United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 06-24**
	)	**Issued: August 3, 2006**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Ocala, FL, Employer	)	

Appearances:
Ronald S. Webster., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On October 3, 2005 appellant timely appealed nonmerit decisions of the Office of Workers' Compensation Programs dated April 12 and September 20, 2005 which denied her requests for reconsideration and a merit decision dated December 14, 2004 which denied modification of her claim for payment of disability compensation for the period on and after April 13, 2001. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant is entitled to wage-loss compensation for a claimed recurrence of disability on and after April 13, 2001 causally related to her accepted work injury; and (2) whether the Office properly refused to reopen appellant's claim for further merit review under 5 U.S.C. § 8128(a) in its April 12 and September 20, 2005 decisions.

FACTUAL HISTORY

This case is on appeal to the Board for the second time.[1] On April 28, 1993 appellant, then a 44-year-old revenue agent, was involved in a work-related motor vehicle accident. The Office accepted the conditions of cervical strain and left knee contusions as being due to the work-related accident and subsequently included the condition of aggravation of cervical spondylosis. She was out of work from April 29 to May 2, 1993 due to her work-related motor vehicle accident and returned to full-time work as a revenue agent eventually moving from work in the field to work in the office. Appellant retired from the employing establishment and was in receipt of annuity benefits on December 17, 2000. In September 2001, she started working as a part-time substitute teacher.

By decision dated May 27, 2003, the Board affirmed the Office's April 12, 2001 decision terminating appellant's compensation effective April 12, 2001 and the Office's November 12 and February 20, 2002 decisions denying appellant's recurrence of disability claim on May 16, 2000. The Board, however, found that a conflict in medical opinion existed between Dr. Michael Gordon, appellant's Board-certified internist, and Dr. Jack L. Gresham, a Board-certified orthopedic surgeon and Office referral physician, over whether residuals from the employment injury of April 28, 1993 had ceased. Thus, the Board remanded the case to the Office for further development to resolve the issue of whether appellant had any residuals causally related to her employment injury after April 12, 2001.[2] The facts and the history surrounding the prior appeal are set forth in the prior decision and are hereby incorporated by reference.

Pursuant to the Board's instruction, the Office referred appellant along with the case record, a statement of accepted facts dated September 3, 2003 and a series of questions, to Dr. Robert S. Roberts, a Board-certified orthopedic surgeon, for an impartial medical examination and to resolve the conflict in medical opinion. In a report dated November 6, 2003, he noted his review of the record, presented his examination findings and provided an impression of cervical spondylosis with C5-6, C7-T1 disc herniations eccentric to the left, right carpal tunnel syndrome and possible right cubital tunnel syndrome. Dr. Roberts opined that appellant's accepted knee contusion had resolved but the cervical strain and associated injuries to the cervical spine were permanent in nature. He further opined that appellant's cervical condition had plateaued and that no additional intervention treatment was possible as appellant had declined surgical treatment in the past for her cervical spine and was not interested in any surgery at this time. Dr. Roberts noted that appellant was currently working as a part-time teacher and opined that she was capable of working in a sedentary or light-duty position for eight hours with restrictions of lifting no greater than five pounds and no frequent bending/stooping.

The Office subsequently accepted the condition of cervical strain/aggravation of cervical spondylosis and reopened appellant's claim for medical treatment of such condition. As

[1] Docket No. 03-618 (issued May 27, 2003).

[2] The Board additionally noted that appellant's third-party surplus, which she received from a third-party settlement, must be absorbed prior to the Office paying of monetary or medical benefits.

appellant's knee condition had resolved, the Office did not authorize any medical treatment for the knee contusion.

On December 10, 2003 appellant filed a Form CA-7 claim for wage-loss compensation for the period April 13, 2001 to the present. In a December 31, 2003 letter, the Office advised appellant that medical evidence establishing disability from work during the entire period claimed was needed.

In a February 13, 2004 letter, appellant's attorney advised that he was submitting several reports from appellant's file which showed that she has severe problems with her residuals from her work injury. This included a February 9, 2000 report from Dr. Michael J. Broom, a Board-certified orthopedic surgeon; a June 20, 2000 report from Dr. Marc J. Gerber, a Board-certified physiatrist, a November 29, 2001 report from Dr. Sheryl Lavender, a neurologist, and an April 10, 2002 report from Dr. Michael Gordon, a hand surgeon, all which were previously of record.

New reports submitted included a March 4, 2004 report from Dr. Gordon diagnosing cervical disc herniation (C6-7 and C7-T1) with C7-8 radiculopathy and chronic pain syndrome and lumbar discogenic disease with chronic pain syndrome. Appellant's physical abilities are not addressed.

In a March 17, 2004 report, Dr. Alexander C. Jungreis, a Board-certified neurologist, provided a detailed examination of appellant's lumbar and cervical spinal conditions along with his treatment plan and recommendations.

By decision dated April 16, 2004, the Office denied appellant's claim for compensation for the period April 13, 2001 onward as the evidence failed to support any disability during the period claimed.

