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

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| **DONALD L. OAKES, Appellant** | ) | |
| **and** | ) | **Docket No. 05-576** |
| | ) | **Issued: July 20, 2005** |
| **U.S. POSTAL SERVICE, MAIN POST OFFICE, West Chester, PA, Employer** | ) | |

*Appearances:*
*Thomas R. Uliase, Esq.,* 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 January 11, 2005 appellant, through counsel, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs' hearing representative dated January 20, 2004, which affirmed the denial of his claim for a recurrence of disability on and after November 13, 2002 causally related to an accepted September 15, 1989 employment injury. He also appealed an October 19, 2004[1] decision in which the Office denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the Office's decision denying further merit review.

### ***ISSUES***

The issues are: (1) whether appellant has established that he sustained a recurrence of disability on and after November 13, 2002 due to his accepted September 15, 1989 employment

[1] Appellant's counsel references a December 15, 2004 decision while appellant noted October 19, 2004 as the nonmerit decision date. A review of the record indicates October 19, 2004 is the correct date for the nonmerit decision as December 15, 2004 is the date of a letter from the Office enclosing a copy of the October 19, 2004 decision.

injury; and (2) whether the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

## ***FACTUAL HISTORY***

On September 18, 1989 appellant, a 33-year-old letter carrier, filed a traumatic injury claim alleging that he injured his lower back on September 15, 1989 in the performance of duty.[2] The Office accepted the claim for lumbar strain, herniated lumbar disc and authorized lumbar bilateral foraminotomy at L4-5 and L5-S1 surgery, which was performed on February 2, 1993. Appellant sustained recurrences of disability in 1992, 1994, 1997 and 1998, which the Office accepted.

On February 6, 2003 the Office received reports dated December 17, 2002, January 2 and 24, 2003 from Dr. Jeffrey S. Yablon, a treating Board-certified neurological surgeon, who diagnosed recurrent right cervical radiculopathy in his December 17, 2002 report. A physical examination revealed full cervical range of motion and "no focal motor or sensory deficits." Appellant related that "he developed the insidious onset of recurrent pain in his neck radiating all the way down the right arm" about a month and half ago.

In a January 2, 2003 report, Dr. Yablon diagnosed a herniated disc at C3-4 based upon a magnetic resonance imaging (MRI) scan. Appellant also complained of low back pain. An examination revealed negative mechanical signs in the lumbar spine "except for moderate tenderness and severe paraspinal spasm" and a mildly antalgic neurological deficit.

Dr. Yablon, in a January 24, 2003 report, noted a lumbar MRI scan revealed multilevel degenerative disc changes, but "no evidence of any significant nerve root or foraminal compression." A cervical MRI scan "suggested some mild stenosis at the C6-7 level."

On February 28, 2003 appellant filed a recurrence of disability claim beginning November 13, 2002.

On March 12, 2003 the Office received a January 18, 2003 lumbar MRI scan by Dr. Lisa Klein, a Board-certified diagnostic radiologist, who reported no "evidence of residual or recurrent disc herniation or any evidence of spinal stenosis. She also reported "moderate degenerative changes of the lower lumbar spine.

In a March 26, 2003 letter, the Office advised appellant that the medical evidence of record was insufficient to support his recurrence claim beginning November 13, 2002.

[2] This was assigned file number 03-0149173. The record contains a copy of a February 5, 2000 traumatic injury claim in which appellant alleged that he sustained a herniation at C4 and C5 on January 18, 2000 when he slipped on ice while delivering mail. This was assigned file number 03-0250180 and accepted for cervical disc displacement, other back symptoms and brachial neuritis. Appellant filed a traumatic injury claim on April 17, 1997 for an injury to his lower back sustained on April 12, 1997. This was assigned file number 03-0226091 and was accepted for thoracic and lumbar sprains. On September 21, 2000 the Office combined file numbers 03-0226091 and 03-0149173, with the latter number as the master file number.

In an April 7, 2003 letter, appellant related that he had filed a traumatic injury claim for an injury sustained on November 13, 2002 and that a December 12, 2002 MRI scan revealed a C3 herniated disc. He also stated that he had returned to full duty after all his surgeries.

By decision dated May 12, 2003, the Office denied appellant's claim for a recurrence of disability beginning November 13, 2002 due to his accepted September 15, 1989 employment injury.

In a letter dated May 14, 2003, appellant requested an oral hearing. A hearing was held on October 27, 2003 at which appellant was represented by counsel and testified. Prior to appellant's testimony, it was noted that appellant filed a traumatic injury claim alleging that he sustained a herniated cervical disc while casing mail on November 13, 2002.[3] It was noted that this claim was still pending. Appellant testified that he was lifting a tub of mail on November 13, 2002 when he felt a pop and "it started spasming down in my chest and down my arm." He was taken to the emergency room and filed a traumatic injury claim.

