United States Department of Labor
Employees' Compensation Appeals Board

DONNA J. DUBBERLY, Appellant	)	
and	)	**Docket No. 05-115**
	)	**Issued: December 12, 2005**
DEPARTMENT OF THE ARMY, DEPARTMENT OF LOGISTICS, Fort Stewart, GA, Employer	)	

Appearances:
Donna J. Dubberly, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 12, 2004 appellant filed a timely appeal from a March 25, 2004 merit decision of the Office of Workers' Compensation Programs, which determined that her actual earnings as a logistical mobilization plans assistant fairly and reasonably represented her wage-earning capacity, an August 3, 2004 merit decision, denying wage-loss compensation from March 25 and June 3, 2004 and a September 20, 2004 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 determined that appellant's actual earnings as a logistical mobilization plans assistant fairly and reasonably represented her wage-earning capacity effective January 12, 2004; (2) whether appellant established that she was disabled on March 25 and June 3, 2004 due to her March 7, 1995 employment injuries; and (3) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 30, 1998 appellant, then a 42-year-old freight rate specialist, filed an occupational disease claim alleging that her migraine headaches were caused by factors of her federal employment. By letter dated January 6, 1999, the Office accepted appellant's claim for temporary aggravation of migraines.

On January 14, 1999 appellant filed a claim (Form CA-7) seeking to buy back leave for the period March 7, 1995 through November 12, 1998. The Office approved the Form CA-7 application on May 13, 1999 for the requested period and indicated that appellant's date of injury was March 7, 1995. The Office later expanded the acceptance of appellant's claim to include myalgia and myositis.

The Office received an unsigned progress note dated August 19, 2003 from Wallette G. Widener, a nurse practitioner, and Dr. Julia L. Mikell, a Board-certified neurologist. They reported appellant's symptoms of headaches and findings on physical and neurological examination. Appellant experienced migraines and muscle tension/muscle contraction headaches. Her treatment plan included medication and stress management and relaxation strategies. The report indicated that appellant was ready to return to work but not to her previous job. Appellant would benefit from another type of job that was not as strenuous and stressful and did not require extended overtime hours. The report noted that Dr. Mikell had seen and evaluated appellant and he concurred with the findings. In a work capacity evaluation dated August 20, 2003, Dr. Mikell indicated that appellant could not return to her previous job due to too much stress and overtime but could work eight hours a day in a different job with no physical limitations.[1]

The employing establishment offered appellant a lower grade position as a logistical mobilization plans assistant by letter dated November 26, 2003. This position was permanent and full time, Monday through Friday from 7:30 a.m. until 4:00 p.m. and did not normally require overtime. On December 12, 2003 appellant accepted the job offer. She returned to work on January 12, 2004. On January 20, 2004 she filed a claim for wage-loss compensation based on the downgraded position.

By decision dated March 25, 2004, the Office reduced appellant's compensation effective January 12, 2004 finding that her actual earnings as a logistical mobilization plans assistant fairly and reasonably represented her wage-earning capacity. The Office applied *Albert C. Shadrick*[2] to determine that her pay rate when disability began was $748.11 per week; that the current pay

[1] A September 5, 2003 report from Norma Jacobs, an Office referral nurse, revealed that she attended the August 19, 2003 examination and had a conference with Dr. Mikell. Ms. Jacobs noted Dr. Mikell's findings included, among other things, that appellant would not be able to return to her prior job due to stress and required overtime but that she could work in another job that was less stressful and did not require overtime. Ms. Jacobs stated that Dr. Mikell told her that "she will write a letter stating that [appellant] will not be able to return to the same job because of the stress and overtime required. She stated that [appellant] can work in another job." Ms. Jacobs noted that she requested and received the August 19, 2003 progress note.

[2] 5 ECAB 376 (1953).

rate of that same position was $790.25 per week; that her current position paid $718.41 per week; and that the adjusted wage-earning capacity amount per week in the current position was $680.78 thereby resulting in a $67.33 loss of wage-earning capacity.

On June 14, 2004 appellant filed a claim for wage-loss compensation for March 25 and June 3, 2004, due to headaches and on April 26, 2004 for a medical appointment. By letter dated June 30, 2004, the Office requested that she submit medical evidence establishing that her migraine headaches and medical appointment were causally related to her March 7, 1995 employment injuries.

The Office received a medical treatment note dated December 16, 2003 from Dr. Stephen G. Pappas, a Board-certified neurologist, who indicated that appellant had experienced a decrease in the frequency of her headaches to a weekly basis. Dr. Pappas' February 16, 2004 treatment note reiterated that appellant experienced up to two less severe headaches a week but still had headaches on a weekly basis. Dr. Pappas' July 14, 2004 disability certificate indicated that appellant had been under his care on April 26, 2004 and that she would be able to return to work on April 27, 2004.

