of injury.

Appellant submitted a report by Dr. Hamadeh dated June 18, 2007 which reiterated a June 11, 2007 report, including pulmonary function test results which showed minimal patchy right middle lobe atelectasis and/or parenchymal scarring and noted that the study was otherwise unremarkable.

OWCP determined that a second opinion evaluation was necessary to address the extent and degree of appellant's asthmatic condition. In a December 19, 2007 report, Dr. David Brush, a physician Board-certified in internal medicine and pulmonary diseases, reviewed appellant's medical history and statement of accepted facts. He opined that appellant's exposure to asphalt fumes from the roof repair on November 21 to 22, 2006 did not cause her pulmonary condition, noting that it was possible that the fumes caused a temporary exacerbation of her asthma. Dr. Brush opined that appellant was not totally disabled from work, noting that many patients with asthma could work full time without limitations, while some others would need some

limitations in their duties or job descriptions based upon avoidance of known exacerbating factors. In his opinion, appellant was not incapacitated by her asthma or by her chronic cough.

By decision dated January 24, 2008, OWCP accepted appellant's claim for temporary aggravation of mild asthma.

Appellant submitted reports by Dr. Chmell indicating that appellant was unable to work for the period December 6, 2007 to April 10, 2008 as well as progress notes by Dr. Hamadeh covering the period February 5 to June 4, 2007.

OWCP determined that another second opinion examination was necessary to address the extent and degree of appellant's asthma condition. In an April 30, 2008 report, Dr. Anil K. Agarwal, a Board-certified orthopedic surgeon, reviewed her medical history and statement of accepted facts. He reiterated that appellant's diagnosis due to the November 22, 2006 employment injury was an exacerbation of mild asthma. Dr. Agarwal also noted that she had a preexisting condition of longstanding mild asthma. He opined that appellant's temporary asthma aggravation would have ended by December 21, 2006. Dr. Agarwal explained that she may have been totally disabled for two or three weeks after she left the job but otherwise had no total disability based on the fact that once away from the fumes she would have returned to her preinjury status within a short period of time. He opined that appellant was capable of returning to work full time. Dr. Agarwal stated that he completed a duty status report (Form CA-5c) indicating that she had reached her maximum medical improvement and had permanent restrictions but noted that they were due to preexisting conditions unrelated to her employment injury.

On June 9, 2008 appellant filed a claim for wage-loss compensation (Form CA-7) for the period January 25 to July 31, 2007.

By decision dated May 29, 2009, OWCP denied appellant's claim for wage-loss compensation for the period December 22, 2006 to July 31, 2007.<sup>3</sup>

On June 3, 2009 appellant requested a review of the written record by an OWCP hearing representative of the May 29, 2009 decision and submitted a July 9, 2009 report by Dr. Chmell who reported that appellant had retired.

By decision dated October 20, 2009, an OWCP hearing representative set aside the May 29, 2009 decision and remanded the case for another second opinion.

In a February 8, 2010 second opinion evaluation report, Dr. Mark Yoder, a physician Board-certified in internal and critical care medicine and pulmonary diseases, reviewed appellant's medical records and statement of accepted facts. Upon examination, he found that her symptoms were consistent with upper airway cough syndrome. Based on her medical history, Dr. Yoder diagnosed occupational asthma and possible thrush. He opined that appellant had an asthma exacerbation on November 22, 2006. Dr. Yoder stated that, while the duration of

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<sup>3</sup> By decision dated November 6, 2008, OWCP found that appellant's chronic low back pain had resolved by December 21, 2006.

the exacerbation would not be determined with certainty, most asthma exacerbations resolved within two weeks to two months with appropriate treatment, and therefore he would favor entering January 22, 2007 as the date the aggravation ceased. He noted that the medical records indicated that appellant's symptoms had returned to baseline by December 5, 2007 and her pulmonary function study results from April 23, 2007 were not significantly different from those in 2005, which provided physiologic evidence for her improvement by April 23, 2007. Dr. Yoder further opined that appellant's respiratory symptoms would not have resulted in her being totally disabled for work from November 22, 2006 to July 31, 2007. He reiterated that appellant's pulmonary function had returned to baseline by April 23, 2007 and noted that even the lowest result prior to that date was well within the normal range.

