United States Department of Labor
Employees' Compensation Appeals Board

RONALD I. NANCE, Appellant	)	
and	)	**Docket No. 04-125**
	)	**Issued: June 14, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Long Island, NY, Employer	)	

Appearances:
Ronald I. Nance, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 20, 2003 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated September 11 and October 8, 2003. The September 11, 2003 decision denied modification of a March 19, 2002 decision which denied compensation for intermittent disability commencing March 25 through December 17, 2000 and for a recurrence of disability commencing January 19, 2001. The decision dated October 8, 2003 denied appellant's reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over both the merits of the case.

ISSUE

The issues on appeal are: (1) whether appellant established entitlement for wage-loss compensation for intermittent disability for the period March 25 through December 17, 2000; (2) whether appellant established a recurrence of disability commencing January 19 through August 4, 2001 and; (3) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 3, 1996 appellant, then a 43-year-old mail handler, filed a traumatic injury claim, alleging that on May 31, 1996 he sustained injuries to his low back, lower right leg and knee as a result of lifting a sack of bulk mail while in the performance of duty. The Office accepted appellant's claim for a herniated disc at L4-5. On July 3, 1996 appellant underwent an authorized discectomy. On September 9, 1996 appellant returned to work as a modified mail handler.[1] In a November 21, 1996 decision, the Office determined that the position of a modified mail handler fairly and reasonably represented appellant's wage-earning capacity. The Office continued to develop appellant's claim and on September 30, 1999 the claim was expanded to include a cervical strain.[2]

In a September 18, 2000 report, Dr. Mark C. Yates, a Board-certified orthopedic surgeon, indicated that x-rays of the lumbar spine showed anterior spurring at L4. He opined that appellant had low back pain and a possible herniated nucleus pulposus. He stated that appellant should have one week of work with no more than four hours a day, progressing to full days over the next few weeks.[3]

In an October 4, 2000 report, Dr. Yates opined that the diagnostic reports showed that appellant had postoperative changes with some disc bulging but good removal of the preop hypertrophic ligaments and no obvious disc pathology. He recommended cage fusions at a L4-5 since appellant had single level disease with persistent symptoms.[4] In an October 4, 2000 disability certificate, Dr. Yates indicated that appellant had been out of work on October 3, 2000 due to back and neck pain.

In a November 6, 2000 treatment note, Dr. Kyle Cabbell, a Board-certified neurological surgeon, indicated that there was no need for surgery to appellant's neck as he did not have neurological signs of myelopathy. The physician opined that, if the reports from diagnostic testing showed cord signal, then appellant would need surgery because of severe stenosis. In a November 7, 2000 treatment note, Dr. Cabbell restricted appellant to no lifting, pushing or pulling greater than 10 pounds.

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[1] Appellant initially treated with Dr. Paul D. Harkins, a Board-certified orthopedic surgeon, who diagnosed acute severe low back pain with lumbar disc rupture. In a duty status report dated February 3, 1997, Dr. Harkins provided restrictions indicating that appellant could perform office-type work with no working on concrete floor, standing and sitting when needed and intermittent lifting up to 20 pounds.

[2] The Office determined that this occurred as the result of the hyperflexion of appellant's neck during a myelogram that was being administered in relation to his accepted lumbar injury.

[3] He placed appellant on permanent light duty in an October 12, 1999 treatment note.

[4] An October 15, 1999 magnetic resonance imaging (MRI) scan was read by Dr. William B. Yeazey, a Board-certified diagnostic radiologist, as showing that appellant had right-sided disc herniations at C3-4 and C4-5 and a central and left-sided disc herniation at C5-6. The physician noted cord compression due to disc herniations and spurring at C5-6.

In a December 11, 2000 decision, the Office denied appellant's claim for compensation for the period September 16 to October 3, 2000, with the exception of eight hours on September 18, 2000. The Office found that the evidence did not establish that appellant was disabled for work or suffered a loss of capacity to earn wages due to the accepted injury.

On December 27, 2000 the Office vacated the December 11, 2000 decision, finding that it improperly determined that the position of modified mail handler represented appellant's wage-earning capacity. The Office determined that appellant was entitled to wage loss for the period September 19 to 25, 2000 for four hours a day and for lost time from work on October 3, 2000.