By decision dated August 3, 2004, the Office denied appellant's claim for compensation for March 25 and June 3, 2004. The Office found that she failed to submit rationalized medical evidence establishing that her inability to work on those dates was causally related to her accepted injury. The Office found the evidence of record sufficient to grant wage-loss compensation for April 26, 2004.

Following the issuance of its August 3, 2004 decision, the Office received Dr. Pappas' August 13, 2004 medical report. He indicated that appellant was experiencing migraine headaches, headache facial pain and myofascial pain syndrome. Dr. Pappas stated that the condition was still present when he examined her on August 11, 2004.

On September 2, 2004 appellant requested reconsideration of the Office's August 3, 2004 decision. She submitted Dr. Pappas' August 27, 2004 report, which noted that appellant was able to work but if she experienced a severe breakthrough migraine, she may have to be out of work occasionally. Dr. Pappas further stated that it was not necessary for her to come to his office for each severe headache.

By letter dated September 14, 2004, the Office requested that Dr. Pappas address whether the aggravation of appellant's migraine headaches was temporary or permanent. The Office further requested that, if he determined that appellant's condition had not ceased or was permanent, then he should provide medical rationale in support of his opinion. Dr. Pappas did not respond.

In a September 20, 2004 decision, the Office denied reconsideration, finding that the evidence submitted was not relevant to the issue of whether appellant was able to perform her work duties on March 25 and June 3, 2004.

LEGAL PRECEDENT -- ISSUE 1

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[3] After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment.

Section 8115(a) of the Federal Employees' Compensation Act[4] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earning fairly and reasonably represent her wage-earning capacity.[5] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[6] However, if actual earnings are derived from a make-shift position designed for the employee's particular needs[7] or when the job constitutes part-time, sporadic, seasonal or temporary work,[8] actual earnings may not represent wage-earning capacity.

The formula for determining loss of wage-earning capacity, developed in the *Albert C. Shadrick* decision,[9] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant's actual wages fairly and reasonably represent her wage-earning capacity. Appellant accepted a downgraded position of logistical mobilization plans assistant effective January 12, 2004, which conformed to the restrictions outlined by her physician, Dr. Mikell. In an August 19, 2003 progress note and an August 20, 2003 work capacity evaluation, Dr. Mikell indicated that appellant could return to work in a position that did not require her to work more than 40 hours a week. The logistical mobilization plans assistant position did not require appellant to work overtime. Appellant began working in the modified

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[3] *See Lawrence D. Price,* 47 ECAB 120 (1995); *Charles E. Minniss,* 40 ECAB 708 (1989); *Vivien L. Minor,* 37 ECAB 541 (1986).

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[6] *Stanley B. Plotkin,* 51 ECAB 700 (2000).

[7] *William D. Emory,* 47 ECAB 365 (1996).

[8] *See Monique L. Love,* 48 ECAB 378 (1997).

[9] 5 ECAB 376 (1953).

[10] 20 C.F.R. § 10.403(c).

position on January 12, 2004 and continued working in the position through March 25, 2004, the date the Office issued a formal loss in wage-earning capacity decision. The fact that she earned wages in this capacity through the date of the Office's decision supports her capacity to earn such wages.[11] She performed the position of logistical mobilization plans assistant for more than 60 days after January 12, 2004 and received actual earnings based on her employment. Moreover, appellant's position as a logistical mobilization plans assistant was not make-shift,[12] part-time, seasonal, sporadic or temporary work.[13] The Board finds that her actual earnings as a logistical mobilization plans assistant fairly and reasonably represents her wage-earning capacity. The Board finds that the Office properly applied the *Shadrick* formula in determining her loss of wage-earning capacity based on actual earnings. The Office first calculated appellant's wage-earning capacity in terms of percentage by dividing her earnings by the "current" pay rate.[14] The Board finds that the Office properly used appellant's actual earnings of $718.41 per week for the period January 12 through March 25, 2004 working a 40-hour week and a current pay rate for her date-of-injury job of $790.25 per week to determine that she had a 91 percent wage-earning capacity. The Office then multiplied the pay rate at the time of the injury, $748.11, by the 91 percent wage-earning capacity percentage. The resulting amount of $680.78 was then subtracted from appellant's date-of-injury pay rate of $748.11, which provided a loss of wage-earning capacity of $67.33 per week. The Office then multiplied this amount by the appropriate compensation rate of three-fourths, to yield $50.00. The Office found that cost-of-living adjustments were not applicable and then calculated the final compensation figure of $50.50 per week or $202.00 every four weeks. The Board finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent her wage-earning capacity and the Office properly reduced appellant's compensation in accordance with the *Shadrick* formula to reflect the receipt of actual wages as a logistical mobilization plans assistant.

