

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

R.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Colorado Springs, CO, Employer**

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**Docket No. 08-2213
Issued: June 23, 2009**

Appearances:

Robert A. Annala, for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 8, 2008 appellant filed an appeal from a June 5, 2008 decision of the Office of Workers' Compensation Programs that denied his request for a bed and July 23, 2008 decision that denied further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of his claim.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for a Tempur-pedic bed; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 5, 2001 appellant, then a 47-year-old letter carrier, filed a Form CA-1, traumatic injury claim, alleging that he pulled a muscle in his back while moving a mail tray the previous day. He stopped work on January 24, 2002 and filed a recurrence claim. On April 26,

2002 the Office accepted that appellant sustained an employment-related herniated disc at L5-S1 with myelopathy and authorized decompressive surgery. On May 28, 2002 Dr. Roberto Masferrer, a neurosurgeon, performed an L5-S1 discectomy. Appellant was hospitalized from June 13 to July 6, 2002 for a postsurgical methicillin-resistant *Staphylococcus aureus* (MRSA) wound infection and was placed on the periodic rolls. The Office accepted a postoperative infection.

Appellant came under the care of Dr. Timothy V. Sandell, a Board-certified physiatrist. In July 2003 he returned to limited duty, four hours daily, three days a week.¹ By decision dated September 22, 2004, the Office found that appellant's actual part-time earnings as a modified letter carrier fairly and reasonably represented his wage-earning capacity.

In an April 1, 2008 report, Dr. Sandell advised that it was reasonable for appellant to consider a change in his mattress in an attempt to control his pain and minimize medication use. He provided a prescription for a Tempur-pedic mattress, stating it was needed for a medical condition. In letters dated April 3 and May 9, 2008, the Office informed appellant of the information needed to evaluate his request for a Tempur-pedic bed. In an April 5, 2008 letter, appellant advised that he was requesting the Grand Tempur-pedic bed,² noting that he had slept on this bed at his parent's home. He stated that he needed it due to his medical condition of arachnoiditis, chronic low back pain, leg nerve pain, epidural fibrosis and radiculopathy due to the MRSA infection and to help with a chronic sleep disturbance. By report dated April 9, 2008, Dr. Sandell stated that he had prescribed the Tempur-pedic mattress in anticipation of reducing appellant's back pain and his need for medication to control his pain, with a long-term goal of increasing his overall activity level.

By report dated May 2, 2008, an Office medical adviser reviewed the medical record and appellant's request for a Tempur-pedic mattress. He concluded, "I think a good mattress will certainly help [appellant] with his symptoms, but will not treat his condition. I cannot advocate the Tempur-pedic brand versus any other type of mattress as this is not a piece of durable

¹ On May 8, 2003 Dr. Bruce H. Peters, Board-certified in neurology, performed a neurological evaluation and electromyographic and nerve conduction studies that were interpreted as compatible with bilateral S1 distribution radiculopathy. On May 14, 2003 Dr. Glen D. Kelley, a Board-certified physiatrist, performed a second opinion evaluation for the Office and submitted a June 26, 2003 supplementary report. In June 2003, appellant began psychological evaluation and treatment with Glenn M. Kaplan, Ph.D., a psychologist. The Office determined that a conflict in medical evidence existed between the opinions of Drs. Sandell and Kelley regarding appellant's restrictions and limitations and referred him to Dr. Herbert H. Maruyama, Board-certified in orthopedic surgery, who provided an August 5, 2003 report advising that appellant could work four hours a day, three days a week, with limitations on his physical activity. On August 22 and September 5, 2003 appellant submitted schedule award claims. By letter dated September 9, 2003, the Office informed him that, as maximum medical improvement had not been reached, he was not entitled to a schedule award, and further noted that he could not receive wage-loss compensation concurrently with a schedule award. On April 7, 2004 appellant had a functional capacity evaluation and in June 2004 was referred to Dr. Hendrick K. Arnold, a Board-certified orthopedist, who provided a second opinion evaluation dated June 23, 2004 in which he advised that appellant's work schedule and restrictions were permanent. On September 28, 2006 Dr. Jack L. Rook, a Board-certified physiatrist, provided examination findings and an impairment rating, concluding that appellant had a 21 percent impairment of each lower extremity. Dr. Sandell submitted numerous reports dating from May 21, 2003 to December 4, 2007.

² He indicated the cost was \$7,499.99.

medical equipment with published peer review studies that show this mattress to be superior to any other mattress.” On May 5, 2008 the Office informed appellant that it was unable to authorize the purchase of the Tempur-pedic mattress. On May 9, 2008 appellant requested a formal decision regarding his mattress request, and provided literature from Tempur-pedic North America, Inc. regarding a sleep study, wound care and back pain.

In a June 5, 2008 decision, the Office denied appellant’s request for a Tempur-pedic mattress. It found that the medical evidence did not adequately address how this mattress was likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.

