United States Department of Labor
Employees' Compensation Appeals Board

ROBERT C. BIBB, SR., Appellant	)	
and	)	**Docket No. 05-1180**
	)	**Issued: September 30, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Bellevue, OH, Employer	)	

Appearances:
Robert C. Bibb, Sr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 6, 2005 appellant filed a timely appeal of the May 11, 2004 merit decision of the Office of Workers' Compensation Programs, which denied his claim for recurrence of disability. Appellant also appealed the Office's February 3, 2005 decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.[1]

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability on July 5, 2003, causally related to his August 30, 1999 employment injury; and (2) whether the Office properly denied appellant's request for a review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] The record contains evidence received after the Office issued its February 3, 2005 decision denying reconsideration. The Board may not consider evidence that was not before the Office at the time it rendered its final decision. 20 C.F.R. § 501.2.

FACTUAL HISTORY

On August 30, 1999 appellant, then a 48-year-old rural letter carrier, sustained a traumatic injury to his right upper extremity while working. He struck his right elbow on the edge of his mail case, which resulted in a bruised elbow and a tingling sensation in at least two fingers. The Office accepted the claim for right elbow contusion. The claim was later expanded to include right elbow ulnar neuropathy and right elbow (olecranon) bursitis. The Office also accepted that appellant sustained a recurrence of disability from June 1 to 20, 2000. He returned to limited-duty work on January 21, 2001.

Appellant sustained another employment injury on February 23, 2002, which the Office accepted for contusion of the jaw, loose left incisor tooth and aggravation of lumbosacral sprain.

On May 24, 2003 appellant stopped work and later relocated to Arizona, where he resided with his parents. The employing establishment terminated appellant effective June 14, 2003. Prior to his May 2003 departure appellant had been performing limited-duty work.[2]

On January 17, 2004 appellant filed a claim for compensation (Form CA-7) for lost wages beginning July 5, 2003. The employing establishment challenged the claim noting that limited-duty work was available and appellant voluntarily relocated to Arizona.

In Arizona, appellant came under the care of Dr. John S. Charochak, an osteopath specializing in pain management. He was also treated by Dr. Ronald B. Joseph, a Board-certified orthopedic surgeon. In an undated attending physician's report (Form CA-20), Dr. Charochak, who first examined appellant on July 5, 2003, noted an October 10, 2000 date of injury where appellant reportedly hurt his right elbow at work. He diagnosed right elbow ulnar neuropathy with probable impingement syndrome, which he attributed to appellant's employment. Dr. Charochak noted that appellant was totally disabled from July 5 to August 31, 2003. He stated that appellant was unable to use his right arm without an increase in symptoms and pain. Dr. Charochak recommended an initial trial at hand therapy, and, if that proved unsuccessful, he proposed a consultation with a hand surgeon and an updated electromyography.

In a November 13, 2003 report, Dr. Joseph noted that appellant had previously injured himself on August 30, 1999 when he struck his right elbow on a counter. He also indicated that appellant complained of right elbow pain since May 2003. Dr. Joseph diagnosed right ulnar neuropathy at the cubital tunnel and right lateral epicondylitis and extensor supinator tendinitis. He recommended right ulnar nerve neurolysis and anterior transposition and possible flexor pronator release on the right. Dr. Joseph attributed appellant's current condition to his occupation. He explained that appellant cased and carried mail with his shoulder in an abducted position and his elbow parallel to the ground in a pronated position. Therefore, appellant's wrist

[2] Appellant was temporarily assigned to the Norwalk facility where his duties included cleaning and organizing the window area, washing counter surfaces, dusting the floor, answering the telephone, picking up empty equipment and assisting in lobby duties. When appellant last worked in May 2003 he was once again reporting to the Bellevue facility, where he had worked as a rural carrier.

extension and flexion activities resulted in the flexor pronator and specifically the extensor supinator tendinitis, better known as "'tennis elbow.'" Dr. Joseph also requested authorization for surgery, which had been tentatively scheduled for January 22, 2004.

Dr. Charochak's assistant, Brian A. Carson, PA-C, provided a January 12, 2004 Form CA-20, in which he reiterated Dr. Charochak's undated Form CA-20. Mr. Carson added that appellant was to follow-up with Dr. Joseph on January 22, 2004 for surgery to the right arm and elbow. On January 21, 2004 appellant suffered a mild myocardial infarction. Because of his cardiac condition he was forced to postpone his right elbow surgery.

Appellant also submitted a February 11, 2004 note from another one of Dr. Charochak's assistants, Robert L. McGranahan, PA-C. He explained that appellant had been on no work status since July 5, 2003 due to an October 10, 2000 employment-related injury to his right elbow. Mr. McGranahan further stated that appellant had been referred to a specialist, Dr. Joseph.

In a February 11, 2004 work status report, Dr. Joseph indicated that appellant remained on no work status. He stated that appellant was disabled from November 13, 2003 to the present time "due to right arm pathology and recent cardiac problems." Appellant was to be reevaluated when his cardiac condition stabilized.

By decision dated May 11, 2004, the Office denied appellant's claim for recurrence of disability.

On August 16, 2004 Dr. Joseph operated on appellant's right arm, which the Office authorized. Additionally, the Office paid wage-loss compensation for temporary total disability beginning August 16, 2004 and placed appellant on the periodic compensation rolls.