In a September 27, 2004 letter, appellant, through her attorney, requested reconsideration. Her attorney resubmitted the medical evidence previously reviewed in the Office's April 16, 2004 decision. He also submitted copies of letters dated February 13, March 29 and April 21, 2004, in which he argued that appellant was unable to perform the duties of a revenue agent and provided a copy of appellant's statement entitled "Re-Ability to Resume Work."

New medical evidence consisted of a March 2, 2004 bilateral screening mammogram, a June 29, 2004 physical therapy report and physical therapy flow sheets from December 15, 2003 to March 30, 2004, and a November 8, 2004 progress report and notice of claimant disability status, in which Dr. Gordon noted that appellant had not reached maximum medical improvement and was on disability due to chronic pain syndrome. Dr. Gordon also provided an assessment of chronic neck pain/degenerative disc disease with radiculopathy and painful right arm/questionable strain.

In an August 30, 2004 report, Dr. Jungreis advised that appellant's condition had not changed since she was last seen on April 16, 2004 and opined that maximum medical improvement was reached. He diagnosed cervical radiculopathy with positive electromylogram

and diagnostic studies. Dr. Jungreis noted that appellant was currently working as a substitute teacher as full-time duty was overwhelming for her. She opined that appellant should continue along those lines.

By decision dated December 14, 2004, the Office denied modification of its previous decision.

In a March 14, 2005 letter, appellant requested reconsideration. Submitted were four identical statements from four different employing establishment revenue agents, dated February 24, March 3 and 4, 2005, who stated that the duties of a revenue agent involved lifting books, records and electronic equipment that "may very easily be of a weight of 10 pounds or more." Appellant's attorney argued that the witness statements support that appellant's job required her to lift 10 or more pounds.

Physical therapy reports dated November 29, 2004 to January 26, 2005 were also provided.

By decision dated April 12, 2005, the Office denied reconsideration finding that the evidence submitted was insufficient to warrant further merit review.

In a July 20, 2005 letter, appellant requested reconsideration and submitted a July 18, 2005 letter from Louise Hawthorne, team manager, who attested to the duties of an Internal Revenue Agent and provided her observation of appellant's physical condition when she worked for her. Ms. Hawthorne opined that, based on her observations and personal interactions with appellant, at the time appellant left the employing establishment, she was not able to meet the physical or mental demands of the Internal Revenue Agent position.

In a medical report dated July 11, 2005, Dr. Gordon advised that appellant has an established diagnosis of cervical degenerative disc disease with nerve compression and chronic radiculopathy to the right arm. He discussed the results of appellant's July 8, 2005 examination and why appellant's physical therapy should be continued.

By decision dated September 20, 2005, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

As used in the Federal Employees' Compensation Act,[3] the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[4] A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which

[3] 5 U.S.C. §§ 8101-8193.

[4] 20 C.F.R. § 10.5(f) (1999); *see Prince E. Wallace*, 52 ECAB 357 (2001); *see e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[5]

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[6] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[7] 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 employees to self-certify their disability and entitlement to compensation.[8]

ANALYSIS -- ISSUE 1

Based on Dr. Roberts' impartial medical opinion, the Office found that appellant had continuing residuals due to the accepted conditions of cervical strain and aggravation of cervical spondylosis and reopened her claim for medical treatment.[9] Appellant subsequently filed a claim for wage-loss compensation for the period April 13, 2001 to the present. Thus, in order to establish disability for the period claimed, appellant must submit rationalized medical evidence demonstrating that she was disabled from work due to her accepted employment injury.[10]

At the outset, the Board notes that the issue of whether a particular injury causes an employee to be disabled for employment and the duration of that disability is a medical issue.[11] Thus, the medical evidence which fails to address the relevant period of disability claimed, Dr. Broom's February 9, 2000 report and Dr. Gerber's June 20, 2000 report, or which contain no discussion on appellant's work abilities, Dr. Gordon's November 8, 2004 progress report and notice of claimant disability status, physical therapy reports and flow sheets, and the nonmedical

[5] 20 C.F.R. § 10.5(x).

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

[7] *Id.*

[8] *Id.*

[9] The Board notes that the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. *See generally James F. Weikel*, 54 ECAB 660 (2003) (to terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment).

[10] *Donald E. Ewals*, 51 ECAB 428 (2000).

[11] The record indicates that appellant returned to regular duty and used an ergonomic chair after her employment injury. Appellant retired about December 17, 2000.

evidence submitted, appellant's statement, her attorney's assertions and witness statements, are insufficient to meet appellant's burden.[12]

The Board notes that, in his November 6, 2003 report, Dr. Roberts, the impartial medical examiner, reviewed the medical records, statement of accepted facts and set forth his physical examination findings. He opined that appellant's cervical condition was permanent in nature and had plateaued. Dr. Roberts additionally opined that, although appellant was working as a part-time teacher, she was capable of working in a sedentary or light-duty position for eight hours with restrictions on lifting and no bending/stooping.