In a January 19, 2001 treatment note, Dr. Cabbell indicated that appellant was seen with pain in his neck and upper extremities due to herniated discs at C4-5 and C5-6. The physician was informed by appellant that his physical restrictions were not being honored. Dr. Cabbell advised keeping appellant off work until the employing establishment complied. In a disability certificate of the same date, he indicated that appellant would be out of work until his next appointment on February 20, 2001. On February 20, 2001 Dr. Cabbell opined that appellant was unable to perform the routine functions of his position without being in severe pain. He stated that, "[f]or that reason, I will continue to keep him out of work based on his report of severe pain." Dr. Cabbell also provided a disability slip advising that he would keep appellant from work from February 20, 2001 until his next appointment on March 20, 2001. In a March 19, 2001 treatment note, he again kept appellant off work until April 5, 2001.

Appellant filed several CA-7 forms for intermittent compensation for the periods of March 25 to December 17, 2000 and commencing January 19, 2001.

By letter dated April 10, 2001, the Office advised appellant that additional evidence was needed regarding his disability claim for March 25 to December 17, 2000. The Office noted that appellant had medical evidence of disability for the date of November 6, 2000 and advised that he would receive payment for this date. Appellant was allotted 30 days to submit the requested evidence.

In an April 24, 2001 treatment note, Dr. Cabbell advised that, as appellant's blood pressure was still elevated, he was unable to release appellant to work. In an April 24, 2001 disability certificate, he indicated that appellant would be under his care and out of work until August 2, 2001
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By decision dated June 7, 2001, the Office denied appellant's claim for intermittent wage loss from March 25 through December 17, 2000 and for a recurrence of total disability commencing on January 19, 2001.

In a letter dated July 13, 2001, appellant requested a request for a review of the written record and submitted additional evidence which was previously submitted.

In an August 8, 2001 report, Dr. Cabbell indicated that appellant could return to work with the previous restrictions listed in the February 12, 1999 CA-17 form.[5]

By decision dated January 2, 2002, the Office hearing representative affirmed the June 7, 2001 decision.[6]

On January 11, 2002 appellant requested reconsideration and submitted additional evidence. The additional evidence included an appointment profile, duplicates of earlier medical reports, a grievance, prescriptions and notes from physician's assistants. In a January 6, 2000 report, Dr. Yates reviewed appellant's light-duty position and indicated that appellant should not be sweeping and mopping, or running a vacuum cleaner and that anything that would exacerbate the low back should be avoided. He explained that since 1998 appellant had been restricted to intermittent lifting up to 20 pounds and office-type work with recommendations of no work on concrete floor unless on a rubber mat. He opined that appellant could do a job with some sitting and standing.

In a February 26, 2002 memorandum, the Office noted that appellant returned to work for four hours a day on September 18, 2000 for one week, and on September 25, 2000 returned to work for eight hours a day until he stopped completely on January 19, 2001.[7]

By decision dated March 19, 2002, the Office denied modification of its prior decisions.[8] On March 19, 2002 the Office also denied appellant's claim for consequential aggravation of preexisting hypertension. In a letter dated March 22, 2002, appellant requested a hearing, which was held on November 18, 2002.[9]

Appellant also submitted additional evidence including a September 18, 2002 report from Dr. David L. Simel, Board-certified in internal medicine, who diagnosed degeneration of intervertebral disc, displacement of cervical intervertebral disc without myelopathy, chronic low back pain and neck pain and opined that he did not expect appellant's condition to improve.[10] The physician indicated that appellant was physically unable to perform his duties as a mail handler and opined that he did "not expect him to be able to return to duties as a mail handler or limited duty." In an October 29, 2002 report, Dr. Simel indicated that appellant's condition was caused or aggravated by his employment activities and opined that due to appellant's extensive

[5] The February 12, 1999 CA-17 form is not of record.

[6] The Office hearing representative found that the medical evidence was not sufficient to meet appellant's burden of proof to establish entitlement to compensation for intermittent time lost from work from March 25, 2000 to December 17, 2000 and for recurrent total disability commencing on January 19, 2001.

[7] The Office paid appellant for eight hours on September 18, 2000.

[8] The Office found that the evidence was insufficient to modify the Office's denial of compensation for recurrent intermittent wage loss for the period from March 25, 2000 through December 17, 2000 and for recurrent total disability on January 19, 2001.

[9] Appellant did not specify which decision dated March 19, 2002 he was referring too.

