

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID P. WINTERS and U.S. POSTAL SERVICE,
LAKE SHORE POST OFFICE, Jacksonville, FL

*Docket No. 03-2178; Submitted on the Record;
Issued March 11, 2004*

DECISION and ORDER

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

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On November 15, 2002 appellant, then a 48-year-old mail carrier, filed an occupational disease claim alleging that on October 7, 2002 he became aware of two bulging discs in his neck, which were squeezing his spinal cord. He alleged that on December 21, 2002 he first realized that his condition was caused by factors of his employment. Appellant stated that he had carried mail for 15 years and that he carried a 35-pound satchel loaded with mail over his shoulder, which caused a loss of feeling (numbness) in his right hand. He also experienced pain and stiffness in his neck and shoulder with twisting and repetitive motions. In a December 2, 2002 letter, the employing establishment controverted the claim on the grounds that appellant failed to submit well-reasoned medical evidence to support his claim.

By letter dated December 10, 2002, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office advised him about the type of factual and medical evidence necessary to establish his claim.

In a January 5, 2003 response, appellant provided information as requested by the Office. He also resubmitted the November 15, 2002 description of his injury. Appellant also submitted additional factual and medical evidence regarding his claim.

By decision dated February 27, 2003 and finalized on March 3, 2003, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that he sustained

an injury caused by factors of his federal employment.¹ In a May 28, 2003 letter, appellant requested reconsideration and submitted factual and medical evidence in support thereof.

In a decision dated June 9, 2003, the Office denied reconsideration on the grounds that the evidence submitted was repetitious and immaterial and thus, insufficient to warrant a review of its prior decision.²

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician 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

¹ Although the Office's decision is dated February 27, 2003, the supervisory claims examiner did not approve the decision until March 3, 2003.

² On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952); 20 C.F.R. § 501.2(c).

³ 5 U.S.C. §§ 8101-8193.

⁴ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁵ See *Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

Appellant did not submit sufficient medical evidence to establish that he sustained an injury caused by factors of his federal employment. He submitted medical reports dated April 18, 2000 to April 2, 2002 from Dr. Sunil N. Joshi, a resident, which addressed his sinus condition, heart palpitations and numbness of the right thumb and index finger. He also submitted the April 18, 2000 report of Dr. Loren P. Murray, a Board-certified internist, agreeing with Dr. Joshi's findings. These reports do not address the cause of appellant's claimed condition or its relationship with his federal employment.

An August 22, 2002 report of Dr. Kenneth G. Nix, a Board-certified internist, revealed that appellant had gastroesophageal reflux, chronic and mildly progressive paresthesias of the right first and second digits probably due to cervical disc disease and chronic mechanical low back discomfort. In a report of the same date, Dr. Jennifer L. Ramsey⁷ indicated that appellant suffered from neck and lower back pain, numb fingers, mood-change and sinus problems. Her September 23, 2002 report addressed appellant's gastrointestinal condition and lower back pain. In her September 27, 2002 letter, Dr. Ramsey requested that appellant be excused from work on certain dates to have blood drawn and to undergo procedures involving anesthesia. The reports of Dr. Ramsey and Dr. Nix did not address the cause of appellant's neck pain or its relationship to his employment. A September 23, 2002 report of Dr. Mark A. Parkulo, an internist, addressed appellant's reflux esophagitis. An October 3, 2002 report of Dr. Timothy Woodward, a Board-certified internist, described a gastrointestinal procedure appellant underwent. These reports are not directly relevant to the claimed cervical condition.

In a November 7, 2001 report, Dr. Alan D. Savoy, a Board-certified internist, discussed appellant's sinus condition. Dr. Keels S. Jorn, a Board-certified internist, also addressed appellant's sinus condition in a report of the same date. A report dated November 22, 2000 from Dr. Kathleen A. Rowlett, a Board-certified internist, revealed that appellant had upper respiratory syndrome. Similarly, Dr. Eric M. Ward, a Board-certified internist, found that he had an upper respiratory infection in a November 22, 2000 report. These medical reports do not relate to the claimed cervical condition.

