United States Department of Labor
Employees' Compensation Appeals Board

T.V., Appellant	)	
and	)	**Docket No. 08-1633**
	)	**Issued: January 7, 2009**
U.S. POSTAL SERVICE, POST OFFICE, North East, PA, Employer	)	

Appearances:
Stephen D. Scavuzzo, Esq., for the appellant
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 May 19, 2008 appellant filed a timely appeal of the September 11, 2007 merit decision of the Office of Workers' Compensation Programs, which denied his claim for recurrence of disability and a February 21, 2008 decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability on March 20, 2007, causally related to his January 20, 2007 employment injury; and (2) whether the Office properly denied his November 24, 2007 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 37-year-old letter carrier, slipped and fell down some steps in the performance of duty on January 20, 2007. That day he received treatment in the Hamot Medical Center emergency department for a left elbow contusion and a shoulder strain. Appellant was

advised that he could perform limited-duty work, which the employing establishment provided beginning January 23, 2007.[1] Within a few days of his injury, he complained of mid-low back pain. On January 30, 2007 Dr. Allan C. Johnson, an osteopath, diagnosed thoracolumbar sprain.

Appellant had a prior history of cervical and lumbar disc disease. Approximately seven months before his January 2007 employment injury, he received chiropractic treatment for herniated discs of the cervical and lumbar spine. A February 13, 2007 magnetic resonance imaging (MRI) scan showed a disc protrusion at L3-4 and a disc bulge and annular tear at L4-5.[2]

Because of his mid-low back complaints, appellant attended physical therapy for approximately six weeks.[3] On February 22, 2007 Dr. Johnson reported that appellant's left shoulder strain and left elbow contusion had completely resolved. Appellant's low back pain continued to improve through February and March 2007 and Dr. Johnson gradually relaxed his work restrictions to permit more lifting. On March 29, 2007 Dr. Johnson released appellant to resume his regular, full-time duties without restriction. At that time, however, appellant was not working due to a recurrence of bronchitis.[4]

Julie McCurdy, a physician's assistant, excused appellant from work on April 2, 2007 because of dizziness and nausea.[5] Appellant's absence from work was to continue until he received an MRI scan on April 9, 2007.

Appellant returned to Dr. Johnson on April 11, 2007. Dr. Johnson noted that appellant was still off work due to ongoing problems with nausea and dizziness, which were being addressed by his primary physician. He advised that appellant's nausea was not work related. As to appellant's back condition, Dr. Johnson indicated "minimal back complaints." Appellant's back condition had returned to its preinjury baseline with his pain "usually" at one on a scale of 1 to 10. Dr. Johnson stated that appellant's lumbosacral sprain had improved and reiterated that appellant was able to resume his regular, full-time duties.

An April 12, 2007 cervical MRI scan showed dessication with diffuse bulging at C5-6 and a posterolateral extradural defect at C6-7.

[1] Appellant's initial restrictions included no lifting, pushing or pulling over five pounds with his left arm. He was also restricted in reaching above shoulder level.

[2] The radiology report noted an improvement of the lumbar discs when compared to a prior study dated May 2, 2005. According to Dr. Johnson, the latest MRI scan revealed no "evidence of any exacerbation of injury by the current events."

[3] Appellant attended physical therapy three days a week from February 6 to March 16, 2007.

[4] In his March 13, 2007 treatment notes, Dr. Johnson reported that appellant was battling bronchitis and had decided to discontinue his back medication while taking cold medication.

[5] Ms. McCurdy is associated with appellant's primary care physician, Dr. Margaret H. Shanley, a Board-certified family practitioner.

On May 9 and June 12, 2007 Ms. McCurdy advised that appellant was to remain off work due to a cervical disc herniation at C6-7. She noted that appellant was scheduled for surgery on August 1, 2007.

A June 15, 2007 duty status report (Form CA-17) from Dr. Steven A. Gilman, a Board-certified neurosurgeon, advised that appellant was to remain off work until he recovered from surgery scheduled for August 1, 2007. Dr. Gilman diagnosed cervical disc displacement, with findings of disc herniation at C6-7 and mild desiccation of the C5-6 disc. The diagnosis was attributed to appellant having fallen down porch steps.

On June 16, 2007 appellant filed a recurrence of disability claim. He alleged that his cervical condition was associated with his January 20, 2007 employment-related fall. Appellant claimed that his disability began on March 20, 2007.

In a July 10, 2007 letter to the Office, the employing establishment controverted the alleged relationship between appellant's cervical condition and his January 20, 2007 fall at work. It reported that appellant had been on limited duty following his January 20, 2007 injury and stopped work on March 20, 2007 because of a reported cough. The employing establishment further noted that appellant had not returned to work, but had submitted evidence regarding a cervical condition and upcoming surgery.

On July 24, 2007 the Office advised appellant that his claim was accepted for contusion of the left forearm, left shoulder sprain and lumbar spine sprain. It noted that he had worked limited duty following his injury and was released to resume his regular duties as of March 29, 2007. With respect to his claimed recurrence of disability, the Office referred him to a separate recurrence development letter also dated July 24, 2007.

The Office subsequently received a June 7, 2007 initial consultation report from Dr. Gilman, who diagnosed a cervical disc and reported that appellant had been experiencing neck and right arm pain for the prior three months. The noted history of injury was that appellant was delivering mail in January when he slipped, fell and "twisted his back." Dr. Gilman further noted that appellant had lower back discomfort and was attending physical therapy. Within a few weeks of starting physical therapy, appellant's neck started to bother him. Dr. Gilman indicated that appellant's neck pain was progressive and had not improved. He performed a physical examination and reviewed a recent cervical MRI scan, which showed mild disc dessication at C5-6 and posterolateral disc herniation on the right at C6-7. Dr. Gilman recommended a cervical discectomy and fusion at C6-7.

Appellant's primary care physician, Dr. Shanley, provided a July 13, 2007 report which attributed appellant's C6-7 disc herniation to his January 20, 2007 fall at work. She had been following him since February 3, 2007 for multiple symptoms of body aching, nausea, dizziness, fatigue, and neck pain that was intermittent. Dr. Shanley noted that on January 20, 2007 appellant was carrying an armful of mail in his left upper extremity when he slipped and fell down stairs. Appellant was evaluated in the emergency room for left elbow pain, forearm pain and shoulder pain. Dr. Shanley indicated that appellant did have lower back and neck pain, but it seemed the left elbow, forearm and shoulder were the distracting injuries. She saw him again on April 2, 2007 and a subsequent cervical MRI scan showed an extradural defect at C6-7 and

surgery was scheduled for August 2007. Dr. Shanley noted that appellant had been off work since March 20, 2007, which she attributed to his initial injury of January 20, 2007. She stated that the cervical disc herniation at C6-7 was related to his fall on January 20, 2007.

On August 15, 2007 Dr. Gilman performed a C6-7 anterior cervical discectomy with decompression and fusion. His postoperative diagnosis was herniated cervical disc, cervical spondylosis and cervical joint instability. The Office denied authorization for this surgical procedure as related to his accepted claim.

By decision dated September 11, 2007, the Office denied appellant's claim for recurrence of disability. It found that the claimed recurrence was not causally related to the January 20, 2007 employment injury. Appellant's cervical condition was not accepted as employment related and the Office noted that there were no complaints of cervical spine discomfort or injury prior to April 2007.

On November 24, 2007 appellant requested reconsideration. He submitted a September 14, 2007 attending physician's report (Form CA-20) from Dr. Gilman. The report identified the date of injury as January 20, 2007, as Dr. Gilman previously reported on June 7, 2007. Dr. Gilman diagnosed cervical disc, cervical spondylosis and joint instability. He attributed the diagnoses to appellant's January 20, 2007 employment injury. Dr. Gilman further noted that appellant had been disabled since March 21, 2007 and would likely remain disabled for three to six months following the August 15, 2007 surgery. Appellant also submitted a copy of Dr. