

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

<p>CHARLES R. JORDAN, Appellant</p> <p>and</p> <p>U.S. POSTAL SERVICE, PALM DESERT POST OFFICE, San Diego, CA, Employer</p>)))))))))))	<p>Docket No. 05-820</p> <p>Issued: October 20, 2005</p>
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Appearances:
 Charles R. Jordan, pro se
 Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 23, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs' hearing representative dated March 1, 2004, affirming an April 3, 2003 decision denying his recurrence of disability claim and an April 15, 2004 decision, denying his request for reconsideration. He further appeals the Office's merit decision dated September 9, 2004, denying modification of the April 15, 2004 decision. Lastly, appellant appeals the Office's nonmerit decision dated November 19, 2004, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained a recurrence of disability beginning October 2, 2002 causally related to his February 4, 1982 employment injuries; and (2) whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 10, 1982 appellant, then a 35-year-old letter carrier, filed a traumatic injury claim alleging that on February 4, 1982 he hurt the ball of his right foot when he stepped out of his truck onto a rock while delivering mail. The Office accepted his claim for a right foot sprain/strain. The Office subsequently expanded the acceptance of his claim to include a nonunion fracture of the sesamoid second metatarsal phalangeal joint of the right foot and authorized surgery which was performed on August 8, 1983. Appellant was temporarily totally disabled from August 8 through September 15, 1983, November 29 through December 27, 1983 and September 23 through October 28, 1985.

On November 20, 2002 appellant filed a claim alleging that he sustained a recurrence of disability beginning on October 4, 2002.¹ He stated that in October 2002 his right foot became extremely swollen and painful at the old surgery site. Appellant submitted medical reports dated June 5, 1984 through and December 15, 1986 from his treating physicians, which found that he had normal use of his right foot with no limitations. A December 11, 2002 x-ray report of appellant's right foot found minimal deformity of the tuft of the fifth ray which may be congenital versus post-traumatic, minimal joint space narrowing and sclerosis involving the first metatarsophalangeal joint indicative of mild osteoarthritis, a small calcaneal plantar enthesophyte and no evidence of acute fractures and postsurgical changes.

By letter dated February 27, 2003, the Office advised appellant of the evidence he needed to submit to establish his recurrence of disability claim. Appellant did not respond within the 30-day time period.

By decision dated March 20, 2003, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability beginning in October 2002 causally related to his February 4, 1982 employment injury.

On March 24, 2003 appellant submitted a March 20, 2003 attending physician's report of Dr. Michael L. Dinnel, a podiatrist, who noted the injury of February 4, 1982 and diagnosed neurofibroma of the right foot. Dr. Dinnel indicated with an affirmative mark that the diagnosed condition was caused by an employment activity because appellant was working on his feet as a mailman.

By letter dated March 25, 2003, appellant requested an oral hearing before an Office hearing representative.

On April 3, 2003 the Office reissued the March 20, 2003 decision because it was sent out 9 days earlier than the 30-day deadline set forth in the February 27, 2003 developmental letter. The April 3, 2003 decision found that the medical evidence submitted was in sufficient to establish that he sustained a recurrence of disability causally related to the February 4, 1982 employment injuries.

¹ In his recurrence of disability claim form, appellant indicated that he had retired on medical disability from the employing establishment. He submitted medical evidence relating to treatment of a left shoulder condition, which has not been accepted by the Office as employment related.

Appellant requested an oral hearing before an Office hearing representative, held on December 8, 2003. In a December 15, 2003 report, Dr. Dinnel's noted that appellant was seen in his office on March 7, 2003 with the chief complaint that the ball of his foot was sore. On physical examination, Dr. Dinnel reported "possible" Morton's neuroma of the second interspace of the right foot. He stated that this was in the same area where appellant had previous pain. Dr. Dinnel opined that it "would appear that this is related to his original injury that was reported to you."

By decision dated March 1, 2004, the Office a hearing representative affirmed the March 20, 2003 decision.