[10] He began treating appellant on April 18, 2001.

L5 and cervical spine injuries, he was unable to perform his duties as a mail handler or do limited duty. In a December 12, 2002 duty status report, Dr. Simel opined that appellant could not perform his usual duties and indicated that the required pain medication affected appellant's concentration. In a January 21, 2003 report, Dr. Simel advised that appellant was unable to care for himself, to do normal activity or to do active work.[11]

By decision dated February 20, 2003, the Office hearing representative affirmed the Office's denial of appellant's claim for a consequential hypertension condition.

In letters dated March 3 and 15, 2003, appellant requested reconsideration and submitted additional evidence including a March 11, 2003 report, in which Dr. Simel opined that appellant's hypertension and chronic pain had been in poor control and remained in such condition until appellant was given methadone. Dr. Simel indicated that, with the improvement of appellant's pain control, appellant's hypertension improved as appellant's chronic pain due to his neck injury adversely affected appellant's hypertension.

By letter dated May 7, 2003, the Office advised appellant that he would be paid compensation commencing April 20, 2003. On May 16, 2003 appellant filed a CA-7 form for the period January 19 to August 4, 2001.

On June 17, 2003 the Office accepted appellant's claim for an aggravation of hypertension. In a letter dated July 1, 2003, the Office advised appellant that he would be paid compensation for July 29, 2002 and from September 22 to November 22, 2002.

On July 2, 2003 appellant requested reconsideration, and submitted additional medical evidence including a July 14, 2003 report in which Dr. Simel indicated that appellant had displacement of cervical intervertebral disc without myelopathy, hypertension, chronic pain and asthma and opined that due to the severity of appellant's pain from his neck injury and the instability of his cervical spine, he did not foresee appellant returning to work of any kind.

By decision dated July 22, 2003, the Office authorized compensation for intermittent wage loss from November 29 through December 13, 2002.

In a September 11, 2003 decision, the Office denied modification of the March 19, 2002 decision. The Office found that the evidence was insufficient to establish compensation for the intermittent hours for the period March 25 to December 17, 2000 and for recurrent disability from January 19 to August 4, 2001.

By letter dated September 13, 2003, appellant requested reconsideration and submitted evidence previously received by the Office.[12]

By decision dated October 8, 2003, the Office denied appellant's request for reconsideration on the grounds that his request neither raised substantial legal questions nor

[11] In his report he uses the word "able"; however, this appears to be a typographical error.

[12] He also noted that the claims examiner referred to a Dr. Smith and he was unaware of treatment by Dr. Smith.

included new and relevant evidence and, thus, it was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of the injury. 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 a federal employment injury, 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 in the Act.[13] 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.[14]

With respect to claimed disability for medical treatment, section 8103 of the Act provides for medical expenses, along with transportation and other expenses incidental to securing medical care for injuries.[15] Appellant would be entitled to compensation for any time missed from work due to medical treatment for an employment-related condition.[16] However, the Office's obligation to pay for medical expenses and expenses incidental to obtaining medical care, such as loss of wages, extends only to expenses incurred for treatment of the effects of any employment-related condition. Appellant has the burden of proof which includes the necessity to submit supporting rationalized medical evidence.[17]

ANALYSIS -- ISSUE 1

With the exception of the following dates, October 4, November 7 and 24, 2000, appellant has not submitted any medical evidence sufficient to establish that he was disabled for work for intermittent periods from March 25 to December 17, 2000.

The Office accepted that appellant missed time from work on September 19 to 25, 2000 for four hours a day and for eight hours a day on October 3 and November 6, 2000, and was paid compensation for these dates. As noted above, appellant is entitled to compensation for time missed from work to undergo medical treatment for an employment-related condition.[18] Appellant also provided documentation to support his missed time from work on October 4, November 7 and 24, 2000. Regarding October 4, 2000, Dr. Yates saw appellant and recommended a second opinion for L4-5 ray cage fusions and indicated that he was disabled on

[13] *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

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

[15] 5 U.S.C. § 8103(a).

[16] *Vincent E. Washington*, 40 ECAB 1242 (1989).

[17] *Dorothy J. Bell*, 47 ECAB 624 (1996).

[18] *See Charles E. Robinson*, 47 ECAB 536 (1996).

