

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

C.F., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Seattle, WA, Employer)

**Docket No. 08-828
Issued: August 25, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 24, 2008 appellant filed a timely appeal of two nonmerit decisions of the Office of Workers' Compensation Programs dated November 28, 2007, which denied his requests for reconsideration. He also timely appealed the Office's March 28, 2007 decision, which denied his claim of disability for the period October 2 to December 22 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues are: (1) whether appellant has established that he was disabled for the period October 2 to December 22, 2006 as a result of his employment-related conditions; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 11, 2006 appellant, then a 53-year-old letter carrier, sustained an injury when he slipped while walking and delivering mail. He experienced pain in the low back and left

shoulder. Appellant did not initially stop work but returned to limited-duty work. The Office accepted the claim for sprain/strain of the thoracic and lumbar regions. Appellant received appropriate compensation and benefits.

In an August 15, 2006 report, appellant's treating physician, Dr. Jena Schliiter, a Board-certified physiatrist, diagnosed a lumbosacral strain. She advised that appellant could work within restrictions. Appellant accepted a modified letter carrier assignments on August 24 and September 5, 2006. In reports dated September 12 and 26, 2006, Dr. Schliiter indicated that appellant's condition had worsened and recommended that he could work light duty and advised that he should sit for no more than four to five hours per day, stand for no more than three to four hours per day and walk no more than two to three hours per day.

In an October 4, 2006 magnetic resonance imaging (MRI) scan of the lumbar spine, Dr. Daniel Heller, a Board-certified diagnostic radiologist, noted that appellant had a transitional L5 vertebral body with diminutive L5-S1 disc space and noted that appellant had a previous laminectomy at L3-4. He also indicated that appellant had an L3-4 posterior osteophytic ridge and accompanying minima disc bulge contiguous with the origin of both transisting roots and slightly displaced in the left root, with mild bilateral bony neural foraminal narrowing and at L4-5 bony neural foraminal narrowing.

In an October 10, 2006 report, Dr. Schliiter saw appellant in follow up for persistent back pain with worsening left leg pain. Appellant related that he could barely move and his left leg pain was "worse than it was preoperatively in 2004." An MRI scan showed ongoing disc desiccation and alteration of the lateral recess of the left nerve root at the L3-4 level. Dr. Schliiter also indicated that appellant had left foraminal narrowing with encroachment due to loss of disc height, which was read at the L3-4 level but opined that "it is probably his previous L5-S1 level." She indicated that this was the area of the previous back surgery and advised that appellant continued to have bony deformity and disc protrusion at the lower level. Dr. Schliiter conducted an inspection of the low back and advised that it showed significant flattening of the lumbar lordosis with tenderness throughout, left much greater than right. She advised that appellant had increased pain in the low back and left leg as well as into the calf with flexion with shooting pain into his left foot on straight leg raise. Dr. Schliiter diagnosed low back injury with worsening radicular pain on the left. She indicated that appellant had to take a bus from Seattle to Tacoma and back and had difficulty doing his job. Dr. Schliiter placed him off work "until he can get definitive treatment." On October 31, 2006 she noted that appellant had shown some improvement since he was off work. Dr. Schliiter conducted a physical examination and determined that the low back showed some flattening with tenderness, greater on the left. She indicated that flexion on the mid thigh level caused increased pain into his low back and left leg, lateral flexion caused increased left leg pain, and appellant had difficulty putting full pressure on his left leg. Dr. Schliiter noted that appellant's straight leg raise remained positive at approximately 75 degrees with shooting pain into his foot but that he was able to tolerate full straight left leg raise "albeit with discomfort." She advised that the neurological examination revealed mildly altered strength in dorsiflexion and plantar flexion, and sensation was mildly decreased to pinprick on the left heel, lateral aspect of the leg and into the fourth and fifth digit on the left side. Dr. Schliiter diagnosed low back injury with radicular symptomatology in the left leg. She advised that appellant would remain off work until he could get injections.

Appellant submitted CA-7 forms requesting wage-loss compensation for the period April 18 to December 22, 2006.

By decision dated December 29, 2006, the Office denied appellant's claim for compensation for the period April 14 to July 5, 2006. It advised appellant that, on September 5, 2006, he was advised that he needed a statement from his supervisor saying he was sent home early because of no work. However, no statement was received. The Office advised appellant that the evidence did not establish disability for the claimed period, with the exception of 13.4 hours for leave without pay which was for doctor's appointments on June 20, July 18, August 28, September 12 and October 10, 2006.

In a letter dated December 29, 2006, the Office advised appellant that it had received his claim for compensation for the period October 2 to December 22, 2006; however, the Office had not received a comprehensive medical report that explained how his disability was due to the January 11, 2006 work injury. The Office advised appellant that he should submit a report from his physician which explained what changes caused any worsening of the accepted lumbar and thoracic sprain and discussed the injury-related factors of disability including objective findings. Appellant was provided 30 days to submit the requested evidence.

In a January 2, 2007 report, Dr. Schliiter indicated that appellant could return to an eight-hour workday on January 4, 2007 with restrictions comprised of: continuous lifting of 5 to 10 pounds for no more than 30 minutes; sitting for no more than 2 hours per day; standing no more than 1 hour continuously or 4 hours intermittently; walking for no more than 3 hours per day; climbing for no more than 30 minutes; kneeling for no more than 15 minutes; bending or stooping for no more than 3 hours, twisting for no more than 4 hours; pulling/pushing for no more than 15 minutes; and driving for no more than 1 hour per day.

Appellant accepted a modified position on January 8, 2007. Dr. Schliiter continued to treat appellant and, on January 30, 2007, advised that appellant could return to work without restrictions.

