

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

T.H., Appellant

and

**U.S. POSTAL SERVICE, WALLINGFORD
STATION, Seattle, WA, Employer**

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**Docket No. 08-1005
Issued: November 17, 2008**

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 February 19, 2008 appellant filed a timely appeal from a March 8, 2007 merit decision of the Office of Workers' Compensation Programs, affirming termination of his compensation benefits and a nonmerit decision dated December 11, 2007 denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective November 29, 2006; (2) whether he established any continuing disability or residuals subsequent to November 29, 2006; and (3) whether the Office properly denied further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 10, 2005 appellant, then a 56-year-old motor vehicle operator, sustained injury to his low back while off-loading a pallet from a truck. The Office accepted the claim for lumbar

strain/sprain and aggravation of bilateral upper arm and shoulder strain/sprain. On June 6, 2006 it accepted appellant's claim for a recurrence of disability beginning June 18, 2005.

In a March 1, 2006 report, Dr. Howard Cushner, an attending Board-certified internist with a subspecialty in nephrology, diagnosed chronic kidney disease. He noted appellant had chronic back pain since May 2005. Appellant was totally disabled from performing his usual work as a driver. Dr. Cushner requested that a functional capacity evaluation be performed.

On June 5, 2006¹ Dr. Karen M. Wooten, a Board-certified physiatrist, noted appellant had complaints of thoracic pain due to an employment injury the prior year. Appellant related that he had back pain for many years and the pain in his mid-thoracic region became persistent since the May 10, 2005 employment injury. Dr. Wooten diagnosed post-traumatic stress disorder, major depressive disorder, shoulder problems, neck problems and chronic pain. A physical examination revealed discomfort on palpation in the T5 to T8 paraspinal area, greater on the right than the left and sensation intact to light touch throughout the upper extremity and lower extremity dermatomes bilaterally. Diagnostic studies showed a mild to moderate L2 to S1 degenerative joint disease based on a June 2005 magnetic resonance imaging (MRI) scan. Dr. Wooten attributed appellant's mid-thoracic back pain to his work injury in 2005.

In a May 22, 2006 report, Dr. Charles S. Paxson, a Board-certified internist with a subspecialty in rheumatology, obtained a history of low back pain since 1979. He noted that the pain became worse with right leg and buttock numbness, since the May 2005 employment injury. Since the employment injury appellant also had mid-thoracic and lower right rib cage pain.

On August 7, 2006 Dr. Wooten diagnosed chronic pain syndrome, multiple pain complaints and mechanical mid-thoracic back pain which she attributed to a June 5, 2005 employment injury. She reported that appellant had "a lot of difficulty just sitting in the clinic today" and had used eight days of leave for a recent pain flare-up. Appellant was seen for his pain complaints and a recommendation for a functional capacity evaluation. Dr. Wooten noted that appellant was disabled from performing his duties as a truck driver due to chronic pain.

On August 16, 2006 Dr. Wooten again requested a consult for appellant's pain condition. She noted a provisional diagnosis of chronic low back pain which had been present since a May 2005 injury when appellant injured himself while moving pallets.

On August 9, 2006 the Office referred appellant to Dr. Joan Sullivan, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Sullivan was asked to address whether appellant continued to have residuals of his accepted conditions, whether his employment injury aggravated any preexisting conditions and whether he was capable of performing his date-of-injury job. In a September 25, 2006 report, she reviewed medical evidence, a statement of accepted facts and set forth findings on physical examination. Dr. Sullivan diagnosed lumbar strain and bilateral shoulder pain due to the May 10, 2005 employment injury. She determined that appellant had mild cervical disc disease, bilateral acromioclavicular joint arthritis and mild degenerative changes of the right shoulder glenohumeral joint, which were preexisting and not aggravated by the accepted employment injury. A physical examination revealed limited right

¹ This is the date of the note and the entry date is June 7, 2006.

shoulder range of motion due to pain and no crepitus in the shoulder range of motion. Dr. Sullivan reported that appellant had multiple pain complaints as well as “nonanatomic, nonphysiologic findings also on examination.” As to the May 5, 2005 employment injury, she opined that appellant was capable of performing his usual duties. However, Dr. Sullivan opined that appellant’s nephrectomy and preexisting nonemployment-related lumbar disc disease restricted him from performing his usual employment as a motor vehicle operator. Appellant had no disability or limitation due to his accepted conditions and any limitations or disability were due to nonemployment-related conditions. Dr. Sullivan concluded that appellant’s accepted lumbar sprain and bilateral upper shoulder condition had resolved. She noted there were no objective findings to support his complaints “other than limitations in range of motion, many of which would have preexisted and are not related to his industrial injury.” In an attached September 25, 2006 work capacity evaluation form (OWCP-5c), Dr. Sullivan advised that appellant’s work restrictions were due to his nonemployment and preexisting lumbar disc disease.

On October 19, 2006 the Office proposed to terminate appellant’s compensation, finding that the medical evidence established that he no longer had any residuals or disability due to his accepted work injury. In a November 10, 2006 response, appellant disagreed with Dr. Sullivan’s September 25, 2006 report.

On November 9, 2006 Dr. Wooten again requested a consult on appellant’s chronic pain condition. She noted a provisional diagnosis of chronic low back pain which had been present since the May 2005 injury.

By decision dated November 29, 2006, the Office finalized the termination of appellant’s wage-loss and medical benefits effective that date. It found that he no longer had any residuals or disability due to his accepted May 10, 2005 employment injury. The weight of the medical evidence rested with the opinion of Dr. Sullivan.

In a letter dated February 12, 2007, appellant requested reconsideration. He submitted medical and factual evidence, including a February 1, 2007 report from Dr. Paxson who noted appellant’s low back symptoms have worsened and that his “mid-thoracic pains seem to be new since the May 2005 event.” Dr. Paxson advised that appellant was unable to perform his usual duties as a driver. He stated that multiple physicians and objective studies “have not found evidence for a reproducible, specific problem in the area” and that any further testing was unlikely to provide clarification. Dr. Paxson stated:

“It seems inescapable that these conditions now are symptomatically worse; with the addition of the thoracic pains and that we cannot define why. I join the chorus of other examiners who believe [appellant]’s worsened symptoms have evolved as a result of his event in May 2005, and that he deserves a [functional] [capacity] [evaluation] to see if there is alternative work open to him.”

By decision dated March 8, 2007, the Office denied modification of the November 29, 2006 decision terminating his compensation benefits.

In a March 23, 2007 progress note, Dr. Timothy J. Lee, a treating physician, reported a history of chronic pain since May 2005 as a result of a lifting injury at work. He diagnosed chronic pain syndrome. In a July 27, 2007 progress note, Dr. Lee diagnosed chronic low back pain and chronic pain syndrome.

On September 12, 2007 appellant requested reconsideration. He submitted Veterans Administration rating decisions dated March 15, 1996, January 21, 2003 and May 15, 2007 and an August 7, 2006 progress note from Dr. Wooten. In an April 7, 2007 report, Dr. Shan Jiang, a Board-certified family practitioner, who noted that appellant's service-connected claim had been accepted for right lower extremity hypoesthesia and L2-3, L3-4, L4-5 and L5-S1 degenerative disc disease by the Veterans Administration (VA). He concluded that the accepted conditions should be changed to lumbar degenerative disc disease at L2-3, L3-4, L4-5 and L5-S1 and IVDS bilateral-lateral femoral cutaneous nerve.

In a nonmerit decision dated December 11, 2007, the Office denied appellant's request for reconsideration.²

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.³ After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁶

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for lumbar strain/sprain and aggravation of bilateral upper arm and shoulder strain/sprain. The Board finds that the weight of the medical evidence is represented by the report of Dr. Sullivan and establishes that appellant had no employment-related disability on or after November 29, 2006.

