United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
	)	**Docket No. 09-682**
and	)	**Issued: October 7, 2009**
DEPARTMENT OF THE ARMY, NEW CUMBERLAND ARMY DEPOT, New Cumberland, PA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 12, 2009 appellant, through counsel, filed a timely appeal of the September 3, 2008 Office of Workers' Compensation Programs' merit decision denying continuation of pay and November 17, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant is entitled to continuation of pay from June 7 to July 21, 2008; and (2) whether the Office properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 6, 2008 appellant, then a 39-year-old distribution process worker, filed a traumatic injury claim alleging that he sustained a back injury as a result of lifting a heavy box on that date. In reports dated June 12 through 25, 2008, Dr. Thomas D. Gault, a chiropractor, stated that appellant suffered from marked right middle to upper dorsal paravertebral myospasms

that were quite sensitive to palpation, a severe spasm with trigger points and tenderness to palpation in the right trapezius, pain in the thoracic spine and unspecified myalgia and myositis. In disability certificates dated June 12 and 23, 2008, he stated that appellant was totally disabled from June 12 to July 2, 2008. In an undated note, Dr. Gault ordered an x-ray of the cervical and thoracic spines due to appellant's work-related pain.

A June 13, 2008 x-ray of Dr. Mark R. Labuski, a Board-certified radiologist, demonstrated an unremarkable cervical spine and minimal disc space narrowing in the thoracic spine. An undated report signed by a physician whose signature is illegible stated that appellant could return to light-duty work on June 7, 2008 with restrictions. An undated report from a physician's assistant whose signature is illegible stated that appellant sustained a back sprain.

In a June 23, 2008 letter, the employing establishment controverted the payment of continuation of pay and appellant's claim, contending that there was no medical evidence establishing total disability causally related to his employment. It further contended that Dr. Gault was not considered to be a physician as defined under the Federal Employees' Compensation Act because he did not diagnose subluxation as demonstrated by x-ray.

By letter dated July 8, 2008, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It further advised him that Dr. Gault's medical records had no probative value as he was not considered to be a physician as defined under the Act. The Office explained that chiropractors are deemed physicians under the Act only when the services are for treatment consisting of manual manipulation of the spine to correct subluxation as demonstrated by x-ray to exist. It requested medical evidence, including a rationalized medical report from an attending physician which described a history of injury, dates and results of examination and tests, diagnosis, treatment provided, and opinion with medical reasons on why the diagnosed condition was caused by the June 6, 2008 incident.

In a July 24, 2008 work capacity evaluation (Form OWCP-5c), Dr. Gault stated that appellant could work eight hours per day with restrictions. In reports dated June 27 through July 11, 2008, he noted appellant's continuing middle to upper dorsal pain and treatment.

In a July 11, 2008 disability certificate, Dr. Paul J. Baughman, a Board-certified osteopath, stated that appellant could not work from July 1 to 15, 2008 due to his medication.

A June 6, 2008 chest x-ray report of Dr. Robert C. Gilroy, a Board-certified radiologist, found stable nodular density in the left lower lobe, and no acute pulmonary disease or significant changes since September 10, 2006. In a June 25, 2008 report, Dr. Gault released appellant to light-duty work with restrictions. Disability certificates dated July 17 and 18, 2008 which contained an illegible signature stated that appellant was unable to work. In a July 17, 2008 prescription note, Dr. Baughman stated that appellant could return to light-duty work on July 18, 2008. A July 22, 2008 report of Dr. Don Potter, an employing establishment physician, stated that appellant could return to work with restrictions.

In a July 22, 2008 report, Dr. Gault opined that appellant was totally disabled for work from June 12 to July 15, 2008 due to his pain medication. He released him to work on July 16,

2008 with restrictions. In a July 24, 2008 Form OWCP-5c, Dr. Gault provided appellant's light-duty work restrictions.

In an undated work restriction evaluation, Dr. Baughman reiterated his opinion that appellant could perform light-duty work with restrictions. In a July 22, 2008 disability certificate, he stated that appellant was unable to work through July 24, 2008 due to sickness.

An unsigned report dated August 6, 2008 which contained the typed name of Dr. William A. Rolle, Jr., a Board-certified physiatrist, found that appellant sustained a thoracic strain as a result of the June 6, 2008 incident. He was released to light-duty work with restrictions. An unsigned August 7, 2008 report which contained the typed name of Dr. Michael F. Lupinacci, a Board-certified physiatrist, stated that appellant sustained probable thoracic muscle spasm and bilateral knee pain with probable quadriceps ligament inflammation bilaterally.

By letter dated September 3, 2008, the Office accepted appellant's claim for thoracic back sprain. In a decision of the same date, it denied continuation of pay on the grounds that the medical evidence failed to establish that he was totally disabled from June 7 to July 21, 2008 due to the accepted June 6, 2008 employment injury.

A September 15, 2008 report of a physician's assistant whose signature is illegible stated that appellant suffered from thoracic pain. He was unable to work and had restrictions.