In a letter dated March 22, 2004, appellant requested reconsideration. He submitted duplicate copies of Dr. Dinnel's March 20 and December 15, 2003 reports, the December 11, 2002 x-ray report and December 6, 2002 progress note.

In an April 15, 2004 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was repetitious and, thus, insufficient to warrant a review of its prior decision.

On April 13, 2004 appellant appealed this decision to the Board. The Board issued an order dismissing appeal on June 29, 2004 because appellant wished to submit new evidence to the Office for reconsideration.²

The Office thereafter received an authorization for surgery form signed by appellant on May 25, 2004 for an injection of Morton's neuroma in his right foot. In a May 25, 2004 report, Dr. Anthony F. Chong, a Board-certified family practitioner, provided a history that appellant hurt his right foot in 1992, working at the employing establishment. Dr. Chong stated that appellant was doing well until two years prior, noting that, without any other injuries or surgeries to the right foot, appellant began to experience pain between the second and third metatarsal bones on the right foot. Dr. Chong noted that appellant related that this was the location of surgeries he underwent and injuries he sustained in 1992 and diagnosed Morton's neuroma as the cause of appellant's pain. He opined that, in light of no other injuries or surgeries since 1992, "it is very likely that [appellant's] pain is therefore a result of the injuries he sustained while under the employment of the postal service."

On June 21, 2004 appellant requested reconsideration of the Office's March 1, 2004 decision. In a September 9, 2004 decision, the Office denied modification of the prior decisions.

Appellant requested reconsideration by letter dated September 20, 2004. He submitted an article regarding Morton's neuroma and a September 15, 2004 report in which Dr. Chong addressed an error regarding the date of appellant's employment-related injury and provided clarification regarding the diagnosis of Morton's neuroma. Dr. Chong noted that appellant sustained an employment-related right foot injury in 1982 and reiterated the diagnosis of Morton's neuroma. He reported that physical examination of appellant's right foot on May 25, 2004 revealed tenderness between the second and third toes. Dr. Chong reiterated his previous

² See Docket No. 04-1309 (issued June 29, 2004).

opinion that, without any other injuries or surgeries since 1982, “it is very likely that [appellant’s] painful neuroma is therefore a result of the injuries he sustained while under the employment of the postal service.” In a May 18, 2004 report, Mitchell R. Rice, a nurse practitioner, noted moderate distress of pain, a stable left foot, swelling in the right foot and sensation over both feet. The report also noted the findings of the December 11, 2002 x-ray report. Appellant also submitted treatment notes dated January 12 and June 13, 1985 from Dr. Robert J. Clement, Jr., a Board-certified family practitioner, regarding his right foot.

On November 19, 2004 the Office issued a decision denying appellant’s request for reconsideration on the grounds that the evidence submitted was duplicative and repetitious and, thus, insufficient to warrant review of its prior decision.

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.³

A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which he claims compensation is causally related to the accepted employment injury.⁴ Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his employment injury.⁵ 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.⁶ Moreover, the physician’s conclusion must be supported by sound medical reasoning.⁷

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.⁸ 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.⁹ While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be

³ 20 C.F.R. § 10.5(x) (2002).

⁴ *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

⁵ *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993).

⁶ *Ricky S. Storms*, 52 ECAB 349 (2001); *see also* 20 C.F.R. § 10.104(a)-(b).

⁷ *Alfredo Rodriguez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

⁸ *See Ricky S. Storms*, *supra* note 6; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

⁹ For the importance of bridging information in establishing a claim for a recurrence of disability, *see Richard McBride*, 37 ECAB 748 at 753 (1986).

speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.¹⁰

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a sprain/strain, fracture and nonunion fracture of the sesamoid second metatarsal phalangeal joint of the right foot. On November 20, 2002 appellant sought compensation for on-going right foot problems. The Board finds that appellant has failed to submit sufficient rationalized medical evidence to establish that his right foot condition, diagnosed on a Morton's neuroma, is causally related to his accepted injury of February 4, 1982.

Appellant submitted medical reports dated June 1984 through December 15, 1986. The Board notes that these reports are insufficient to establish appellant's claim because they predate the alleged recurrence of disability beginning in October 2002.