² The Board notes that, following the December 11, 2007 nonmerit decision, the Office received additional evidence. The Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

³ *Paul L. Stewart*, 54 ECAB 824 (2003).

⁴ *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ See *Del K. Rykert*, 40 ECAB 284 (1988).

⁶ *James F. Weikel*, 54 ECAB 660 (2003).

In a September 25, 2006 report, Dr. Sullivan reviewed appellant's history of injury and medical treatment for the accepted lumbar and shoulder strains. She noted that appellant had several preexisting medical conditions but found that they had not been aggravated by the accepted injury. Dr. Sullivan also found that his accepted lumbar strain and bilateral upper arm and shoulder strains had resolved. She stated that appellant had no disability or limitation due to his accepted employment injuries and that any limitations or disability were due to nonemployment conditions. Dr. Sullivan noted that there were no objective findings which supported appellant's ongoing subjective complaints other than limitations in range of motion, which preexisted his injury and were not related to his federal employment.

In reports dated June 6 and August 7, 2006, Dr. Wooten, an examining Board-certified physiatrist, diagnosed thoracic pain, post-traumatic stress disorder, shoulder and neck problems and chronic pain, which she attributed to appellant's employment injury. She noted that appellant had chronic back pain since the May 10, 2005 employment injury. The Board notes that several conditions diagnosed by Dr. Wooten have not been accepted as employment related. It is appellant's burden of proof to establish causal relationship between the diagnosed conditions and his employment.⁷ Dr. Wooten presented no rationale or explanation in support of her conclusion that appellant's chronic back pain and thoracic pain were due to his May 10, 2005 employment injury. While she noted that appellant sustained his injury in May 2005 while lifting a pallet from a truck, she did not explain how residuals of his accepted conditions contributed to his thoracic pain or chronic pain.⁸ The Board has previously held that mere conclusory statements, not fortified by explanation, are insufficient to establish causal relationship between an employment incident and a diagnosed condition.⁹ The Board finds that Dr. Wooten's reports do not establish that appellant had continuing work-related residuals and are insufficient to create a conflict with Dr. Sullivan's report.

Similarly, the March 1, 2006 report by Dr. Cushner and May 22, 2006 report by Dr. Paxson are also insufficient to create a conflict with Dr. Sullivan's report. Dr. Cushner diagnosed chronic kidney disease and noted appellant has had chronic back pain since May 2005. Dr. Paxson diagnosed low back pain since 1979, which had worsened. Neither physician provided any opinion as to how appellant's conditions were causally related to his accepted employment injury. The Board has held that 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 relationship¹⁰ Merely noting that appellant has had a back condition since May 2005 does not qualify as an opinion as to the cause of his condition as neither physician discussed what happened in May 2005 or noted the employment injury.

⁷ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁸ *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

⁹ *Id.*

¹⁰ *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007).

The September 25, 2006 report of Dr. Sullivan is based on an accurate factual background and provides medical rationale for her conclusions.¹¹ The Office met its burden of proof to terminate appellant's benefits. The weight of the medical evidence establishes that residuals of his employment-related condition ceased.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant.¹² In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's diagnosed condition and the implicated employment factors.¹³ The opinion of the physician must be based on a complete factual and medical background of appellant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant did not meet his burden of proof in establishing that he had continuing employment-related disability or residuals after November 29, 2006.

Appellant requested reconsideration after the Office met its burden of proof to terminate his compensation benefits. In support of his request, he submitted a February 1, 2007 report from Dr. Paxson, who submitted findings similar to his prior report and concluded that appellant's back condition had worsened since the May 2005 employment injury and that his "mid-thoracic pains seem to be new." Dr. Paxson noted that he was unable to define why appellant had thoracic pain and his symptoms had worsened. He recommended a functional capacity evaluation (FCE). However, Dr. Paxson did not explain how appellant had any continuing employment-related condition. While he concluded that appellant's condition had worsened following the injury based on medical reports by appellant's various physicians, he did

¹¹ *Michael S. Mina*, 57 ECAB 379 (2006) (in assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality; the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion, are facts which determine the weight to be given to each individual report).