In disability certificates dated July 11 to August 28, 2008, Dr. Baughman stated that appellant suffered from back pain and that he was totally disabled from July 1 to September 2, 2008.

Unsigned reports dated September 5 and 15, 2008 which contained the typed name of Dr. Rolle stated that appellant sustained a thoracic sprain. An August 7, 2008 prescription note of Rebecca Lingefelter, a physician's assistant, stated that appellant was unable to work from August 6 to 8, 2008 due to back and knee pain. A September 5, 2008 report of a physician whose signature is illegible stated that appellant could return to light-duty work with restrictions. In a September 8, 2008 note, Dr. Peter J. Tucker, a Board-certified urologist, excused appellant from work. Unsigned treatment notes dated September 10 to October 1, 2008 addressed appellant's physical therapy. An unsigned September 18, 2008 treatment note stated that he sustained a thoracic sprain and strain.

A September 26, 2008 report containing the typed name of Dr. Shervin C. Dean, a Board-certified radiologist, provided the results of a magnetic resonance imaging (MRI) scan of appellant's thoracic spine. It found a small left central disc protrusion at T8-9 and no evidence of disc disease or spinal stenosis. The report also found a stable appearance to a noncalcified pulmonary nodule of the left lobe.

An October 14, 2008 report from the employing establishment's health unit stated that appellant was sent home and that he sustained a thoracic sprain.

On October 27, 2008 appellant requested reconsideration of the September 3, 2008 decision. He continued to experience severe back pain since his June 6, 2008 employment injury

despite being treated with medication and steroid injections. An October 27, 2008 report from the prior physician's assistant whose signature is illegible reiterated the diagnosis of thoracic pain and opinion that appellant was totally disabled with restrictions.

Unsigned reports dated October 3 through 27, 2008 containing Dr. Rolle's typed name stated that appellant sustained thoracic neuritis and was status post an epidural steroid injection.

Unsigned notes dated October 2 to 9, 2008 addressed appellant's physical therapy.

By decision dated November 17, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not relevant and, thus, insufficient to warrant a merit review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

In order to establish entitlement to continuation of pay, an employee must establish, on the basis of reliable, probative and substantial evidence, that he was disabled as a result of a traumatic employment injury. As part of this burden, he must furnish medical evidence from a qualified physician who, based on a complete and accurate history, concludes that the employee's disability for specific periods was causally related to such injury.[1] As used in the Act, the term disability means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury.[2] In other words, if an employee is unable to perform the required duties of the job in which he was employed when injured, the employee is disabled.[3]

ANALYSIS -- ISSUE 1

The Office accepted that on June 6, 2008 appellant sustained a thoracic strain. It found that he was not entitled to continuation of pay from June 7 to July 21, 2008 as the medical evidence failed to establish that he was totally disabled due to his accepted June 6, 2008 employment injury. The Board finds that appellant did not submit medical evidence establishing that he was totally disabled from June 7 to July 21, 2008 due to the June 6, 2008 employment injury.

Appellant submitted several medical records of Dr. Gault, a chiropractor. Section 8101(2) of the Act provides that the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the

[1] *Carol A. Dixon*, 43 ECAB 1065 (1992); *Virginia Mary Dunkle*, 34 ECAB 1310 (1983). *See Carol A. Lyles*, 57 ECAB 265 (2005); 20 C.F.R. § 10.205(a) (to be eligible for continuation of pay, a person must: (1) have a traumatic injury which is job related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury).

[2] *Marvin T. Schwartz*, 48 ECAB 521 (1997).

[3] *Id.*

spine to correct a subluxation as demonstrated by x-ray to exist.[4] Dr. Gault did not diagnose a subluxation.[5] In the absence of a diagnosis of subluxation based on x-rays, he is not considered to be a "physician" as defined under the Act. The Board finds, therefore, that Dr. Gault's reports, disability certificates and OWCP-5c forms have no probative value in establishing appellant's employment-related disability from June 7 to July 21, 2008.

The undated and unsigned report from a physician's assistant whose signature is illegible also has no probative value. A physician's assistant is not considered to be a "physician" as defined under the Act.[6] The Board finds, therefore, that the report of the physician's assistant fails to establish that appellant was totally disabled from June 7 to July 21, 2008 due to the June 6, 2008 employment injury.

Moreover, the undated report and July 17 and 18, 2008 disability certificates which contained illegible signatures and the August 6 and 7, 2008 and unsigned reports which contained the typed names of Dr. Rolle and Dr. Lupinacci, respectively, have no probative value as the author(s) cannot be identified as a physician.[7] As this evidence lacks proper identification, the Board finds that it does not constitute probative medical evidence sufficient to establish appellant's burden of proof.[8]

Dr. Baughman's July 17, 2008 prescription note, undated and July 24, 2008 work restriction evaluations stated that appellant could return to light-duty work with restrictions. In a July 22, 2008 report, Dr. Potter released appellant to work with restrictions. However, neither Dr. Baughman nor Dr. Potter provided an explanation as to why appellant was disabled prior to being released for light-duty work. The Board finds that the prescription note and report of these physicians are insufficient to establish appellant's burden of proof.