In a November 15, 2001 report, Dr. Amy Kotsenas, a Board-certified radiologist, provided computerized tomography (CT) findings regarding appellant's sinus condition. In a September 12, 2002 report, Dr. Sami R. Achem, a Board-certified internist, provided the results of a biopsy of appellant's esophagus. Dr. Laura W. Bancroft, a Board-certified radiologist, provided her findings on x-ray examination of appellant's esophagus in her September 24, 2002 report. These diagnostic reports do not pertain to the claimed cervical condition.

An April 18, 2000 report of Dr. Howard I. Jolles, a Board-certified radiologist, indicated that appellant had a tetanus diptheria vaccine. His November 7, 2001 x-ray report revealed a normal heart size and no acute process, but degenerative changes with wedging lower in the

⁶ Victor J. Woodhams, 41 ECAB 345, 351-52 (1989).

⁷ Dr. Ramsey's qualifications are unclear from the record.

thoracic spine. His December 4, 2002 x-ray report also revealed a normal heart size and no acute process. Similarly, a September 28, 2001 report of Dr. Jon N. Dalton, a Board-certified radiologist, revealed a normal chest. In a September 28, 2001 electrocardiograph report, Dr. Richard Wayne Kreeger, a Board-certified internist, indicated that appellant had sinus arrhythmia. These x-ray and diagnostic reports are not directly relevant to the claimed cervical condition.

A December 12, 2002 report of Dr. Joseph G. Cernigliaro, a Board-certified radiologist, provided his findings on an ultrasound examination of appellant's legs. A December 10, 2002 report of Dr. Mandell D. Stearman, a Board-certified radiologist, revealed that appellant underwent fluoroscopic surgery on that date. His December 11, 2002 chest x-ray report provided normal findings. As noted, the above medical evidence submitted by appellant is insufficient to establish his claim. The various reports fail to address the relevant issue in this case, whether the two bulging discs of his neck were caused by or contributed to factors of his federal employment.

Appellant submitted the August 26, 2002 treatment notes of Connie J. Champion, a nurse, regarding his medication and need to be excused from work due to medical appointments. He also submitted a December 27, 2002 report of Nancy Tillman, a registered nurse, regarding pain at the iliac crest harvest site associated with his hip graft. Ms. Champion's treatment notes and Ms. Tillman's report are of no probative medical value inasmuch as a nurse is not a "physician" within the meaning of the Act.⁸ Similarly, the December 6, 18 and 23, 2002 reports of Grace Herzog and the December 19, 2002 report of Hoi Kee Ng, who are physician's assistants have no probative value because a physician's assistant is not a "physician" as defined under the Act.⁹

The radiological reports of Dr. Alice Patton and Dr. Mark J. Kransdorf, Board-certified radiologists, and Dr. Stearman cover the period October 11 through December 30, 2002 and revealing that appellant has stenosis of the cervical spine with cervical radiculopathy. However, these reports failed to address whether the diagnosed conditions were caused by factors of his employment.

The October 7 and 22, 2002 reports of Dr. Devon I. Rubin, a Board-certified neurologist, found that appellant had cervical radiculopathy and abnormality within the cervical cord and he discussed surgery. Dr. Eric Nottmeier, a neurosurgeon, found in reports dated October 21 to December 9, 2002 that appellant had cervical radiculopathy with severe central canal stenosis and single cord change on magnetic resonance imaging testing. He noted a discussion he had with appellant concerning surgery. The reports of Drs. Rubin and Nottmeier, however, failed to address whether appellant's cervical radiculopathy was caused or aggravated by any factors of his federal employment.