Appellant requested reconsideration on January 17, 2005. He submitted a copy of a March 10, 2004 letter from the Office requesting additional evidence regarding his claimed July 5, 2003 recurrence of disability. Appellant also submitted a copy of the May 11, 2004 decision denying his claim. The Office also received personnel records regarding appellant's route assignment and salary, copies of pay stubs and a July 21, 2003 letter from Postmaster Edward J. Andres, Jr., advising appellant of his termination effective June 14, 2003. Additionally, appellant submitted excerpts from an employing establishment manual concerning occupational safety and health. He also submitted copies of Office correspondence regarding his accepted injury of February 23, 2002 along with dental records and a May 30, 2002 lumbar magnetic resonance imaging (MRI) scan. Lastly, the Office received another copy of Dr. Charochak's undated Form CA-20.

By decision dated February 3, 2005, the Office denied appellant's request for reconsideration.

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 a 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.[3] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, non-performance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[4]

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position, or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.[5]

ANALYSIS -- ISSUE 1

The record indicates that appellant was performing limited duty when he last worked at the Bellevue facility on May 23, 2003. But his exact duties at that time are unclear. Appellant has not alleged that his claimed recurrence of disability was the result of a change in the nature and extent of his limited-duty assignment. There is also no evidence that the employing establishment withdrew appellant's limited-duty assignment prior to his May 23, 2003 work stoppage. Therefore, he must establish disability due to a change in the nature and extent of his employment-related condition.[6]

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury.[7] This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.[8] The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[9]

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[3] 20 C.F.R. § 10.5(x) (1999).

[4] *Id.*

[5] *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[6] *Terry R. Hedman*, *supra* note 5.

[7] 20 C.F.R. § 10.104(b) (1999); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Carmen Gould*, 50 ECAB 504 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[8] *See Helen K. Holt*, *supra* note 7.

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

Dr. Charochak indicated that appellant was totally disabled for work from July 5 to August 31, 2003 and Dr. Joseph stated that appellant was disabled beginning November 13, 2003. However, neither physician's opinion is sufficiently rationalized to support a finding of total disability due to appellant's August 30, 1999 employment injury. Dr. Charochak identified the date of injury as October 10, 2000, which is more than a year following the accepted employment injury of August 30, 1999, which raises the question of a proper medical history. Therefore, Dr. Charochak's undated report is insufficient to establish that appellant is currently disabled due to his August 30, 1999 employment injury.[10]

Dr. Joseph noted in a November 13, 2003 report that appellant injured himself on August 30, 1999 when he "hit his right elbow on a counter." He also noted that appellant was able to work until April or May 2003 and that he was currently not working. In a February 11, 2004 work status report, Dr. Joseph indicated that appellant was on "no work status" from November 13, 2003 to the present. But neither report attributed appellant's current disability to his August 30, 1999 employment injury. Dr. Joseph described in detail the position of appellant's shoulder, elbow and wrist as he cased and carried the mail. The position of his right upper extremity combined with the repetitive nature of his duties was the identified cause of appellant's "tennis elbow." Although Dr. Joseph attributed appellant's current condition to his employment, he did not provide sufficient rationale to relate the disability to the injury accepted in this case.

As appellant failed to establish a change in the nature and extent of his August 30, 1999 employment-related condition, the Office properly denied his claim for recurrence of disability beginning July 5, 2003.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.[11] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[12] 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.[13]

[10] The January 12 and February 11, 2004 reports are from Dr. Charochak's assistants. A physician's assistant is not qualified to offer a medical opinion under the Federal Employees' Compensation Act. 5 U.S.C. § 8101(2); *Allen C. Hundley*, 53 ECAB 551, 554 (2002).

[11] 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606(b)(2)(1999).

[13] 20 C.F.R. § 10.608(b) (1999).

ANALYSIS -- ISSUE 2

Appellant's January 17, 2005 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 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).[14]

Appellant also failed to satisfy the third requirement under section 10.606(b)(2); that the information submitted constitute relevant and pertinent new evidence not previously considered by the Office. The information regarding appellant's February 23, 2002 employment injury is not relevant to the issue of whether he suffered a recurrence of disability on July 5, 2003 causally related to the August 30, 1999 employment injury. Therefore, the submission of dental records and a May 30, 2002 lumbar MRI scan does not justify reopening the claim for merit review. Furthermore, appellant's personnel records and the employing establishment's occupational safety and health guidelines do not address the relevant issue of whether appellant was incapacitated for work as a result of his August 30, 1999 employment injury. The only relevant medical evidence appellant submitted was Dr. Charochak's undated Form CA-20, which noted that appellant was totally disabled from July 5 to August 31, 2003. Appellant initially submitted this same report on January 26, 2004 and the Office previously considered this evidence in its May 11, 2004 decision. As Dr. Charochak's undated report was already part of the record, it is insufficient to warrant reopening the claim for merit review.[15] Because appellant did not submit any relevant and pertinent new evidence, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[16]

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 the January 17, 2005 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that he sustained a recurrence of disability beginning July 5, 2003, causally related to his August 30, 1999 employment injury. The Board further finds that the Office properly denied appellant's January 17, 2005 request for reconsideration.

[14] 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999).

[15] Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

[16] 20 C.F.R. § 10.606(b)(2)(iii) (1999).

ORDER

IT IS HEREBY ORDERED THAT the February 3, 2005 and May 11, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 30, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board