Dr. Baughman's July 11, 2008 disability certificate stated that appellant could not work from July 1 to 15, 2008 due to his medication. Although he found that appellant was totally disabled during the period in question, he did not provide an opinion stating that his disability was causally related to the June 6, 2008 employment injury. The Board finds that Dr. Baughman's disability certificate is insufficient to establish appellant's burden of proof.

The diagnostic reports of Dr. Labuski and Dr. Gilroy regarding appellant's thoracic and pulmonary conditions and the July 22, 2008 disability certificate of Dr. Baughman finding that appellant was disabled through July 24, 2008 are insufficient to establish his entitlement to continuation of pay. These records do not address the issue of his disability for work from

[4] 5 U.S.C. § 8101(2).

[5] The Office's implementing federal regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See* 20 C.F.R. § 10.5(bb).

[6] *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); 5 U.S.C. § 8101(2).

[7] *Ricky S. Storms*, 52 ECAB 349 (2001).

[8] *See D.D.*, 57 ECAB 734 (2006); *Vickey C. Randall*, 51 ECAB 357, 360 (2000); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

June 7 to July 21, 2008 or how any disability was causally related to the accepted employment injury. The Board finds that Dr. Labuski's and Dr. Gilroy's reports and Dr. Baughman's disability certificate are insufficient to establish appellant's burden of proof.

The Board finds that there is insufficient rationalized medical evidence to establish that appellant was totally disabled from June 7 to July 21, 2008 due to the accepted June 6, 2008 employment injury. Appellant did not meet his burden of proof to establish his entitlement to continuation of pay.[9]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[10] 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.[11] 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.[12] 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

On October 27, 2008 appellant disagreed with the Office's September 3, 2008 decision which denied continuation of pay from June 7 to July 21, 2008. The relevant issue of whether he was totally disabled from June 7 to July 21, 2008 due to the accepted June 6, 2008 employment injury is medical in nature.

Ms. Lingefelter's August 7, 2008 prescription note stated that appellant was totally disabled for work from August 6 to 8, 2008 due to back and knee pain. Dr. Tucker's September 8, 2008 note excused appellant from work. The September 15 and October 27, 2008 reports of a physician's assistant stated that appellant suffered from thoracic pain. These reports also stated that he was totally disabled for work and had restrictions. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[13] Although Ms. Lingefelter, Dr. Tucker and the physician's assistant found that appellant was totally disabled, they did not state that he was

[9] This decision applies only to appellant's entitlement to continuation of pay. It does not affect appellant's entitlement to appropriate compensation for any time missed from work due to his accepted employment injury.

[10] 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).

[11] 20 C.F.R. § 10.606(b)(1)-(2).

[12] *Id.* at § 10.607(a).

[13] *D. Wayne Avila*, 57 ECAB 642 (2006).

disabled from June 7 to July 21, 2008 due to the June 6, 2008 employment injury. Therefore, the Board finds that this evidence is insufficient to reopen appellant's claim for further merit review.

Dr. Rolle's reports dated September 5 through October 27, 2008, the unsigned September 18, 2008 treatment note and the employing establishment's October 14, 2008 health unit report stated that appellant sustained a thoracic sprain, strain and neuritis. The September 5, 2008 report of a physician whose signature is illegible stated that appellant could return to light-duty work with restrictions. Dr. Dean's September 18, 2008 MRI scan report found a small left central disc protrusion at T8-9, a stable appearance to a noncalcified pulmonary nodule of the left lobe and no evidence of disc disease or spinal stenosis. The unsigned September 10 to October 9, 2008 treatment notes addressed appellant's physical therapy. This evidence does not contain an opinion addressing the relevant issue of whether appellant was totally disabled from June 7 to July 21, 2008 due to the June 6, 2008 employment injury. Thus, the Board finds that the evidence noted above is insufficient to reopen his claim for further merit review.[14]

Dr. Baughman's disability certificates dated July 11 to August 28, 2008 contained his conclusory statement that appellant suffered from back pain and that he was totally disabled from July 1 to September 2, 2008. These disability certificates are similar to his July 11, 2008 disability certificate which the Office previously reviewed. 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.[15] Dr. Baughman's July 11 to August 28, 2008 disability certificates contained no new information or reasoning to support his opinion that appellant was totally disabled, from June 7 to July 21, 2008 due to the accepted employment injury. As his disability certificates are repetitious of his earlier disability certificate, the Board finds that they are insufficient to reopen appellant's claim for further merit review.

The evidence submitted by appellant 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 constitute relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he is not entitled to further merit review.[16]

CONCLUSION

The Board finds that appellant is not entitled to continuation of pay for the period June 7 through July 21, 2008. The Board further finds that the Office properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

[14] *Id.*

[15] *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Freddie Mosley*, 54 ECAB 255 (2002).

[16] *See* 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB 207 (2005).

ORDER

IT IS HEREBY ORDERED THAT the November 17 and September 3, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 7, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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