In an April 11, 2003 note, Dr. Paul J. Marcotte, a treating Board-certified neurological surgeon, diagnosed "clear nonunions at C5-6 and C6-7" based upon a computerized tomography (CT) scan of the cervical spine and attributed his pain to this condition. Dr. Marcotte then concluded that "there is a relationship between his ongoing symptoms and his previous treatments and injury." On May 30, 2003 Dr. Marcotte checked "yes" that the condition was caused or aggravated by appellant's employment.

In an August 5, 2003 report, Dr. Steven J. Valentino, a treating osteopath, opined that appellant's "disability is related to" the September 15, 1989 employment injury. He noted that appellant had surgery and "he failed to respond and has continued with radicular symptoms since that time." In an August 27, 2003 addendum, Dr. Valentino stated that he has not treated appellant since January 4, 2001. He concluded that appellant "had a recurrence of disability" on November 13, 2002 based upon appellant's statement "that he could no longer continue working as the result of a worsening of his condition."

By decision dated January 20, 2004, an Office hearing representative affirmed the denial of appellant's recurrence claim due to his accepted 1989 employment injury. The hearing representative found the evidence of record insufficient to establish that appellant's disability beginning November 13, 2002 was causally related to his accepted lumbar and thoracic conditions of September 15, 1989. He noted the evidence and appellant's testimony attributed his disability to a November 13, 2002 employment incident and not to the accepted 1989 employment injury.

Appellant, through counsel, requested reconsideration in a June 17, 2004 letter and submitted reports by Dr. Marcotte in support of his request.[4]

[3] This was assigned file number 03-2013657.

[4] Appellant references a November 13, 2002 employment injury.

On February 28, 2003 Dr. Marcotte related that appellant had a long history of back problems and had undergone two lumbar surgeries. He stated that appellant was doing well until sustaining an employment injury in November 2002 due to lifting a box of mail. Dr. Marcotte diagnosed chronic low back pain and opined that appellant "developed acute symptomatology in November." Based upon the pain distribution, he concluded that there was "lower extremity cervical involvement."

On October 19, 2004 the Office, without conducting a merit review, denied appellant's request for reconsideration on the grounds that the submitted evidence was cumulative, repetitious, irrelevant and immaterial to warrant further medical review.

## ***LEGAL PRECEDENT -- ISSUE 1***

Section 10.5(x) of the Office's regulations provides, in pertinent part:

> "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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."[5]

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.[6] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury.[7] Moreover, the physician's conclusion must be supported by sound medical reasoning.[8]

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[9] In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.[10] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be

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[5] 20 C.F.R. § 10.5(x).

[6] *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[7] Section 10.104(a), (b) of the Code of Federal Regulations provides that when an employee has received medical care as a result of the recurrence, he or she should arrange for the attending physician to submit a detailed medical report. The physicians report should include the physician's opinion with medical reasons regarding the causal relationship between the employee's condition and the original injury, any work limitations or restrictions and the prognosis. 20 C.F.R. § 10.104.

[8] *Robert H. St. Onge*, *supra* note 6.

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

[10] For the importance of bridging information in establishing a claim for a recurrence of disability, *see Robert H. St. Onge*, *supra* note 6; *Shirloyn J. Holmes*, 39 ECAB 938 (1988); *Richard McBride*, 37 ECAB 748 (1986).

speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[11]

## ***ANALYSIS -- ISSUE 1***

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability on November 13, 2002 causally related to his September 15, 1989 employment injury.

The Office accepted that appellant sustained a lumbar strain, herniated lumbar disc and authorized lumbar bilateral foraminotomy at L4-5 and L5-S1 surgery due to the September 15, 1989 employment injury. The Office also accepted that appellant sustained recurrences of disability in 1992, 1994, 1997 and 1998.

Appellant has not submitted rationalized medical evidence establishing that his condition on or after November 13, 2002 was causally related to the September 15, 1989 injury by a spontaneous change in his medical condition. Rather, the evidence tends to support that a new injury occurred on November 13, 2002 as he was picking up a tub of mail. A January 18, 2003 MRI scan documents "moderate degenerative changes of the lower lumbar spine," but noted that there was no evidence of spinal stenosis or recurrent or residual disc herniation. This evidence does not causally relate the diagnosed condition to the originally accepted injury and provided no opinion as to disability. The reports by Dr. Yablon are insufficient to establish appellant's recurrence claim as the physician provided no opinion as to whether appellant sustained a period of disability on November 13, 2002 and did not note a history of the employment injury.

