United States Department of Labor
Employees' Compensation Appeals Board

ANTHONY D. GOLPHIN, Appellant	)	
and	)	**Docket No. 04-1053**
	)	**Issued: February 11, 2005**
DEPARTMENT OF THE ARMY, ARMY CORPS OF ENGINEERS, Savannah, GA, Employer	)	

Appearances:
Anthony D. Golphin, 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 March 11, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 30, 2003, which denied wage-loss compensation after June 11, 1989, and a May 21, 2003 decision which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether appellant was entitled to benefits after June 11, 1989 due to his work-related injury; and (2) whether the Office properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 16, 1985 appellant, then a 32-year-old mail clerk, filed a traumatic injury claim alleging that on July 17, 1985 he injured his head, back and neck when he stood and struck

the top of his head on a light switch. Appellant continued to work for the employing establishment until he was terminated on August 16, 1985.[1] Appellant's claim was accepted for a contusion to the head and a herniated C6-7 disc. Appellant underwent surgery to repair the herniated disc on October 8, 1985. The Office paid wage-loss compensation for the period August 26, 1985 to June 10, 1989. The record reflects that appellant commenced working for various private employers in 1989.

On August 28, 1991 appellant filed a claim for compensation after June 10, 1989 (Form CA-7) claiming compensation for the period June 10, 1989 through the present time in the amount of the difference between his date-of-injury pay and private industry pay.

By letter dated July 30, 2001, the Office asked for further information with regard to appellant's claim. Pursuant to the Office's request, appellant submitted his social security records which indicated that appellant had numerous nongovernment jobs from 1989 to 1991.

In a medical report dated August 30, 1989, Dr. Edward F. Downing, a Board-certified neurosurgeon, indicated that appellant came to see him complaining of headaches and dizziness and occasional neck pain. He stated that he did not think that appellant's symptoms of headaches and dizziness were related to his cervical spine. In a May 2, 1990 report, Dr. Downing noted that appellant had been to National Guard camp and, while there, had the onset of severe low back pain and bilateral leg pain, right slightly greater than the left, for which he was hospitalized. He noted that appellant had a right L5-S1 disc herniation. On April 3, 1991 Dr. Downing indicated that appellant could be returned to his former occupation. In a report dated May 8, 1991, he noted that appellant, while working as a painter, was experiencing neck pain. In an October 9, 1991 report, Dr. Downing indicated that appellant had a physical assessment at a rehabilitation center wherein "he made no effort whatsoever." Dr. Downing indicated that appellant's examination did not substantiate any of his complaints, that he had reached maximum medical improvement and that he could see no reason why he could not return to work.

In a note dated May 1, 1991, Dr. Jeffrey Taylor, an internist, indicated that appellant had been seen in his office on March 19, 29 and April 29, 1991 for neck, arm and shoulder pain.

By decision dated September 17, 2001, the Office denied appellant's claim for wage-loss compensation after June 11, 1989 for the reason that the medical evidence was insufficient to establish that he was disabled due to his accepted injury.

In a medical report dated June 16, 1999, Dr. Downing indicated that appellant had been treated by him in 1985 for a C6-7 disc and ultimately recovered after a slow convalescent period. He obtained a history that appellant recently fell off a ladder from 20 feet, injuring his neck, his lower back and right arm. In reviewing appellant's magnetic resonance imaging scan, he noted "a nicely healed fusion at C6-7 with osteophytes at C3-4, 4-5 and 5-6 producing cord compression greatest at C3-4, which is probably an acute disc herniation in addition to a small osteophyte." He concluded that appellant had cervical spondylosis and myelopathy secondary to

[1] The record is not clear as to why appellant was terminated. Appellant testified that he was "laid off." However, there is also an indication in the record that appellant was terminated for cause during his probation period.

an injury, and was going to require surgical decompression at all three levels. On June 29, 1999 appellant was seen by Dr. Sanford Berens, a Board-certified radiologist, for a C3-4, 4-5 and 5-6 anterior cervical discectomy, osteophytectomy and interbody fusion and plating. In a January 3, 2000 progress note, Dr. Downing indicated that appellant had considerable restricted range of motion but was basically pain free. He indicated that appellant was not going to be able to return to construction work. Dr. Downing concluded, "With a four-level fusion, I think it is unrealistic for him to try to do that and I have suggested he pursue his social security because I think he is disabled from the type of work that he had trained to do." In his report dated April 3, 2000, he stated that there was no way appellant could do construction work with a four-level fusion.

On October 13, 2001 appellant requested an oral hearing which was held on February 7, 2003. Appellant noted that he had seen physicians over the years at the Department of Veterans Affairs. He tried to go back to work for the government, but was laid off. Appellant indicated that he never returned to the employing establishment after 1985. He indicated that he fell off a ladder while working for One Stop which required further surgery on his neck and that this surgery was paid for by that employer.

