

**United States Department of Labor
Employees' Compensation Appeals Board**

DANIEL R. STERLING, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Beckley, WV, Employer**

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**Docket No. 04-138
Issued: March 15, 2004**

Appearances:
Daniel R. Sterling, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 22, 2003 appellant filed a timely appeal of the October 3, 2003 decision of the Office of Workers' Compensation Programs, which denied appellant's August 25, 2003 request for reconsideration. He also timely appealed the Office's July 9, 2003 decision, which denied his claim on the merits. 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 established that he sustained a low back injury in the performance of duty on September 5, 2002; and (2) whether the Office properly denied appellant's request for review of the merits of his case under 5 U.S.C. § 8128.

FACTUAL HISTORY

On September 12, 2002 appellant, then a 57-year-old maintenance mechanic, filed a traumatic injury claim alleging that on September 5, 2002 he sustained a low back injury from

unloading vinyl siding and repeatedly getting in and out of the shuttle van. He described his injury as “low back pain that goes down into his groin on both sides.” Appellant did not stop work following his alleged injury. Sterling Moon provided a September 12, 2002 witness statement in which he indicated that appellant told him he had “hurt his back working on [September 5, 2002] unloading siding.”

Appellant’s claim was accompanied by a September 24, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine that revealed loss of disc hydration from L2 down to S1, with discogenic end plate changes at the inferior aspect of L2, consistent with mild or early degenerative disease. Additionally, there was no indication of focal disc herniation or spinal stenosis. The September 24, 2002 MRI scan was attached to an undated and unsigned request for a neurological consultation, which noted a diagnosis of “back pain.”

By letter dated October 8, 2002, the Office requested additional factual and medical evidence. The Office specifically requested a comprehensive medical report from appellant’s treating physician that described symptoms, examination and test results, provided a diagnosis, explained the treatment provided and the effects and included a reasoned explanation on the cause of the condition.

The Office received a September 9, 2002 x-ray of the lumbosacral spine that revealed mild degenerative changes. Additionally, appellant provided September 9, 2002 treatment notes that included a history of unloading siding at work and getting in and out of a shuttle van. The September 9, 2002 treatment notes, signed by Joel W. Sharp, PA-C, reported a diagnosis of “muscle strain.” In a report dated October 16, 2002, Dr. Constantino Y. Amores, a Board-certified neurosurgeon, diagnosed lumbar/lumbosacral spondylosis. He also reported that the neurological examination showed no neurological deficits. Additionally, Dr. Amores reported comorbidities of degenerative disc disease, anxiety disorder, depression, hypertension and gastro esophageal reflux disease. Lastly, the Office received September 16, 2002 treatment notes and October 24 and 25, 2002 duty status reports (Form CA-17), from Dr. Hassan A. Jafary, a Board-certified internist. He reported low back pain and multiple lumbar disc dehydration.

In a decision dated November 20, 2002, the Office accepted that on September 5, 2002 appellant was unloading siding and he repeatedly got in and out of a shuttle van. The Office, however, denied the claim because the medical evidence did not establish that appellant’s diagnosed back condition was caused by the work he performed on September 5, 2002.

In a letter dated January 6, 2003 and postmarked January 9, 2003, appellant requested an oral hearing. As appellant’s hearing request was dated and postmarked more than 30 days after the Office’s November 20, 2002 decision, the Office, on March 18, 2003 denied the request as

untimely.¹ The Office advised appellant that he could pursue his claim through the reconsideration process, which he did by letter dated April 10, 2003.

Along with his April 10, 2003 reconsideration request, appellant submitted a December 20, 2002 report from Dr. Jafary, who noted that appellant suffered an injury at his workplace on September 5, 2002 which caused severe myofascial lumbar pain. He indicated that appellant was unloading a van when he injured himself. The Office reviewed the claim on the merits and by decision dated July 9, 2003 the Office denied modification of the prior decision.

On August 25, 2003 appellant requested reconsideration. He provided additional copies of evidence that had previously been submitted. By decision dated October 3, 2003, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.² The second component is whether the employment incident caused a personal injury.³ Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.⁴

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a low back injury in the performance of duty on September 5, 2002. While the record established that the September 5, 2002 employment incident occurred as alleged, the Board finds that the medical evidence is insufficient to establish that appellant sustained a low back condition causally related to his employment exposure.

¹ Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought. 20 C.F.R. § 10.616(a) (1999). However, the Office has discretion to grant or deny a request that was made after this 30-day period. *Herbert C. Holley*, 33 ECAB 140 (1981). In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons. *Rudolph Bermann*, 26 ECAB 354 (1975).

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *John J. Carlone*, 41 ECAB 354 (1989).

⁴ See *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of causal relationship must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and claimant's specific employment factors. *Id.*

Dr. Amores' October 16, 2002 report diagnosed lumbar/lumbosacral spondylosis. However, the physician did not specifically attribute appellant's back condition to his employment. Dr. Amores did not mention the September 5, 2002 employment incident.

Dr. Jafary stated, in his December 20, 2002 report, that "to the best of my knowledge [appellant] suffered injury at his workplace on September 5, 2002 which caused severe myofascial lumbar pain while unloading a van." He attributed appellant's symptoms to his work-related injury and indicated that appellant's employment activity caused his injury. While Dr. Jafary's opinion supports causal relationship, he provided no medical reasoning or rationale to support his opinion.

The September 9, 2002 treatment notes signed by Joel W. Sharp, PA-C, are also insufficient to meet appellant's burden. Mr. Sharp noted a history of unloading siding at work and getting in and out of a shuttle van and he diagnosed a muscle strain. However, this is not considered probative medical evidence because he is a physician's assistant and not a physician.⁵

As the medical evidence of record fails to establish a causal relationship between the September 5, 2002 employment incident and appellant's diagnosed back condition, the Office properly denied appellant's claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.⁷ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS -- ISSUE 2

Appellant's August 25, 2003 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by

⁵ See 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

⁶ 5 U.S.C. § 8128.

⁷ 20 C.F.R. § 10.606(b)(2) (1999).

⁸ 20 C.F.R. § 10.608(b) (1999).

the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant did not submit any relevant and pertinent new evidence along with his August 25, 2003 request for reconsideration. The evidence that accompanied appellant's reconsideration request had previously been submitted and considered by the Office. This includes appellant's September 9, 2002 x-ray, the September 24, 2002 MRI scan, Dr. Amores' October 16, 2002 report and Dr. Jafary's September 16, 2002 treatment notes. Evidence that is duplicative of evidence already in the record does not provide a basis for reopening the claim for merit review.⁹ Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied appellant's August 25, 2003 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that his claimed low back condition was due to the September 5, 2002 employment incident. Additionally, the Board finds that the Office properly denied his request for reconsideration.

⁹ See *Daniel Deparini*, 44 ECAB 657 (1993).

ORDER

IT IS HEREBY ORDERED THAT the October 3 and July 9, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 15, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member