⁸ 5 U.S.C. § 8101(2) which defines "physician" as including surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see also Joseph N. Fassi*, 42 ECAB 231 (1991) (medical evidence signed only by a registered nurse or nurse practitioner is generally not probative evidence).

⁹ *See Lyle E. Dayberry*, 49 ECAB 369 (1998).

The October 22, 2002 report of Dr. Tammeza Campbell,¹⁰ the December 4, 2002 report of Dr. Dewitt M. Coleman,¹¹ the December 4, 2002 report of Dr. Rowlett and the December 16, 2002 report of Dr. Nottmeier discussed appellant's cervical surgery. These reports failed to address whether his cervical condition was caused by factors of his employment.

As appellant has failed to submit rationalized medical evidence establishing that he sustained a cervical condition caused or contributed to by factors of his federal employment, the Board finds that he has not met his burden of proof in this case.

The Board further finds that the Office properly refused to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128 of the Act,¹² 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) constituting relevant and pertinent new evidence not previously considered by the Office.¹³ 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.¹⁴ 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.¹⁵

On reconsideration appellant argued that the Office claims examiner made several mistakes in the February 27, 2003 decision. He contended that the claims examiner found that he submitted diagnostic reports and medical records dated November 22, 2000 through December 30, 2002; however, he never saw a physician at the Mayo Clinic or any place else on November 22, 2000 or named Dr. Ward. Appellant also contended that the year of record was 2002 and not 2000. He noted that he was seen by Dr. Ramsey on August 22, 2002 and during his annual physical examination, he complained of continual numbness and loss of feeling and control in his right arm, right hand and fingers along with stiffness and pain in his neck. Appellant further noted that his first neurology appointment was with Dr. Rubin on October 11, 2002 and with Dr. Nottmeier on October 21, 2002. Dr. Ward's November 22, 2000 report indicated that appellant was seen by him at the Mayo Clinic for an upper respiratory infection.

¹⁰ Dr. Campbell's qualifications are unclear from the record.

¹¹ Similarly, Dr. Coleman's qualifications are unclear from the record.

¹² 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).

¹³ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁴ *Id.* at § 10.607(a).

¹⁵ *Id.* at § 10.608(b).

Appellant also argued that the claims examiner incorrectly stated that his physician, Dr. Ward, indicated in an October 22, 2000 report, that he telephoned him regarding his lifting restrictions because Dr. Ward was not his physician.¹⁶

Appellant's argument that he was never seen by Dr. Ward or any other physician at the Mayo Clinic is irrelevant to the issue whether he has sustained a cervical injury caused by factors of his employment. Evidence that does not address the particular issue involved is irrelevant and also constitutes no basis for reopening a case.¹⁷

In support of his request for reconsideration, appellant resubmitted his November 15, 2002 statement describing his injury and awareness of his condition, Dr. Nottmeier's October 21, 2002 report, Dr. Rubin's October 7, 2002 report and his January 5, 2003 letter in response to the Office's December 10, 2002 request to submit additional evidence supportive of his claim. This evidence was previously considered by the Office and thus, it is insufficient to warrant reopening appellant's claim on the merits.¹⁸

Appellant submitted a copy of the Office's February 27, 2003 decision that was finalized on March 3, 2003 and a copy of his occupational disease claim. None of this evidence addressed the relevant issue of causal relationship. Similarly, the internet article entitled "Cervical Radiculopathy" is irrelevant as it is generalized and does not address the issue whether appellant's cervical condition was caused or aggravated by factors of his employment. The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the necessary causal relationship to establish that a claimed condition is related to an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.¹⁹ Therefore, the article does not constitute a basis for reopening appellant's claim.

Because appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a relevant argument not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits in its June 9, 2003 decision.

¹⁶ The Board notes that the record does not contain an October 22, 2000 report of Dr. Ward.

¹⁷ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁸ *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

¹⁹ *William C. Bush*, 40 ECAB 1064 (1989).

The June 9 and March 3, 2003 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 11, 2004

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member