

FACTUAL HISTORY

This case was before the Board on a prior appeal.¹ The facts and the history of the case are contained in the Board's prior decision and are incorporated herein by reference. On April 17, 2002 appellant, then a 74-year-old clerk, filed a traumatic injury claim alleging that on March 19, 2002 she aggravated a preexisting back subluxation while carrying empty buckets and lifting boxes, which caused pain in her shoulder and back. The Office accepted the claim for a thoracic subluxation. Appellant stopped work on March 21, 2002.² She filed a recurrence claim on July 24, 2002 and a claim for wage-loss compensation (Form CA-7) for the period March 20 to June 19, 2002. By decision dated October 29, 2002, the Office denied appellant's claim for recurrence of disability. On August 22, 2003 the Board found the evidence insufficient to support appellant's claimed period of disability and affirmed the October 29, 2002 Office decision.

On January 18, 2005 the Office received an August 31, 2004 report by Dr. Richard E. Rattay, appellant's treating Board-certified orthopedic surgeon, who diagnosed "impingement pathology with supraspinatus and subscapularis tendinosis, possible even partial rotator cuff tear" based upon review of reports and a magnetic resonance imaging (MRI) scan. Dr. Rattay attributed appellant's shoulder pain, disuse dysfunction and other problems to the two employment injuries sustained on March 19, 2002. He opined that appellant sustained a permanent injury as a result of her employment injury, "which consists of progressive left shoulder arthritic change, probable labral tear, partial rotator cuff tear and impingement syndrome." Dr. Rattay also opined that appellant "has a loss of use of her left arm at or above the shoulder level and has constant pain" including "loss of wage-earning capacity due to disuse and dysfunction of her left shoulder."

On April 29, 2005 the Office accepted appellant's claim for dislocated thoracic vertebra, not to exceed May 31, 2002, left shoulder osteoarthritis, left shoulder adhesive capsulitis and left shoulder enthesopathy.³ On May 5, 2005 appellant filed a claim for wage-loss compensation for the period March 21, 2002 to the present.

On August 9, 2005 Dr. Rattay diagnosed severe degenerative joint disease of the left shoulder. He opined that appellant was unable to use her left arm or shoulder for any work activity.

The Office paid appellant wage-loss compensation for the period August 31, 2004 to November 26, 2005 and subsequently placed her on the periodic rolls for temporary total disability.

¹ Docket No. 03-713 (issued August 22, 2003).

² The employing establishment terminated her employment effective June 14, 2002 because she was absent without leave (AWOL) following the work injury for an extended period of time.

³ The Office issued a decision vacating prior decisions denying appellant's claim for a shoulder condition.

On January 24, 2006 the Office received additional medical and factual evidence from appellant. In a July 31, 2002 report Dr. Pamela Maben, a treating Board-certified internist, diagnosed tendinitis, chronic back pain and sleep apnea. She noted that appellant had not been released to go back to work until June 19, 2002 due to her medical problems. The Office also received a billing statement for chiropractor treatment received March 22 to June 10, 2002 and a billing statement by Dr. Howard A. Aks, a treating Board-certified anesthesiologist with a subspecialty in pain medication, for treatment given on June 4 and 18, 2002.

In a letter dated January 31, 2006, the Office informed appellant that the medical evidence of record was insufficient to support her claim for wage-loss compensation due to her thoracic spine and shoulder injuries for the period March 19, 2002 through August 30, 2004. The Office advised appellant as to the medical information to submit. She submitted reports dated March 26, 2001, April 1 and June 10, 2002 from Dr. Carlos Bateman, a chiropractor, who released appellant to work effective April 1, 2002 and noted that appellant could not lift more than 20 pounds. On June 10, 2002 Dr. Bateman released appellant to light-duty work effective June 11, 2002 with restrictions of no lifting more than 20 pounds.

In a report dated March 4, 2006, Dr. Rattay stated that appellant was disabled from work for the period March 2004 through August 31, 2004.