By decision dated February 24, 2010, OWCP denied appellant's claim for wage-loss compensation for the period December 22, 2006 to July 31, 2007 finding that the weight of the medical evidence rested with Dr. Yoder's February 8, 2010 report. It found that appellant's temporary aggravation of asthma ceased on January 22, 2007.

On April 23, 2010 appellant requested reconsideration and submitted additional evidence.

On March 22, 2010 Dr. Evan G. McLeod, a physician Board-certified in internal medicine and pulmonary diseases, indicated that a February 22, 2010 chest x-ray was normal. He opined that appellant's cough was probably secondary to rhinitis with postnasal drainage, her nocturnal episodes of acute dyspnea could be due to laryngospasm related to pharyngeal secretions from rhinitis and that her asthma seemed to be well controlled.

By decision dated July 22, 2010, OWCP denied modification of the February 24, 2010 decision.

On August 9, 2010 appellant requested reconsideration and submitted an August 2, 2010 report by Dr. McLeod who stated that appellant's history was consistent with a prolonged exacerbation of asthma related to exposure, over a period of approximately two weeks in October and November 2006, to tar fumes to which she was exposed at work. She also submitted an August 5, 2010 report by Dr. Chmell who indicated that over a two-week period in October 2006 appellant received inhalation exposure to toxic fumes which injured her respiratory tree and caused uncontrollable coughing as a result.

By decision dated September 21, 2010, OWCP denied modification of the July 22, 2010 decision.

On September 30, 2010 appellant requested reconsideration and later submitted an October 8, 2010 report by Dr. McLeod who reported that he initially examined appellant in July 2007, therefore he could not personally attest to the severity of her symptoms between November 2006 and July 2007. Dr. McLeod opined that it was plausible that repeated exposure to noxious fumes over a two-month period could lead to acute asthma which might be very slow to resolve.

By decision dated December 16, 2010, OWCP denied modification of the September 21, 2010 decision.

On January 3, 2011 appellant requested reconsideration and submitted a January 3, 2011 report by Dr. Hamadeh stating that he had treated appellant from November 2006 to June 2007 for environmental asthma and chronic cough and resubmitted his progress notes from February 5 to June 4, 2007.

By decision dated March 16, 2011, OWCP denied appellant's request for reconsideration. It found that appellant did not submit sufficient evidence to warrant a merit review of the December 13, 2010 decision because it did not show that OWCP erroneously applied or interpreted a point of law, nor did appellant present a point of law not previously considered or submit relevant and pertinent new evidence not previously considered by OWCP.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>4</sup> sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."<sup>5</sup> This meaning, for brevity, is expressed as disability for work.<sup>6</sup> For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.<sup>7</sup> Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.<sup>8</sup>

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA.<sup>9</sup> The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>10</sup>

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

<sup>6</sup> *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>7</sup> *See William A. Archer*, 55 ECAB 674 (2004).

<sup>8</sup> *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

<sup>9</sup> *See Merle J. Marceau*, 53 ECAB 197 (2001).

<sup>10</sup> *See Fereidoon Kharabi*, *supra* note 8.

## ANALYSIS -- ISSUE 1

The Board finds appellant is not entitled to wage-loss compensation for total disability for the period December 22, 2006 to July 31, 2007.

In order to determine the extent and degree of any employment-related disability caused by the employment-related asthma condition, OWCP referred appellant to Dr. Yoder who conducted the most recent evaluation and concluded on February 8, 2010 that appellant's temporary aggravation of her mild asthma condition ceased by January 22, 2007. Dr. Yoder explained that most exacerbations of asthma resolve from two weeks to two months with appropriate treatment. He pointed out that appellant's symptoms returned to baseline by December 5, 2007, that her pulmonary function study results from April 23, 2007 were not significantly different from those in 2005, which provided physiologic evidence for her improvement by April 23, 2007 and that the lowest result prior to that date was well within the range of normal. Dr. Yoder concluded, therefore, that appellant's respiratory symptoms would not have resulted in total disability for work from November 22, 2006 to July 31, 2007.