¹² See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

¹³ *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁴ *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Victor J. Woodhams*, 41 ECAB 345 (1989).

not provide sufficient explanation or rationale to establish that any continuing condition or disability was caused by his accepted injuries.¹⁵ The Board finds that his report was insufficient to establish that appellant had any continuing residuals of his employment-related conditions after November 29, 2006.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,¹⁶ the Office's regulation provides 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.¹⁷ 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.¹⁸ 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.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that the Office properly denied appellant's request for merit review. The underlying issue for reconsideration was whether the Office properly terminated appellant's compensation effective November 29, 2006.

In support of his September 11, 2007 request for reconsideration, appellant noted that the VA had increased his disability rating. Appellant's allegation does not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered. The underlying issue is medical in nature. The fact that the VA increased his disability rating for his back condition is not relevant to the issue of whether his May 10, 2005 injury in civilian employment caused ongoing residuals on disability. A finding of disability by the VA has no bearing on a disability finding under the Act as each statute has different standards of medical proof on the question of causal relation. Therefore, disability under one statute does not establish disability under the other statute.²⁰ This argument does not constitute a basis for reopening appellant's case for further merit review. Consequently,

¹⁵ See *Jimmie H. Duckett*, *supra* note 8; *Franklin D. Haislah*, *supra* note 8.

¹⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

¹⁷ 20 C.F.R. § 10.606(b)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁸ *Id.* at § 10.607(a).

¹⁹ 20 C.F.R. § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

²⁰ *H.S.*, 58 ECAB ____ (Docket No. 07-582, issued June 14, 2007); *John E. Cannon*, 55 ECAB 585 (2004); *David Budzik*, 52 ECAB 339 (2001).

appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also submitted a July 27, 2007 progress note by Dr. Lee, an August 7, 2006 report by Dr. Wooten and an April 7, 2007 report by Dr. Jiang. The submission of Dr. Jiang's April 7, 2007 report and Dr. Lee's July 27, 2007 progress report does not require reopening of his claim for merit review because they are not relevant to the main issue of the present case.²¹ The April 7, 2007 report and July 27, 2007 progress note provide no opinion on whether appellant continued to have any residuals or disability due to his accepted May 5, 2005 employment injury. Dr. Jiang opined that appellant's accepted VA conditions be changed and did not mention the accepted employment-related injury. Dr. Lee diagnosed chronic low back pain and chronic pain syndrome with no opinion as to causation. The August 7, 2006 report of Dr. Wooten was previously considered by the Office when it terminated his compensation benefits on November 29, 2006. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.²²

Appellant has not submitted any relevant and pertinent new evidence, advanced a legal argument not previously considered by the Office, nor argued that the Office erroneously interpreted a specific point of law. Thus, he has not met the criteria to have the Office reopen his case for review on the merits.²³

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation and medical benefits effective November 29, 2006 and that appellant did not meet his burden of proof in establishing that he was disabled as a result of his previous employment injuries after November 29, 2006. The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits on December 11, 2007.

²¹ *F.R.*, 58 ECAB ____ (Docket No. 05-15, issued July 10, 2007) (evidence that does not address the particular issue involved does not constitute a basis for reopening a case).

²² *J.P.*, 58 ECAB ____ (Docket No. 06-1274, issued January 29, 2007).

²³ *M.E.*, 58 ECAB ____ (Docket No. 07-1189, issued September 20, 2007) (when an application for reconsideration 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).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 11 and March 8, 2007 and November 29, 2006 are affirmed.

Issued: November 17, 2008
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