By decision dated March 9, 2006, the Office awarded 8 hours of continuation of pay for April 1 and May 1, 2002 and 76 hours of compensation for medical appointments during the period May 3, 2002 to August 12, 2004. The Office denied appellant's request for wage-loss compensation for the remaining disability claimed between March 19, 2002 to August 30, 2004 on the grounds that the record was devoid of any supporting medical evidence.

On October 10, 2006 the Office received appellant's reconsideration requests dated August 25 and September 1, 2006 containing arguments that were previously considered by the Office.

By decision dated November 14, 2006, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of proof to establish the essential elements of her claim by the weight of the evidence.⁵ For each period of disability claimed, the employee has the burden of establishing that she was disabled for work as a result of the accepted employment injury.⁶ Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Amelia S. Jefferson*, 57 ECAB ____ (Docket No. 04-568, issued October 26, 2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁶ See *Amelia S. Jefferson*, *supra* note 5. See also *David H. Goss*, 32 ECAB 24 (1980).

evidence.⁷ The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.⁸

Under the Act the term “disability” means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁹ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹⁰ An employee who has a physical impairment causally related to her federal employment, but who nonetheless has the capacity to earn the wages she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.¹¹ When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wages.¹²

To meet this burden, a claimant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician’s opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factor(s).¹³ The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁴

ANALYSIS -- ISSUE 1

The Office accepted appellant’s claim for dislocated thoracic vertebra, not to exceed May 31, 2002, left shoulder osteoarthritis, left shoulder adhesive capsulitis and left shoulder enthesopathy. She filed a claim for wage-loss compensation for the period March 19, 2002 through August 30, 2004. The Office advised appellant that she must support her disability for work with medical evidence. In order to establish disability for the period March 19, 2002 through August 30, 2004, appellant must submit rationalized medical evidence demonstrating that she was disabled for work due to her employment injury. The Office found that appellant

⁷ See *Edward H. Horton*, 41 ECAB 301 (1989).

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

⁹ *S.M.*, 58 ECAB ____ (Docket No. 06-536, issued November 24, 2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

¹⁰ *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

¹¹ *Merle J. Marceau*, 53 ECAB 197 (2001).

¹² *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

¹³ *A.D.*, 58 ECAB ____ (Docket No. 06-1183, issued November 14, 2006).

¹⁴ *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

was entitled to compensation for 8 hours of continuation of pay for April 1 and May 1, 2002 and 76 hours of compensation for medical appointments during the period May 3, 2002 to August 12, 2004. The issue is whether appellant submitted sufficient medical evidence to establish her disability for the remaining dates during the period March 19, 2002 through August 30, 2004.

Appellant submitted a July 31, 2002 report by Dr. Maben; a March 4, 2006 report by Dr. Rattay; reports dated March 26, 2001, April 1 and June 10, 2002 by Dr. Bateman; a chiropractor; a June 5, 2002 MRI scan of the left shoulder; a May 12, 2002 thoracic spine x-ray interpretation; and a June 4, 2002 report by Dr. Aks. Dr. Maben diagnosed tendinitis, chronic back pain and sleep apnea. She indicated that appellant was not released to work until June 19, 2002 due to her medical problems. Dr. Maben's opinion is insufficient to show that appellant was disabled from March 19 to June 19, 2002 as the Office has not accepted the conditions of tendinitis and chronic back pain and the opinion did not address causal relationship, which would have assisted appellant in meeting her burden of proving the causal nexus.

The record contains reports dated August 31, 2004 and August 9 and March 4, 2006 by Dr. Rattay. In the August 31, 2004 report, he diagnosed "impingement pathology with supraspinatus and subscapularis tendinitis, possible even partial rotator cuff tear" due to her March 19, 2002 employment injury, Dr. Rattay opined that appellant "has a loss of use of her left arm at or above the shoulder level and has constant pain" including "loss of wage-earning capacity due to disuse and dysfunction of her left shoulder." Dr. Rattay diagnosed severe degenerative joint disease of the left shoulder in his August 9, 2005 report. He opined that appellant was unable to use her left arm or shoulder for any work activity. In the March 4, 2006 report, Dr. Rattay stated that appellant was totally disabled for the period March 19, 2002 through August 31, 2004. The August 31, 2004 and August 9, 2006 reports are insufficient to support appellant's claim that she was totally disabled as he did not address the issue of whether appellant was totally disabled from working and why. The August 31, 2004 report was silent as to the issue of disability while the August 9, 2005 report merely noted that appellant was unable to use her left shoulder or arm for any work activity. In a March 4, 2006 report, Dr. Rattay states that appellant was totally disabled for the period March 19, 2002 through August 30, 2004 with no diagnosis or explanation supporting his conclusion that appellant was totally disabled for this period. These reports do not provide any explanation as to why appellant's accepted employment injuries prevented her from performing the duties her position for the period March 19, 2002 through August 30, 2004.¹⁵ The Board has held that a medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.¹⁶ Dr. Rattay's reports are insufficient to establish disability for the period March 19, 2002 through August 30, 2004.

¹⁵ See *Sandra D. Pruitt*, 57 ECAB ____ (Docket No. 05-739, issued October 12, 2005); *Michael E. Smith*, 50 ECAB 313 (1999) (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).

¹⁶ *T.F.*, 58 ECAB ____ (Docket No. 06-1186, issued October 19, 2006).

Appellant also submitted various reports by Dr. Bateman and Dr. Nicholson, treating chiropractors. However, as they did not diagnose subluxation by x-ray, they are not physicians as defined by 5 U.S.C. § 8101(2).

Appellant had the burden of proving by the preponderance of the reliable, probative and substantial evidence that she was disabled for work as a result of her employment injury. The Board finds that appellant has failed to establish her entitlement to compensation due to her accepted thoracic spine and shoulder injuries for the period March 19, 2002 through August 30, 2004, except for those dates accepted by the Office and the hearing representative.

LEGAL PRECEDENT -- ISSUE 2

The Act¹⁷ provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.¹⁸ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.¹⁹

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.²⁰

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.²¹ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.²²

ANALYSIS -- ISSUE 2

The Office received appellant's August 25 and September 1, 2006 requests for reconsideration on October 10, 2006. Appellant has not shown that the Office erroneously

¹⁷ 5 U.S.C. § 8101 *et seq.*

¹⁸ 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB ____ (Docket No. 06-121, issued June 6, 2006).

¹⁹ 20 C.F.R. § 10.605.

²⁰ 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB ____ (Docket No. 06-868, issued June 16, 2006).

²¹ 20 C.F.R. § 10.607(a). *See Joseph R. Santos*, 57 ECAB ____ (Docket No. 06-452, issued May 3, 2006).

²² 20 C.F.R. § 10.608(b). *See Candace A. Karkoff*, 56 ECAB ____ (Docket No. 05-677, issued July 13, 2005).

applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by the Office. Appellant did not submit any new medical evidence in connection with her reconsideration requests which addresses the relevant issue of whether she was entitled to wage-loss compensation for the period March 19, 2002 through August 30, 2004. In addition, appellant's reconsideration requests contain arguments that are cumulative and repetitive of contentions that were presented and rejected by the Office in its previous decisions. The Board finds that the Office properly refused to reopen appellant's claim for reconsideration.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her August 25 and September 1, 2006 requests for reconsideration.

CONCLUSION

The Board finds that appellant has not established that she was disabled for work and entitled to wage-loss compensation for the period March 19, 2002 through August 30, 2004. The Board further finds that the Office properly refused to reopen her 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 decisions of the Office of Workers' Compensation Programs dated November 14 and March 9, 2006 are affirmed.

Issued: June 12, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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