The Board finds that Dr. Roberts' opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant but also reviewed her medical records and reported accurate medical and employment histories. Accordingly, Dr. Roberts opinion that appellant is capable of performing a sedentary or light-duty position for eight hours with restrictions is accorded special weight.[13] This appears to be consistent with the requirements of the employing establishment position that appellant held when she retired.

The reports appellant submitted are insufficient to overcome the weight of Dr. Roberts opinion or to create a new conflict in the medical evidence. As previously noted, some of the evidence submitted by appellant in support of her claim that she was disabled from work on and after April 13, 2001 due to her accepted employment injury does not address the issue at hand. Additionally, the Board notes that Dr. Lavender's November 29, 2001 report and Dr. Gordon's April 10, 2002 report were previously of record and addressed by the Board in its decision of May 27, 2003. As this matter was previously adjudicated by the Board, absent new medical evidence, the subject matter reviewed in the May 27, 2004 decision is *res judicata*.[14] Additionally, the Board notes that Dr. Gordon was on one side of the conflict resolved by Dr. Roberts and did not otherwise present new findings or rationale to support his opinion.[15]

In his March 17, 2004 report, Dr. Jungreis does not address appellant's work abilities; thus, his report is irrelevant to the issue at hand.[16] However, in his August 30, 2004 report, Dr. Jungreis noted that appellant was working as a substitute teacher as full-time duty was overwhelming for her and opined that she should continue working in that capacity. As

[12] *See Fereidoon Kharabi*, *supra* note 6.

[13] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Bryan O. Crane*, 56 ECAB ___ (Docket No. 05-232, issued September 2, 2005); *Gary R. Sieber*, 46 ECAB 215 (1994).

[14] *See Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998); *Hugo A. Mentink*, 9 ECAB 628 (1953).

[15] *See Jaja K. Asaramo*, 55 ECAB ___ (Docket No. 03-1327, issued January 5, 2004). Submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is, generally, insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.

[16] *See Fereidoon Kharabi*, *supra* note 6.

previously noted, findings on examination are generally needed to support a physician's opinion that an employee is disabled for work.[17] Dr. Jungreis, however, failed to relate his findings to appellant's inability to work in a full-time capacity or provide any explanation as to why appellant could no longer perform full-time duty as a result of her work injury. The Board has held that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[18] Thus, Dr. Jungreis' reports are insufficient to overcome the weight of Dr. Roberts' opinion or to create a new conflict in the medical evidence.

Since appellant has not met her burden of proof to establish that she sustained a recurrence of disability for the period on and after April 13, 2001 causally related to her employment injury, she has not established employment-related disability during the claimed period.

LEGAL PRECEDENT -- ISSUE 2

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[19] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[20] Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[21]

ANALYSIS -- ISSUE 2

The issue before the Board is not whether appellant has established her claim, but whether she met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring the Office to reopen her claim for merit review.

In both her March 14 and July 20, 2005 reconsideration requests, appellant did not show that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Appellant, however, submitted new

[17] *See Dean E. Pierce*, 40 ECAB 1249 (1989).

[18] See *Fereidoon Kharabi*, *supra* note 6.

[19] 20 C.F.R. § 10.608(a) (1999).

[20] 20 C.F.R. § 10.606(b)(1)-(2).

[21] 20 C.F.R. § 10.608(b).

evidence in her March 14 and July 20, 2005 reconsideration requests. In her March 14, 2005 request for reconsideration, appellant submitted four witness statements attesting to the duties of appellant's position along with physical therapy reports from November 29, 2004 to January 26, 2005. In her July 20, 2005 request for reconsideration, appellant submitted a July 18, 2005 letter from Ms. Hawthorne and a July 11, 2005 medical report from Dr. Gordon.

It is well established that the question of whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[22] Thus, the underlying issue is medical in nature. Evidence of the physical requirements of appellant's position from laypersons or a laypersons observation of whether appellant could or could not perform the duties of such position, however, do not constitute a medical opinion addressing the issue of whether appellant has any disability commencing on or after April 13, 2001 due to her accepted work-related injury of April 28, 1993. Thus, such evidence does not constitute new and relevant evidence as any claim of appellant's work duties and her ability to perform such from layperson are not relevant to the case. Additionally, the new medical evidence submitted failed to address whether the work injury of April 28, 1993 prevented appellant from performing her work duties for the period in question. Neither the physical therapy reports nor Dr. Gordon's medical report of July 11, 2005 provided any discussion of appellant's disability or relate her disability and objective evidence to the April 28, 1993 work injury. Thus, such evidence does not constitute new and relevant evidence with respect to appellant's contention that she could no longer perform the duties of her position on and after April 13, 2001 due to the effects of the April 28, 1993 work injury.

As 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 relevant and pertinent evidence not previously considered by the Office, the Office properly denied her requests for reconsideration in its April 12 and September 20, 2005 decisions.

CONCLUSION

The Board finds that appellant has not established entitlement to wage loss or leave buy back on and after April 13, 2001. The Board further finds that the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) in its April 12 and September 20, 2005 decisions.

[22] *See Fereidoon Kharabi*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated September 20 and April 12, 2005 and December 14, 2004 are affirmed.

Issued: August 3, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board