By decision dated March 28, 2007, the Office denied appellant's claim for disability compensation for the period October 2 to December 22, 2006. It found that he did not provide any evidence which supported injury-related disability for work for the claimed time frame.

On September 21, 2007 appellant requested reconsideration of the Office's December 29, 2006 decision. The Office received copies of evidence previously of record.

On September 21, 2007 appellant requested reconsideration of the Office's March 28, 2007 decision.¹

By decision dated November 28, 2007, the Office denied appellant's request for reconsideration of its March 28, 2007 decision without a review of the merits on the grounds that

¹ Appellant actually wrote April 28, 2007; however, there is no decision dated April 28, 2007, thus it appears, he was actually requesting reconsideration of the March 28, 2007 decision.

his request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

In a separate decision of November 28, 2007, the Office denied appellant's request for reconsideration of its December 29, 2006 decision without a review of the merits on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

As used in the Federal Employees' Compensation Act,² the term "disability" means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.³ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁴

Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.⁵ Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.⁶ The Board has held that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁷ While there must be a proven basis for the pain, due to an employment-related condition can be the basis for the payment of compensation.⁸ The Board, however, will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁹

² 5 U.S.C. §§ 8101-8193.

³ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f).

⁴ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

⁵ *Edward H. Horton*, 41 ECAB 301 (1989).

⁶ *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

⁷ *John L. Clark*, 32 ECAB 1618 (1981).

⁸ *Barry C. Peterson*, 52 ECAB 120 (2000).

⁹ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS -- ISSUE 1

In support of his claim for disability for the period October 2 to December 22, 2006, appellant provided reports from Dr. Schliiter. On October 10 and 31, 2006 Dr. Schliiter examined appellant and noted that he “could barely move” and advised that his left leg pain was “worse than it was preoperatively in 2004.” She reviewed diagnostic test results and found ongoing disc desiccation and alteration of the lateral recess of the left nerve root at the L3-4 level and left foraminal narrowing with encroachment due to loss of disc height at his previous L5-S1 level, bony deformity and disc protrusion at the lower level, significant flattening of the lumbar lordosis with tenderness throughout, and increased pain in the low back, left leg, calf and left foot. Dr. Schliiter diagnosed a low back injury with worsening radicular pain on the left side and noted that appellant had to take a bus from Seattle to Tacoma and back. She indicated that appellant would be off work until he could get definitive treatment. The Board finds that these reports are insufficient to establish appellant’s claim for disability for the period October 2 to December 22, 2006. Dr. Schliiter merely provided findings. She did not provide any specific opinion on causal relationship between the claimed period of disability and the accepted employment conditions, sprain/strains of the thoracic and lumbar regions. Medical evidence which does not offer any opinion regarding the cause of an employee’s condition is of limited probative value on the issue of causal relationship.¹⁰ Furthermore, Dr. Schliiter did not specifically address what, if any, role appellant’s preexisting back condition may have had on his claimed disability.

In subsequent reports, Dr. Schliiter noted appellant’s treatment and disability status. Again, she did not address causal relationship between the period of claimed disability and the accepted employment conditions. Similarly, Dr. Heller’s October 4, 2006 MRI scan report did not address whether appellant had disability causally related to his January 11, 2006 work injury. Therefore, these reports are insufficient to establish appellant’s claim for wage-loss compensation from October 2 to December 22, 2006.

Although appellant alleged that he was disabled for the period October 2 to December 22, 2006, due to his accepted employment injury, the medical evidence of record does not establish that his claimed disability was related to his accepted employment injuries. The Board finds that appellant failed to submit sufficient medical evidence and has not met his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,¹¹ the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written

¹⁰ *Michael E. Smith*, 50 ECAB 313 (1999).

¹¹ 5 U.S.C. § 8128(a).

application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(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 [the Office].”¹²

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹³

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his claim for disability for the period April 14 to July 5, 2006 and requested reconsideration of the Office’s December 29, 2006 decision¹⁴ on September 21, 2007. On that same date, he also requested reconsideration of the Office’s March 28, 2007 decision which denied his claim for disability for the period October 2 to December 22, 2006.

Regarding the December 29, 2006 decision, the underlying issue on reconsideration was whether appellant established that he was disabled as a result of his employment injury for the period April 14 to July 5, 2006. Regarding the March 28, 2007 decision, the underlying issue on reconsideration was whether appellant established that he was disabled as a result of his employment injury for the period October 2 to December 22, 2006.

However, appellant did not provide any relevant or pertinent new evidence to the issue of whether he was disabled for the period April 4 to July 5, 2006 or from October 2 to December 22, 2006.

On reconsideration appellant submitted reports from Dr. Schliiter dated January 2 and 30, 2007. However, these reports are not relevant as the physician did not address whether appellant was disabled for the period October 2 to December 22, 2006. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵ Appellant also provided copies of evidence previously of record. The

¹² 20 C.F.R. § 10.606(b).

¹³ 20 C.F.R. § 10.608(b).

¹⁴ The Board does not have jurisdiction to review the December 29, 2006 decision as that decision was issued more than one year prior to the filing of this appeal on January 24, 2008. *See* 20 C.F.R. § 501.3(d)(2).

¹⁵ *Robert P. Mitchell*, 52 ECAB116 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Alan G. Williams*, 52 ECAB 180 (2000).

submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.¹⁶ Thus, these copies are insufficient to warrant reopening appellant's claim for further merit review.

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that the Office erroneously applied or interpreted a specific point of law, or advanced a relevant new argument not previously submitted. Therefore, the Office properly denied his requests for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that he was disabled for the period commencing October 2 to December 22, 2006 as a result of his employment-related injuries. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 28 and March 28, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 25, 2008
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

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