United States Department of Labor
Employees' Compensation Appeals Board

W.R., Appellant	)	
and	)	**Docket No. 09-1107**
	)	**Issued: January 8, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 18, 2009 appellant filed a timely appeal from the November 18, 2008 merit decision of the Office of Workers' Compensation Programs, which denied his claim of disability for a particular period. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office's January 30, 2009 nonmerit decision denying his request for reconsideration.[1]

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability from September 17 to 23, 2007 as a result of his accepted employment injury; and (2) whether the Office properly denied his January 12, 2009 request for reconsideration.

[1] The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board, therefore, has no jurisdiction to review any evidence appellant submitted on appeal that was not before the Office when it issued its decisions on November 18, 2008 and January 30, 2009.

FACTUAL HISTORY

On August 4, 1989 appellant, then a 37-year-old supervisor of mails, filed an occupational disease claim alleging that his back condition, which he first became aware of in March 1987, was a result of his federal employment. The Office accepted his claim for aggravation of preexisting spondylolisthesis at L5-S1 with L5 spondylosis and spina bifida occulta. Appellant received compensation for wage loss.

On June 14, 2007 appellant accepted a rehabilitation assignment offer as a mail handler effective June 23, 2007. Physical restrictions included no continuous standing or walking and no lifting over 10 pounds.

On January 11, 2007 appellant filed a claim for compensation for total disability from September 17 to 23, 2007. He sought medical attention on September 18, 2007 for numbness in his toes: "States that not all of them are numb and his big toes are numb only when he puts weight on them and it feels as though he is walking on something." Dr. Thelma Evans, an internist, diagnosed tenia pedis (athlete's foot), onychomycosis (a fungal infection), hypertension and chronic low back pain due to old work injury. She prescribed an antifungal cream to be applied at bedtime to the nail beds and around the toenails. Dr. Evans advised appellant not to soak his feet in bleach water but to use Epsom salt if he preferred to use something other than plain water. She gave him a note to be off work from September 17 to 23, 2007, returning to work on September 24, 2007 with restrictions on walking, standing and lifting.

On November 30, 2007 the Office informed appellant that the report of Dr. Evans did not explain any material change in his employment-related condition. It asked him to submit a narrative report with a well-rationalized statement from his physician showing that he was disabled due to his work injury. "Your doctor should also explain why you were unable to work limited duty."

Appellant responded that his limited duty was not consistent with his work restrictions. On May 9, 2008 Dr. Thierry Dubois, his family physician, wrote the following:

> "[Appellant] is a patient here at Advocate Beverly. Patient was seen by Dr. Thelma Evans September 7, 2007 thru September 9, 2007. Patient was diagnosed with an [a]cute [e]xacerbation of his [c]hronic [l]ow [b]ack [p]ain. His low back pain is work related. Patient was given work statement September 7, 2007 work statement has the patient returning to work September 10, 2007 with limitations. September 18, 2007 statement has the patient return to work [September 29, 2007] [sic] with limitations."

In a decision dated November 18, 2008, the Office denied appellant's claim for wage loss from September 17 to 23, 2007. It found that the medical evidence did not establish work-related disability for the period claimed.

On January 12, 2009 appellant requested reconsideration. He explained that Dr. Evans was on extended leave and could not be contacted to secure the requested medical narrative prior

to the Office decision denying his claim. Appellant stated that he had examined the record, which "revealed such a narrative in support of my claim."

In a decision dated January 30, 2009, the Office denied appellant's request for reconsideration. It found that he failed to identify the medical narrative to which he referred. The Office listed Dr. Evans' return to work slip and Dr. Dubois' May 9, 2008 report, and that no new medical evidence pertaining to his claim of disability from September 17 to 23, 2007 had been submitted following the November 18, 2008 decision. Because appellant's request for reconsideration neither raised substantive legal questions nor included new and relevant evidence, it found it insufficient to warrant a review of its prior decision.