The reports by Dr. Marcotte are insufficient to support appellant's recurrence claim. He diagnosed "clear nonunions at C5-6 and C6-7" based upon a CAT scan of the cervical spine and attributed appellant's pain to this condition. Dr. Marcotte then concluded that "there is a relationship between his ongoing symptoms and his previous treatments and injury," but provided no further explanation and did not reference the September 15, 1989 employment injury. On a May 30, 2003 Dr. Marcotte checked "yes" that the condition was caused or aggravated by appellant's employment. The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's disability was related to the history is of diminished probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[12] Dr. Marcotte failed to submit a rationalized medical opinion relating appellant's cervical condition to his accepted September 15, 1989 employment injury

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

[12] *Calvin E. King*, 51 ECAB 394 (2000); *Linda Thompson*, 51 ECAB 694 (2000).

and his reports are insufficient to establish that appellant sustained a recurrence of disability causally related to the accepted 1989 injury.[13]

Dr. Valentino attributed appellant's disability to his September 15, 1989 employment injury and noted that appellant had radicular symptoms since his failure to respond to surgery. On August 27, 2003 Dr. Valentino indicated that he had not treated appellant since January 4, 2001; however, he concluded that appellant's recurrence of disability on November 13, 2002 was due to his September 15, 1989 employment injury based upon appellant's statement "that he could no longer continue working as the result of a worsening of his condition." However, Dr. Valentino did not provide sufficient rationale explaining how appellant sustained a disability on November 13, 2002 causally related to his accepted September 15, 1989 employment injury. The only rationale provided by Dr. Valentino was appellant's April 3, 2003 statement. Moreover, Dr. Valentino noted that he had not treated or seen appellant since January 4, 2001. Dr. Valentino's opinion regarding the cause of appellant's disability is speculative and is not supported by adequate medical rationale. The Board has held that an opinion, which is speculative in nature, is of diminished probative value on the issue of causal relationship.[14] The Board held in *Connie Johns*[15] that the opinion of the physician must be one of reasonable medical certainty, supported with affirmative evidence, explained by medical rationale and based on a complete and accurate factual and medical background. Dr. Valentino's opinion on causal relationship is of little probative value since it contains a conclusory statement on causal relationship.[16]

Furthermore, appellant's testimony at the hearing and an April 7, 2003 letter attributed his disability beginning on November 13, 2002 to a new injury he sustained when he was picking up a tub of mail. Appellant noted that he filed a traumatic injury claim for a herniated disc sustained on November 13, 2002. At the hearing appellant testified that he was picking a tub of mail up on November 13, 2002 when felt a pop and "it started spasming down in my chest and down my arm." He stated that he was taken to the emergency room and filed a traumatic injury claim.

The Board finds that the factual and medical evidence does not establish that appellant sustained a recurrence of disability on and after November 13, 2002 causally related to his accepted September 15, 1989 employment injury.[17]

[13] *See Carmen Gould*, 50 ECAB 504 (1989) (finding that a physician's opinion that failed to explain the relationship between appellant's current back condition and the accepted lumbar strain was insufficient to establish causation and thus failed to meet appellant's burden of proof).

[14] *Ricky S. Storms*, *supra* note 11.

[15] *Connie Johns*, 44 ECAB 560 (1993); *see also Philip J. Deroo*, 39 ECAB 1294 (1988).

[16] *Albert C. Brown*, 52 ECAB 152 (2000).

[17] *See Cleopatra McDougal-Saddler*, 47 ECAB 980 (1996); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8128(a) of the Federal Employees' Compensation Act[18] vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[19]

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[20] Section 10.608(b) provides that, when an application for review of the merits of a claim 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.[21] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[22]

## ***ANALYSIS -- ISSUE 2***

The Office denied reconsideration of appellant's claim, finding that the medical evidence submitted on reconsideration was cumulative, repetitious, irrelevant and immaterial. The January 20, 2004 Office hearing representative's decision found that appellant had not established that she sustained a recurrence of disability on and after November 13, 2002 due to his accepted September 15, 1989 employment injury. The Board finds that the evidence submitted on reconsideration did not address this issue. Dr. Marcotte noted that appellant had a long history of back problems and noted that appellant had been doing well until he sustained an employment injury in November 2002. As his report attributes appellant's disability to a new injury, it is not pertinent to the issue of whether appellant sustained a recurrence of the September 15, 1989 employment injury on November 13, 2002.

Appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a legal argument not previously considered by the Office. Further, he failed to submit relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, he is not entitled to a merit review.[23]

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[18] 5 U.S.C. § 8128(a) ("[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[19] *Veletta C. Coleman*, 48 ECAB 367 (1997).

[20] 20 C.F.R. § 10.606(b)(2).

[21] 20 C.F.R. § 10.608(b).

[22] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[23] *See James E. Norris*, 52 ECAB 93 (2000).

## ***CONCLUSION***

The Board finds that the Office properly denied appellant's claim that he sustained a recurrence of disability on and after November 13, 2002 due to his accepted September 15, 1989 employment injury. The Board also finds that the Office properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 19 and January 20, 2004 are affirmed.

Issued: July 20, 2005
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