October 3, 2000. On November 7, 2000 appellant saw Dr. Cabbell who recommended a change in his physical restrictions. Additionally, appellant had an MRI scan of the cervical spine on November 24, 2000. The Board notes that these reports are related to appellant's accepted conditions of herniated disc at L4-5 or cervical strain and finds that these reports are sufficient to establish that appellant underwent medical treatment on those dates due to his accepted employment injury. Appellant, therefore, is entitled to compensation for the time he spent on these days undergoing medical treatment. The Office's September 11, 2003 decision will be modified to reflect this entitlement.[19]

LEGAL PRECEDENT- ISSUE 2

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[20]

Causal relationship is a medical issue,[21] and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.[22] The physician's opinion must be based on a complete factual and medical background of the claimant, 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.[23]

ANALYSIS -- ISSUE 2

In the instant case, appellant has not provided sufficient medical reports, based on objective findings, which establish that there has been a change in the nature and extent of his condition such that he can no longer perform his light-duty job and also has provided no evidence to establish that there has been a change in the nature and extent of his light-duty job requirements commencing January 19, 2001.

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[19] The Board notes that the record contains an April 24, 2001 treatment note from Dr. Cabbell indicating appellant's blood pressure was elevated. As the Office accepted aggravation of hypertension, appellant would also be entitled to compensation for time spent on this date undergoing medical treatment.

[20] *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[21] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[22] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[23] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

Appellant provided several reports from Dr. Cabbell dated January 19 through August 8, 2001, who noted that he was advised by appellant that his physical restrictions were not being honored at the employing establishment. He kept appellant off work until they were honored. However, the Board notes that the record does not contain any evidence to suggest that appellant's physical restrictions were not being honored. Dr. Cabbell also kept appellant off work because of pain. However, he offered no opinion to suggest that appellant's condition had changed or that his light-duty requirements had changed, and thus his opinion, therefore, is of diminished probative value to support the claim of a recurrence of total disability.

Appellant also provided several reports from Dr. Simel dated September 18, October 29 and December 12, 2002 and July 14, 2003. However, he did not provide any contemporaneous findings on examination for the claimed dates of recurrent disability commencing on January 19 through August 4, 2001. Dr. Simel did not provide any opinion, supported by medical rationale, explaining how the accepted conditions including the condition of hypertension caused any disability for the light-duty position appellant was performing at the time the alleged disability occurred. Dr. Simel did not provide any opinion that appellant was disabled for any period of employment as a result of the accepted aggravation of hypertension.[24]

In the instant case, none of the reports submitted by appellant contained a rationalized opinion to explain why appellant could no longer perform the duties of his light-duty position beginning January 19, 2001.[25] As appellant has not submitted any medical evidence showing that he sustained a recurrence of disability beginning January 19 to August 4, 2001 due to his accepted employment injury, he has not met his burden of proof.

LEGAL PRECEDENT -- ISSUE 3

Under section 8128(a) of the Federal Employees' Compensation Act,[26] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(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

[24] Appellant also submitted additional medical records that are not relevant to appellant's claim as they refer to periods before and after the periods of time in question and there is no indication that appellant could not perform his light-duty position on the above dates or that there was a change in his condition during these time periods.

[25] *See Charles E. Burke*, 47 ECAB 185 (1995).

[26] 5 U.S.C. § 8128(a).

"(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."[27]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[28]

ANALYSIS -- ISSUE 3

In the instant case, appellant disagreed with the Office's September 11, 2003 decision and requested reconsideration. He submitted documents that were previously submitted and reviewed by the Office. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.[29] Appellant did not provide any new or relevant evidence to establish that he was disabled during these time frames due to his accepted employment-related conditions.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advanced a relevant new argument not previously submitted or constituted relevant and pertinent new evidence not previously considered by the Office, the Office properly denied his request for reconsideration.

CONCLUSION

The Board finds that, with the exception of the dates of October 4, November 7 and 24, 2000 and April 24, 2001, appellant has not met his burden of proof to establish that he is entitled to compensation for intermittent hours for the period March 25 through December 17, 2000 and for recurrent total disability from January 19 through August 4, 2001. Further, the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[27] 20 C.F.R. § 10.606(b).

[28] 20 C.F.R. § 10.608(b).

[29] *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 8 and September 11, 2003 are hereby affirmed as modified and the case is remanded to the Office for proceedings consistent with the opinion of this Board.

Issued: June 14, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member