On appeal, appellant repeated that Dr. Evans was on an extended leave of absence. He stated that he filed a Form CA-2 through his agency but that the Office did not receive it. Appellant attached a copy of the claim form. He also stated that additional medical evidence was submitted but never sent to the Office. Appellant enclosed copies of medical records he maintained to substantiate his claim, including Dr. Evans' notes and a response from Dr. Dubois.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[2] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[3]

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position, or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[4]

ANALYSIS -- ISSUE 1

Appellant has the burden of proof to establish his entitlement to compensation for wage loss for the period claimed. In June 2007 he returned to limited duty as a mail handler in a rehabilitation assignment. Appellant filed a claim for total wage loss from September 17 to 23, 2007. He has to show either a change in the nature and extent of his injury-related condition or a change in the nature and extent of his limited-duty job requirements.

[2] 5 U.S.C. § 8102(a).

[3] 20 C.F.R. § 10.5(f).

[4] *See Terry R. Hedman*, 38 ECAB 222, 227 (1986).

The medical evidence does not establish any change in the nature and extent of his injury-related condition. Indeed, it appears that appellant was off work due to a fungal infection, not because of the low back injury he sustained in the late 1980s. When he sought medical attention on September 18, 2007, his complaint was numbness in his toes. In addition to hypertension and chronic low back pain, appellant's treating internist, Dr. Evans, diagnosed athlete's foot and a fungal infection. After prescribing an antifungal cream and offering advice on soaking his feet, she took him off work from September 17 to 23, 2007. Dr. Evans made no mention of appellant's spondylolisthesis at L5-S1, his L5 spondylosis or his spina bifida occulta as being a cause of his disability for work.

On May 9, 2008 Dr. Dubois, appellant's family physician, did little more than review the notes of Dr. Evans. He offered no opinion on whether appellant needed to miss work from September 17 to 23, 2007 because of a worsening of his accepted employment injuries.

The medical evidence of record does not show a change in the nature and extent of appellant's injury-related condition. Neither does the factual evidence show a change in the nature and extent of appellant's limited-duty job requirements. Appellant stated that his limited duty was not consistent with his work restrictions, but he offered no evidence to establish that this was the reason he had to stop work for a week beginning September 17, 2007. He made no mention of this to Dr. Evans when he sought medical attention on September 18, 2007. Appellant complained instead about his toes.

Because the evidence fails to establish that appellant sustained a recurrence of disability from September 17 to 23, 2007 as a result of his accepted employment injury, the Board finds that appellant has not met his burden of proof. The Board will affirm the Office's November 18, 2008 decision denying compensation for wage loss from September 17 to 23, 2007.

On appeal, appellant asserts that he filed additional documents, including a Form CA-2 and unspecified medical evidence, but the employing establishment never sent it along to the Office. It makes no difference to this appeal. The Board's review of the case is strictly limited to the evidence that was, in fact, before the Office at the time of its final decision. The Board cannot consider evidence that does not so appear in the case record.

LEGAL PRECEDENT -- ISSUE 2

The Office may review an award for or against payment of compensation at any time on its own motion or upon application.[5] The employee shall exercise this right through a request to the district Office.[6]

An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by the Office in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.605.

interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[7]

A request for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[8] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the request for reconsideration without reopening the case for a review on the merits.[9]

ANALYSIS -- ISSUE 2

Appellant made his January 12, 2009 request for reconsideration within one year of the Office's November 18, 2008 merit decision denying his recurrence claim. His request was therefore timely. The request did not show that the Office erroneously applied or interpreted a specific point of law. It did not advance a relevant legal argument not previously considered by the Office, nor did it include evidence that constituted relevant and pertinent new evidence not previously considered by the Office.

Appellant explained that Dr. Evans was on extended leave and could not be contacted to secure the requested medical narrative. That is not relevant to the issue of his entitlement to the compensation claimed. It merely accounts for his failure to submit the necessary medical evidence. Appellant added that his own examination of the record revealed a narrative in support of his claim. However, he did not specifically identify which medical narrative of record.

Appellant's January 12, 2009 request for reconsideration does not meet any of the standards for obtaining a merit review of his case. The Board finds that the Office properly denied his request. The Board will affirm the Office's January 30, 2009 decision denying a reopening of his case.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained a recurrence of disability from September 17 to 23, 2007 as a result of his accepted employment injury. The Board further finds that the Office properly denied appellant's January 12, 2009 request for reconsideration.

[7] *Id*. at § 10.606.

[8] *Id*. at § 10.607(a).

[9] *Id*. at § 10.608.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2009 and November 18, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 8, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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