On July 9, 2008 appellant requested reconsideration and submitted a July 1, 2008 report from Dr. Sandell who stated:

“Pursuing the mattress has been done in attempts to give [appellant] some relief and aid in lessening the amount of monthly compensation. A trial of a mattress has allowed him to get a better night’s sleep. With better pain control, we will likely be able to minimize his medications. This also lessens the likelihood of the need for more aggressive and costly interventions such as epidural steroid injections or repeat surgery. Therefore, I think the specific mattress (Tempur-pedic) has been recommended as it relates to his work injury and as it relates to providing relief and potentially aid in lessening his amount of monthly compensation.”

Appellant also submitted duplicates of the reports of Dr. Rook and Dr. Peters and the April 9, 2008 report from Dr. Sandell.

By decision dated July 23, 2008, the Office denied appellant’s reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

Section 8103 of the Federal Employees’ Compensation Act³ provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.⁴ While the Office is obligated to pay for treatment of employment-related conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁵

In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under section 8103, with the only limitation on the

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8103; *see Dona M. Mahurin*, 54 ECAB 309 (2003).

⁵ *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

Office's authority being that of reasonableness.⁶ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.⁷ In order to be entitled to reimbursement for medical expenses, a claimant must establish that the expenditures were incurred for treatment of the effects of an employment-related injury.⁸ Proof of causal relationship must include supporting rationalized medical evidence.

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a herniated lumbar disc and subsequent complications including an MRSA infection. Appellant requested authorization to purchase a Tempur-pedic mattress and the Office denied the request, finding that he had not submitted sufficient evidence to justify the purchase.

The Board finds that the Office did not abuse its discretion in denying appellant's request to purchase the Tempur-pedic mattress. In its June 5, 2008 denial of the request, the Office explained that the medical evidence of record did not adequately address how the mattress requested was likely to cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of compensation. It found that Dr. Sandell, the only physician who addressed the need for the mattress, did not adequately address in what way the Tempur-pedic mattress was medically necessary due to the approved work injury. In his April 1 and 9, 2008 reports, Dr. Sandell advised that it was reasonable for appellant to consider a change in his mattress in an attempt to control his pain and minimize pain medication use, with the long-term goal of increasing his overall activity level. He, however, did not provide any further explanation for his recommendation.

The Board finds that in the reports Dr. Sandell do not adequately explain how the Tempur-pedic mattress was necessitated by appellant's employment-related lumbar spine condition or otherwise explain the medical process through which it would provide additional relief or reduce the degree or period of disability. The Office medical adviser explained that the requested mattress was not a piece of durable medical equipment with published peer review studies to establish it to be superior to any other mattress.

Appellant also submitted literature regarding the Tempur-pedic bed and an article regarding back pain. The Board finds that these publications are of no evidentiary value in establishing the need for the requested bed because the materials are of general application and are not determinative as to whether the bed is likely to cure or give relief in appellant's case.⁹

⁶ *James R. Bell*, 52 ECAB 414 (2001).

⁷ *Minnie B. Lewis*, 53 ECAB 606 (2002).

⁸ *Cathy B. Mullin*, 51 ECAB 331 (2000).

⁹ *See Allen C. Hundley*, 53 ECAB 551 (2002).

For these reasons, the Office did not abuse its discretion in denying appellant's request to authorize the purchase of a Tempur-pedic mattress. It found that Dr. Sandell provided insufficient explanation for the necessity of the item, and the Board finds that it was not unreasonable for the Office to deny authorization for its purchase.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹¹ Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹² This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (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.¹³ Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁴

ANALYSIS -- ISSUE 2

In his July 9, 2008 request for reconsideration, appellant stated that Dr. Sandell's opinion was sufficient to establish that the requested Tempur-pedic bed was medically necessary and attached a July 1, 2008 from Dr. Sandell and duplicates of evidence previously of record. He therefore did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or 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).¹⁵

With respect to the third above-noted requirement under section 10.606(b)(2), 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.¹⁶ While in his July 1, 2008 report, in addition to the arguments previously raised, Dr. Sandell asserted that the requested mattress could potentially

¹⁰ *D.K.*, 59 ECAB ____ (Docket No. 07-1441, issued October 22, 2007).

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.608(a).

¹³ *Id.* at § 10.608(b)(1) and (2).

¹⁴ *Id.* at § 10.608(b).

¹⁵ *Id.* at § 10.606(b)(2).

¹⁶ *Patricia G. Aiken*, 57 ECAB 441 (2006).

aid in lessening the amount of appellant's monthly compensation, the Board finds this report to be essentially duplicative of the physician's previous reports as again, he merely provided a general explanation to support the mattress request. As appellant did not submit relevant and pertinent new evidence not previously considered by the Office, it properly denied his reconsideration request by its July 23, 2008 decision.

CONCLUSION

The Board finds that the Office properly denied appellant's request for a Tempur-pedic bed and properly refused to reopen his claim for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).¹⁷

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 23 and June 5, 2008 be affirmed.

Issued: June 23, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁷ Regarding appellant's statement on appeal that he is entitled to a schedule award, the Office has not issued a final decision regarding his schedule award claim, and the Board's jurisdiction is limited to reviewing final decisions of the Office. 20 C.F.R. § 501.2(c); *see Karen L. Yaeger*, 54 ECAB 323 (2003).