After the hearing, appellant submitted medical reports dated August 18, 2000 from Dr. Lemmy N. Effa, a Board-certified internist, who indicated that appellant had an anxiety disorder/depression, chronic neck pain and chest pain. Dr. Effa noted that appellant had a C5-6 discectomy in 1985 and had a second cervical spine surgery in 1999 with insertion of a titanium rod.

By decision dated April 30, 2003, the Office hearing representative affirmed the September 17, 2001 decision denying compensation after June 11, 1989.

By letter dated May 7, 2003, appellant requested reconsideration and submitted records from the Westside Urban Health Center dated March 29, 1991 to August 14, 1995. These records indicate that appellant was treated for degenerative arthritis, muscle sprain/spasm and pain in his neck and back. Appellant also submitted medical notes from Dr. Effa, indicating that appellant was treated for neck pain on November 28, 1998 and October 29, 1999. Appellant also submitted reports that were previously of record.

By decision dated May 21, 2003, the Office denied appellant's request for reconsideration on the grounds that the submitted evidence was irrelevant or immaterial.

LEGAL PRECEDENT -- ISSUE 1

A "recurrence of disability" means an inability to work after an employee has returned to work, caused by a spontaneous change in medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[2]

A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which he claims

[2] 20 C.F.R. § 10.5(x) (2001).

compensation is causally related to the accepted employment injury.[3] Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his employment injury.[4] This burden includes the necessity of furnishing medical evidence from a physician, who on the basis of a complete and accurate factual and medical history concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a contusion of the head and herniated nucleus pulposus at C6-7 and paid for surgery. The Office paid compensation for wage loss for the period August 26, 1985 to June 10, 1989. Subsequent to June 10, 1989 appellant worked for several employers in the private sector. In June 1999, while working for a private employer, appellant fell off a ladder resulting in further surgery on his neck at C3-4. A recurrence of disability means a spontaneous change in medical condition which resulted from the previous injury and without an intervening injury.[6] In the instant case, the Board finds that appellant's fall from the ladder while working for a subsequent employer constitutes an intervening injury and, accordingly, appellant is not entitled to compensation after June 1999. He has not demonstrated that his disability was due to the accepted C6-7 cervical condition, which Dr. Downing noted had nicely healed.

The Board finds that the medical evidence does not establish that appellant sustained a recurrence of disability after June 11, 1989. Dr. Downing noted that appellant experienced neck pain after June 11, 1989, but he did not state that this pain was disabling. On August 30, 1989 he noted "occasional neck pain" and opined that appellant's headaches and dizziness were not related to his cervical spine. On May 8, 1991 Dr. Downing noted that appellant, who was working as a painter, was having neck pain but did not attribute this to appellant's accepted injuries nor did he state that the pain was disabling. He also questioned appellant's efforts on a physical assessment. Dr. Downing's reports subsequent to the June 1999 fall discuss appellant's injuries from the fall from the ladder and do not relate his cervical condition to the 1985 injury. Accordingly, his reports do not establish a recurrence of disability.

The other medical evidence of record does not establish that appellant sustained a recurrence of disability causally related to his federal employment. Dr. Taylor noted that appellant was treated for neck arm and shoulder pain on three occasions in early 1991, but he did not find that the pain was disabling or relate it to appellant's 1985 employment injury. Drs. Behrens and Effa saw appellant after his June 1999 injury and did not give an opinion on the causation of his neck pain or disability. Dr. Effa specifically noted that appellant had a

[3] *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

[4] *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993).

[5] *Alfred Rodriquez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

[6] *Carlos A. Marrero*, 50 ECAB 117 (1998).

second cervical spine surgery in 1999. The medical evidence of record is insufficient to meet appellant's burden of proof.[7]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[8] the Office 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.[9] 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.[10] 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.

ANALYSIS -- ISSUE 2

The relevant issue in this case is a medical one, whether appellant sustained a recurrence of disability on June 11, 1989 causally related to his July 17, 1985 employment injury. In support of his request for reconsideration, appellant submitted records from the Westside Urban Health Center dated from March 29, 1991 to August 14, 1995 which indicated that appellant was treated for neck and back pain. Appellant also submitted notes from Dr. Effa indicating that appellant was treated for neck pain from November 28, 1998 to October 29, 1999. He also submitted medical evidence that had been previously considered. None of these reports indicate that appellant was disabled after June 11, 1989 for reasons causally related to his accepted injury. Furthermore, Dr. Effa's reports are similar to those already in the record. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[11]

CONCLUSION

The Board finds that the Office properly determined that appellant was not entitled to compensation benefits after June 11, 1989 and that it properly denied appellant's request for reconsideration.

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[7] *Carmen Gould, supra* note 4.

[8] 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).

[9] 20 C.F.R. § 10.606(b)(1)–(2).

[10] *Id.* at § 10.607(a).

[11] *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 21 and April 30, 2003 are affirmed.

Issued: February 11, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member