In a March 20, 2003 report, Dr. Dinnel indicated with an affirmative mark that appellant's neurofibroma of the right foot was caused by the February 4, 1982 employment injury. He stated that appellant was working on his feet as a mailman. This report does not provide any medical rationale explaining how appellant's condition was caused by the accepted employment injury of 1982. Therefore, the report is insufficient to establish his claim. Dr. Dinnel opined that appellant suffered from "possible" Morton's neuroma of the second toe of the right foot. He opined it would "appear" that this condition was caused by the February 4, 1982 employment. Without medical rationale explaining how the accepted injury caused disability commencing in October 2002, this report is insufficient to establish causal relationship and is of diminished probative value.¹¹

Dr. Chong's May 25, 2004 report found that appellant experienced pain in the second and third metatarsal bones of the right foot. He opined that this condition was "likely" a result of a 1992 employment-related injury in light of the fact that appellant had not undergone any surgeries or sustained any injuries since 1992. The opinion of Dr. Chong regarding causal relation is speculative and equivocal in nature and of diminished probative value.¹² Moreover, Dr. Chong's report failed to provide an accurate factual background as he indicated that appellant sustained a work-related injury in 1992 rather than in 1982. The Board finds that Dr. Chong's reports are insufficient to establish appellant's claim.

As appellant has failed to submit rationalized medical evidence establishing that he sustained a recurrence of disability beginning October 4, 2002 that was causally related to his February 4, 1982 employment injuries, he has not met his burden of proof.

¹⁰ See *Ricky S. Storms*, *supra* note 6; *Morris Scanlon*, 11 ECAB 384, 385 (1960).

¹¹ See *Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

¹² *Ricky S. Storms*, *supra* note 6.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,¹³ 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.¹⁴ 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.¹⁵ 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

The Office found that appellant failed to establish that he sustained a recurrence of disability beginning October 4, 2002 causally related to the February 4, 1982 employment injury. Appellant requested reconsideration on September 20, 2004. In support of his September 20, 2004 request, appellant submitted an article regarding Morton's neuroma and Dr. Clement's treatment notes. However, these reports dated from 1985 and are therefore not relevant to the claimed periods of disability commencing in October 2002. The Board finds that this evidence does not satisfy the requirements of section 8128 as it is not relevant to the issue of the case. Moreover, the article is of no evidentiary value as it is of general application and is not specific as to appellant's condition and circumstances of his employment.¹⁶

Dr. Chong's report noted that appellant sustained the employment-related injury in 1982, rather than in 1992 as previously indicated. Dr. Chong reiterated his opinion that appellant's pain in the second and third toes of the right foot was likely a result of the February 4, 1982 employment because he had not undergone any surgeries or sustained any injuries since 1982. Dr. Chong's report is repetitive of his May 25, 2004 report regarding the cause of appellant's current foot problems and, thus, it does not constitute a basis for reopening a case.¹⁷ The Board finds that Dr. Chong's report was insufficient to warrant further merit review of appellant's claim.

A report which contained the typed name of Mr. Rice, a nurse practitioner, indicates that appellant experienced problems with his right and left foot. The Board has held that the report of a nurse practitioner is of no probative value inasmuch as a nurse is not a "physician" under the

¹³ 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).

¹⁴ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *See Vernon O. Fein*, 34 ECAB 78 (1982).

¹⁷ *Id.*

Act.¹⁸ The Board finds that evidence submitted by appellant does not constitute a basis for reviewing the merits of his claim.

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant 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, the Board finds that he was not entitled to a merit review.¹⁹

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a recurrence of disability beginning October 2, 2002 causally related to his February 4, 1982 employment injuries. The Board further finds that the Office properly denied appellant's requests for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 19, September 9, April 15 and March 1, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 20, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁸ 5 U.S.C. § 8101(2); *see also Joseph N. Fassi*, 42 ECAB 231 (1991) (medical evidence signed only by a registered nurse or nurse practitioner is generally not probative evidence).

¹⁹ *See James E. Norris*, 52 ECAB 93 (2000).