LEGAL PRECEDENT -- ISSUE 2

A claimant, for each period of disability claimed, has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he or she is disabled for work as a result of the employment injury. Whether a particular injury causes an employee to be disabled for employment, and the duration of that disability, are medical issues which must be established, probative and substantial evidence.[15] The Office is not precluded from adjudicating

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[11] The Office procedure manual provides that, after a claimant has been working for 60 days, the Office will determine whether her actual earnings fairly and reasonably represent her wage-earning capacity and, if so, shall issue a formal decision no later than 90 days after the date of return to work. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

[12] *See William D. Emory, supra* note 7 (grandfather's babysitting position was designed for his particular needs).

[13] *See Monique L. Love*, *supra* note 8 (appellant's position was "sheltered" designed only for her particular needs).

[14] "The Office may use any convenient date for making the comparison as long as both rates are in effect on the date used for comparison." 20 C.F.R. § 10.403(d).

[15] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.[16]

In this case, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed disability for 11 hours during the period May 21 through June 13, 2003 and her accepted emotional condition.[17] The Board has held that the mere belief that a condition was caused or aggravated by employment factors or incidents is insufficient to establish a causal relationship between the two.[18] The Board will not require the Office to pay compensation for disability in the absence of 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.[19]

ANALYSIS -- ISSUE 2

The Office accepted that appellant experienced migraines and myalgia and myositis. Appellant sought compensation for her ongoing headaches on March 25 and June 3, 2004. The Board finds that appellant has failed to submit rationalized medical evidence establishing that she was disabled on March 25 and June 3, 2004 due to her accepted conditions.

Appellant submitted Dr. Pappas' treatment note dated December 16, 2003 which indicated that her headaches were less severe and frequent but still experienced headaches on a weekly basis. The Board finds that this treatment note is insufficient to establish her claim for wage loss on March 25 or June 3, 2004 as the report predates the days claimed.

Dr. Pappas' July 14, 2004 disability certificate revealed that appellant was under his care on April 26, 2004 and that she would be able to return to work on April 27, 2004. This disability certificate is insufficient to establish appellant's claim for wage loss because he did not provide a diagnosis or find appellant disabled for work on the dates claimed. The Office utilized this report to grant benefits for April 26, 2004. It is not sufficient, however, to support disability for March 25 or June 3, 2004.

Appellant submitted treatment notes that were signed by someone with an illegible signature which indicated that she suffered from daily dull headaches. These treatment notes are insufficient to establish appellant's claim because it is not clear that they are from a physician.[20]

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[16] *See Sharon C. Clement*, 55 ECAB ___ (Docket No. 01-2135, issued May 18, 2004) at n.10, slip op. at 5; *Cf. Elsie L. Price*, 54 ECAB ___ (Docket NO. 02-755, issued July 23, 2003) (acceptance of disability for an extended period of time was sufficient to establish that modification of the wage-earning capacity determination was warranted).

[17] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

[18] *Id*.

[19] *Fereidoon Kharabi, supra* note 15.

[20] *Vickey C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572 (1988) (reports not signed by a physician lack probative value).

Therefore, the Board finds that, as the treatment notes lack proper identification, they do not constitute probative medical evidence sufficient to establish appellant's burden of proof.

Appellant has failed to submit sufficient medical evidence establishing that she was disabled for work on March 25 and June 3, 2004 due to her accepted conditions. She has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128 of the Act,[21] 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.[22] 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.[23] 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 of the merits.[24]

ANALYSIS -- ISSUE 3

On September 2, 2004 appellant requested reconsideration of the Office's August 3, 2004 decision, denying wage loss for disability on March 25 and June 3, 2004. The relevant underlying issue in this case is whether appellant established that she was disabled on the claimed dates due to her accepted employment injuries.

In support of her reconsideration request, appellant submitted Dr. Pappas' August 13, 2004 medical report in which he noted that she experienced migraine headaches, headache facial pain and myofascial pain syndrome. In an August 27, 2004 letter, Dr. Pappas stated that appellant was being treated for her migraine headaches and that she was able to work but if she experienced a severe breakthrough migraine, she may have to be out of work occasionally. The Board finds that these reports are insufficient to establish appellant's claim inasmuch as they do not address the relevant issue of her disability on March 25 and June 3, 2004. The Board has held that the submission of evidence or argument which is not relevant to the case record does not constitute a basis for reopening a case.[25] As such, Dr. Pappas' report and letter are insufficient to warrant further merit review of appellant's claim.

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[21] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[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).

[22] 20 C.F.R. § 10.606(b)(1)-(2).

[23] *Id*. at § 10.607(a).

[24] *Id*. at § 10.608(b).

[25] *Edward W. Malaniak*, 51 ECAB 279 (2000).

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. Further, she failed to submit relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that she was not entitled to a merit review.[26]

CONCLUSION

The Board finds that the Office properly determined that appellant's actual earnings as a logistical mobilization plans assistant fairly and reasonably represents her wage-earning capacity effective January 12, 2004. The Board further finds that appellant failed to establish that she was disabled on March 25 and June 3, 2004 due to her March 7, 1995 employment injuries. The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 20, August 3 and March 25, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 12, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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

[26] *See James E. Norris*, 52 ECAB 93 (2000).