In a series of reports, Dr. Chmell diagnosed lumber disc derangement with radiculopathy, right foot derangement, pulmonary derangement, skin rash, Stevens-Johnson syndrome and right eye derangement and indicated that appellant was unable to work. Although he opined that appellant was totally disabled, he failed to provide a rationalized medical explanation as to how the residuals of the November 22, 2006 employment injury prevented her from continuing in her federal employment. Thus, appellant has not met her burden of proof to establish that she is entitled to compensation for any wage-loss compensation with the submission of Dr. Chmell's reports.

Appellant also submitted reports by Dr. Hamadeh dated March 19, June 11 and 18, 2007 and an October 8, 2010 report by Dr. McLeod. The medical reports of Drs. Hamadeh and McLeod are of diminished probative value as they fail to offer any probative medical opinion on whether appellant was disabled on the dates at issue due to her accepted conditions.<sup>11</sup> Thus, appellant has not met her burden of proof.

As appellant has not submitted sufficient rationalized medical explanation as to how the residuals of the employment injury prevented her from continuing in her employment, she has not met her burden of proof to establish entitlement to wage-loss compensation for the period claimed.

On appeal appellant contends that her claim for wage-loss compensation should not be denied on the basis that her doctors will not state the time of her disability as she is currently under their care. While OWCP accepted that appellant sustained an employment injury, appellant bears the burden to establish through medical evidence that she was disabled during the claimed time periods and that her disability was causally related to her accepted injury.<sup>12</sup> The Board finds that appellant submitted no rationalized medical evidence explaining how the

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<sup>11</sup> See *Sandra D. Pruitt*, 57 ECAB 126 (2005). See also *V.P.*, Docket No. 09-337 (issued August 4, 2009).

<sup>12</sup> See *V.P.*, *supra* note 11.

November 22, 2006 employment injury materially worsened or aggravated her temporary aggravation of mild asthma condition and caused her to be disabled for work from December 22, 2006 to July 31, 2007.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) 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 of FECA,<sup>13</sup> 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.<sup>14</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.<sup>15</sup> 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.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

In support of her January 3, 2011 reconsideration request, appellant submitted a January 3, 2011 report by Dr. Hamadeh stating that he had treated appellant from November 2006 to June 2007 for environmental asthma and chronic cough. The Board finds that submission of this report did not require reopening appellant's case for merit review. As OWCP denied her claim based on the lack of supportive medical evidence and this report repeats evidence already in the case record, it is cumulative and does not constitute relevant and pertinent new evidence. Therefore, it is not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant also resubmitted progress notes by Dr. Hamadeh covering the period February 5 to June 4, 2007. The Board finds that the submission of these reports did not require reopening appellant's case for merit review because these submissions were previously reviewed by OWCP. As these submissions repeat evidence or are duplicative of evidence already in the case record and reviewed by OWCP, the Board finds that they do not constitute relevant and pertinent new evidence. Therefore, appellant has not established a basis for reopening her case.<sup>17</sup>

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<sup>13</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>14</sup> 20 C.F.R. § 10.606(b)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>15</sup> *Id.* at § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements OWCP will deny the application for review without reviewing the merits of the claim).

<sup>16</sup> See *Eugene F. Butler*, 36 ECAB 393 (1984).

<sup>17</sup> See *D.K.*, 59 ECAB 141 (2007).

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. Because appellant only submitted cumulative and repetitive evidence with her request for reconsideration, the Board finds that she did not meet any of the necessary requirements and she is not entitled to further merit review.<sup>18</sup>

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that she is entitled to wage-loss compensation benefits for total disability from December 22, 2006 to July 31, 2007. Because appellant's request for reconsideration did not meet at least one of the criteria required to reopen a case the Board finds that OWCP properly denied her request for reconsideration without a merit review.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 16, 2011 and December 16, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 19, 2012  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> See *L.H.*, 59 ECAB 253 (2007).