United States Department of Labor
Employees' Compensation Appeals Board

ROBERT F. PARTEN, Appellant	)	
and	)	**Docket No. 05-251**
	)	**Issued: April 4, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Knoxville, TN, Employer	)	

Appearances:
Robert F. Parten, 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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 2, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 30, 2004 merit decision denying his claim that he sustained an employment-related injury on November 21, 2001. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on November 21, 2001; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 5, 2001 appellant, then a 49-year-old rural carrier, filed a traumatic injury claim alleging that he sustained numbness in his left leg below the knee after he bent over to lift a heavy package from a mail cart at work on November 21, 2001. Appellant did not stop work.[1]

In a November 21, 2001 report, Dr. W. Barry Bingham, an attending Board-certified orthopedic surgeon, indicated that he had treated appellant 10 days earlier for left-sided sciatica.[2] Dr. Bingham noted that appellant reported paresthesias and numbness in his left lower lateral leg extending to his foot after lifting a box at work.

In a report dated January 2, 2002, Dr. P. Merill White, an attending Board-certified orthopedic surgeon, noted that appellant had pain and numbness in the nerve distribution between the lateral calf and the dorsal foot and indicated that he likely had a disc herniation at L4-5.[3] He indicated that appellant reported experiencing pain after lifting a heavy package from a mail cart on November 21, 2001 and stated that the "onset of his left lower extremity symptoms constitute a new injury."

By decision dated February 19, 2002, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained an injury in the performance of duty on November 21, 2001.[4]

In a report dated May 6, 2002, Dr. Cletus J. McMahon, an attending Board-certified orthopedic surgeon, indicated that he saw appellant on March 26, 2002 at which time he reported suffering left leg pain and numbness and low back pain due to lifting a heavy box at work on the day before Thanksgiving.[5] Dr. McMahon stated that a magnetic resonance imaging (MRI) scan from March 29, 2002 showed a herniated disc at L5-S1 and that on April 22, 2002 appellant underwent a surgical excision for the herniated disc at L5-S1.[6] He stated, "Based upon the history that [appellant] gave me on his visit on March 26, 2002, it would appear that his surgery was a direct result of the injury that he had at work the day before Thanksgiving of 2001."

In a September 3, 2003 report, Dr. McMahon provided an account of his treatment of appellant which was similar to that he provided in his May 6, 2002 report. Dr. McMahon

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[1] In 1999 appellant sustained an employment-related aggravation of lumbar disc disease and a herniated nucleus pulposus at L5-S1. The Office also accepted that appellant's lumbar surgery on July 27, 1999 was related to this employment injury.

[2] The record contains a November 12, 2001 report in which Dr. Bingham indicated that appellant had left sciatica.

[3] Dr. White incorrectly listed the date of appellant's prior surgery as July 1991 rather than July 1999. In a report dated March 1, 2002, Dr. White indicated that these findings showed a radiculopathy in the L5 nerve distribution and supported his suggested diagnosis of a disc herniation at L4-5.

[4] The Office accepted the occurrence of the employment incident on November 21, 2001.

[5] The Board notes that November 21, 2001 was the day before Thanksgiving in 2001.

[6] The record contains an April 22, 2002 report which details the performance of this surgery by Dr. McMahon. The report reveals that appellant's S1 nerve was compressed prior to the surgery.

indicated that appellant's condition improved after the April 22, 2002 surgery and he was able to return to work on August 5, 2002. He stated that appellant "had no specific injury but it is certainly possible with that with [sic] his 26 years of lifting, twisting, bending and turning that it certainly could have contributed to him having a herniated disc in his lumbar spine because of the continued repetitive type of activities."

Appellant requested a hearing before an Office hearing representative and, by decision dated and finalized October 21, 2003, the hearing representative affirmed the Office's February 19, 2002 decision.

Appellant submitted a March 6, 2004 letter in which he requested reconsideration and discussed his difficulty in getting approval for diagnostic testing. He submitted the results of the March 29, 2002 MRI scan testing in which Dr. R. Stephen Williams, a Board-certified radiologist, indicated that he had degenerative changes at L5-S1 with disc protrusion that might compromise the S1 root. Dr. Williams indicated that there appeared to be prior surgery at L5-S1. Appellant also submitted statements from coworkers detailing the November 21, 2001 lifting incident.

By decision dated March 30, 2004, the Office affirmed its October 21, 2003 decision.

By letter dated September 3, 2004 and received by the Office on September 9, 2004, appellant again requested reconsideration of his claim. Appellant argued that Dr. White's January 2, 2002 report incorrectly identified his July 1997 surgery as occurring in July 1991 and that Dr. Williams' March 29, 2002 report provided an opinion that his present condition was related to his July 1999 surgery.

Appellant submitted an April 22, 2004 report in which Dr. McMahon stated that he saw appellant on March 26, 2002 at which time he reported suffering left leg pain and numbness and low back pain due to lifting a heavy box at work on the day before Thanksgiving. Dr. McMahon stated that an MRI scan from March 29, 2002 showed a herniated disc at L5-S1 and that on April 22, 2002 appellant underwent a surgical excision of the herniated disc at L5-S1. He stated:

> "Based upon the history and physical examination, and the MRI [scan] findings of [appellant], I would assume that the low back and left leg pain which resulted in the [herniated nucleus pulposus] and subsequent surgery in 2002 was a direct result of the injury he had at Thanksgiving 2001. It certainly could be a re-occurrence (sic) or an aggravation of his previous injury at L5-S1 on the left in July, 1999. Certainly the mechanism of injury of leaning over the buggy and trying to lift a heavy package is consistent with a herniated disc."

By decision dated September 17, 2004, the Office denied appellant's request for merit review of his claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[7] 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.[8] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[9]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[10] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[11] The term "injury" as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[12]

ANALYSIS -- ISSUE 1

Appellant filed a claim alleging that he sustained numbness in his left leg below the knee after he bent over to lift a heavy package from a mail cart at work on November 21, 2001. He later claimed that he sustained a herniated disc at L5-S1 and that this condition and his surgery in April 2002 were related to the November 21, 2001 incident. Although the occurrence of the November 21, 2001 incident has been accepted, appellant has not submitted sufficient medical evidence to establish that it caused an injury as alleged.

Appellant submitted a November 21, 2001 report in which Dr. Bingham, an attending Board-certified orthopedic surgeon, noted that he reported paresthesias and numbness in his left lower lateral leg extending to his foot after lifting a box at work. This report, however, is of limited probative value on the relevant issue of the present case in that it does not contain an

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[7] 5 U.S.C. § 8101 *et seq.*

[8] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[9] *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

[10] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[11] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[12] *Elaine Pendleton*, *supra* note 8; 20 C.F.R. § 10.5(a)(14).

opinion on causal relationship.[13] Dr. Bingham noted that he had treated appellant for left sciatica 10 days prior to November 21, 2001 and he did not provide an opinion isolating the cause of appellant's complaints.

Appellant submitted a January 2, 2002 report in which Dr. White, an attending Board-certified orthopedic surgeon, noted that he had symptoms indicative of a likely disc herniation at L4-5. Dr. White indicated that appellant reported experiencing pain after lifting a heavy package from a mail cart on November 21, 2001 and stated that the "onset of his left lower extremity symptoms constitute a new injury." This report, however, is of limited probative value on the relevant issue of the present case in that Dr. White did not provide adequate medical rationale in support of his apparent conclusion on causal relationship. Dr. White did not provide any notable description of the November 21, 2001 incident or explain the mechanism of how such an action could have caused an injury as serious as a disc herniation.[14] Moreover, he did not explain why appellant's condition on November 21, 2001 and afterwards was not due to some nonwork-related condition such as degenerative disc disease.

In a report dated May 6, 2002, Dr. McMahon, an attending Board-certified orthopedic surgeon, stated that an MRI scan from March 29, 2002 showed a herniated disc at L5-S1 and that on April 22, 2002 appellant underwent a surgical excision for the herniated disc at L5-S1. He stated, "Based upon the history that [appellant] gave me on his visit on March 26, 2002, it would appear that his surgery was a direct result of the injury that he had at work the day before Thanksgiving of 2001." However, Dr. McHahon also failed to provide medical rationale in support of his opinion in that he did not provide any notable description of the November 21, 2001 incident or explain the mechanism of how this action could cause such a serious injury. Moreover, Mr. Mahon produced a September 3, 2003 report which tends to make his overall opinion on the cause of appellant's condition equivocal in nature.[15] In this report, Dr. McMahon discussed his treatment of appellant's condition and stated that appellant "had no specific injury but it is certainly possible with that with [sic] his 26 years of lifting, twisting, bending and turning that it certainly could have contributed to him having a herniated disc in his lumbar spine because of the continued repetitive type of activities."[16]

[13] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[14] I t should be noted that the record does not contain diagnostic testing showing a herniation at L4-5.

[15] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956) (finding that an opinion which is equivocal or speculative is of limited probative value regarding the issue of causal relationship).

[16] It should be noted that appellant has not filed a claim alleging that his job duties over a period of time caused his lower extremity condition.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[17] 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) constitute relevant and pertinent new evidence not previously considered by the Office.[18] 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.[19] 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 on the merits.[20]

ANALYSIS -- ISSUE 2

In his September 3, 2004 reconsideration request, appellant argued that Dr. White's January 2, 2002 report incorrectly identified his July 1997 surgery as occurring in July 1991 and that Dr. Williams' March 29, 2002 report provided an opinion that his present condition was related to his July 1999 surgery. While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[21] Appellant's argument does not have a reasonable color of validity and therefore does not require reopening of his claim. He did not articulate how the above-mentioned error in Dr. Williams' report supported his claim that he sustained an employment-related injury on November 21, 2001. Moreover, the Office has already considered the probative value of Dr. Williams' report and a cursory review of the report reveals that while it indirectly mentions appellant's July 1999 surgery it does not provide an opinion that his present condition was related to this surgery.

Appellant also submitted an April 22, 2004 report of Dr. McMahon. However, this report is extremely similar to the May 6, 2002 report of Dr. McHahon which had previously been considered by the Office. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[22] Both reports provided a similar account of the treatment of appellant's back and lower extremity condition and his surgery at L5-S1. The May 6, 2002 and April 22, 2004 reports both posit that the injury which led to this surgery was sustained on November 21, 2001, but the reports are similar in that they both fail to provide any notable discussion of the mechanism of injury and lack medical rationale in support of their conclusions.

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[17] 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).

[18] 20 C.F.R. §§ 10.606(b)(2).

[19] 20 C.F.R. § 10.607(a).

[20] 20 C.F.R. § 10.608(b).

[21] *John F. Critz*, 44 ECAB 788, 794 (1993).

[22] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

In the present case, appellant has not established that the Office improperly refused to reopen his claim for a review on the merits of its March 30, 2004 decision under section 8128(a) of the Act, because he 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 new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an injury in the performance of duty on November 21, 2001. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 17 and March 30, 2004 decisions are affirmed.

Issued: April 4, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member