

injury; and (2) whether OWCP properly denied further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case was previously before the Board. By decision dated October 9, 2007, the Board affirmed a December 26, 2006 OWCP decision denying appellant's claim for wage-loss compensation for the periods October 18 to November 24, 2006.³ On May 24, 2006 appellant, then a 43-year-old part-time flexible clerk, sustained an injury when the "U" cart she was pushing, which contained five feet of flats, fell down jerking her hands and arms. She stopped work on May 24, 2006 and returned to modified duty on May 25, 2006. OWCP accepted the claim for cervical strain and bilateral shoulder sprains. The facts and the circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

On January 12, 2009 OWCP received a Form CA-7 claim for compensation for the period October 18 through December 26, 2006. Appellant signed the form on November 17, 2008.

Medical reports relevant to the time period of compensation claimed included reports from Dr. David Hilburn, a Board-certified family practitioner. In a November 1, 2006 report, Dr. Hilburn noted that appellant did not improve with an epidural. Examination showed pain to palpation in the upper trigger point area radiating down to her arm and decreased motor strength in the right arm. An assessment of chronic pain, right shoulder, arm and up into the neck was provided. Dr. Hilburn stated that appellant was unable to work and took her off work until December 4, 2006. He advised that she was probably permanent and stationary and might seek a second opinion. In a December 4, 2006 report, Dr. Hilburn noted continued pain to palpation in the upper trigger point area with pain radiating into the right arm. No distal loss of function or obvious bone deformity was noted. An assessment chronic upper, back, neck and shoulder strain was provided. Dr. Hilburn took appellant off work through December 26, 2006. He also declared her permanent and stationary.

Appellant returned to modified work on December 27, 2006.

In a January 22, 2009 letter, OWCP informed appellant that she had previously submitted a claim for compensation for the period October 18 through November 24, 2006, which it denied on December 26, 2006 and which the Board affirmed on October 9, 2007. For the period November 25 through December 26, 2006, OWCP advised her that additional medical evidence was needed. It noted that although Dr. Hilburn indicated that appellant had chronic pain and could not work in his November 1 and December 4, 2006 reports, it was not sufficient to establish total disability.

In response, OWCP received a December 18, 2006 duty status report from Dr. Hilburn indicating that appellant could work six hours a day with restrictions on December 27, 2006. Dr. Hilburn diagnosed upper back and arm strain. In a December 18, 2006 note, he indicated that she stated that the pain was intolerable and prevents her from working. In a December 26,

³ Docket No. 07-1174 (issued October 9, 2007).

2006 report, Dr. Hilburn noted mild spasm to palpation with pain radiating to her right shoulder with any extreme motions of her shoulder. No masses, no obvious bone deformity and no distal loss of function were noted. Dr. Hilburn assessed continued right shoulder and arm pain with upper trigger point spasm. He indicated that appellant would continue with anti-inflammatory agents and acupuncture and approved her for light-duty work. In a February 27, 2008 report, Dr. Hilburn noted the history of injury and her treatment. He stated that she was seen on October 23, 2006 after having an epidural five days previously and because of increased pain with the epidural she was unable to work. Appellant was placed off work October 23, 2006 and was unable to go back until December 26, 2006. Dr. Hilburn stated that she was given a release from work because of her increased pain from October 18 through November 24, 2006. He indicated that, since that time, appellant's pain only lessened somewhat and she continued with pain as well as her work with light-duty restrictions. Dr. Hilburn reiterated that she was excused from work during the period October 18 to November 24, 2006 because of pain.

By decision dated May 5, 2011, OWCP denied appellant's claim for wage-loss compensation for the period November 25 through December 26, 2006 on the basis that the medical evidence failed to establish that she was totally disabled from working due to her accepted neck and bilateral shoulder strains.

In a May 12, 2011 letter, appellant, through her attorney, requested a telephonic hearing from the May 5, 2011 decision, which was held August 3, 2011. She contended that the evidence of record supported the claimed disability was causally related to the accepted employment injuries. No new evidence pertinent to the claimed period of disability was received.

By decision dated September 27, 2011, an OWCP hearing representative affirmed the May 5, 2011 decision.

On October 20, 2011 appellant requested reconsideration. A copy of Dr. Hilburn's February 27, 2008 report was submitted, which the attorney contended was new had not been previously considered.

By decision dated January 17, 2012, OWCP denied appellant's reconsideration request on the grounds the evidence submitted was duplicative, repetitive and insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

Under FECA the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁴ Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA⁵ and whether a particular injury causes an

⁴ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁵ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁶ Whether a particular injury causes an employee to be 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 medical evidence.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

ANALYSIS -- ISSUE 1

Appellant filed a claim for wage-loss compensation alleging that she was disabled for work for the period November 25 through December 26, 2006. However, she has not submitted adequate medical evidence demonstrating total or partial disability for this period of time due to her accepted conditions of cervical strain and bilateral shoulder sprains.

In November 1 and December 4, 2006 reports, Dr. Hilburn assessed chronic pain, right shoulder, arm and up into the neck and chronic upper back, neck and shoulder strain and opined that appellant was unable to work. While he noted that she had continued pain and recommended that she be off work, Dr. Hilburn failed to address in either report how or why she was disabled due to the accepted conditions. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁹ While Dr. Hilburn indicated in his December 18, 2006 and February 27, 2008 reports that appellant was taken off work because her pain was intolerable and prevented her from working, he again failed to address how or why she was disabled due to the accepted conditions. Therefore, his reports are of diminished probative value.¹⁰ There is no other probative medical evidence of record which addresses whether appellant was disabled during the period claimed due to her work injuries. Appellant has failed to submit sufficient rationalized medical opinion evidence to establish that she was unable to work during the period November 25 to December 26, 2006 due to her accepted conditions. She had failed to establish that she was disabled and, thus, is not entitled to wage-loss compensation for the period claimed. Appellant has not established her claim for wage-loss compensation during the period November 25 through December 25, 2006.

Appellant may submit new evidence of 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.

⁶ *Donald E. Ewals*, 51 ECAB 428 (2000).

⁷ *Tammy L. Medley*, 55 ECAB 182 (2003); *see Donald E. Ewals, id.*

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

⁹ *See C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁰ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128 of FECA,¹¹ OWCP 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.¹² 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.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

OWCP denied appellant's claim for wage-loss compensation for the period November 25 through December 26, 2006. The Board finds that her request for reconsideration met none of the regulatory requirements for a review of the merits of this decision.

Appellant's October 20, 2011 request for reconsideration did not allege that OWCP erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP. She thus is not entitled to further review on the merits of her case under the first two sections of 10.606(b)(2).¹⁵

Regarding Dr. Hilburn's February 27, 2008 report submitted by appellant on reconsideration, this is not relevant because it is duplicative as the report was previously before OWCP when it issued its May 5, 2011 decision. Therefore, this report is insufficient to require OWCP to reopen the claim for a merit review.¹⁶ As there was no new relevant or pertinent evidence for OWCP to consider that appellant was not entitled to review under the third section of 10.606(b)(2).¹⁷

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a

¹¹ Under section 8128 of FECA, [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. 5 U.S.C. § 8128(a).

¹² *Id.* at § 10.606(b)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

¹³ *Id.* at § 10.607(a).

¹⁴ 20 C.F.R. § 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).

¹⁵ 20 C.F.R. § 10.606(b)(2)(i) and (ii).

¹⁶ See *James W. Scott*, 55 ECAB 606 (2004) (evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

¹⁷ 20 C.F.R. § 10.606(b)(2)(iii).

specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant's attorney generally contended that OWCP's decision was contrary to fact and law. For the reasons stated above, the Board finds that appellant did not submit sufficient medical evidence to establish that she was unable to work during the period November 25 to December 26, 2006 due to her accepted conditions. Appellant had failed to establish that she was disabled and, thus, is not entitled to wage-loss compensation for the period claimed.

CONCLUSION

The Board finds that appellant has not established entitlement to wage-loss benefits for periods of disability from November 25 to December 26, 2006. The Board further finds that OWCP properly denied her request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated January 17, 2012 and September 27, 2011 are affirmed.

Issued: October 16, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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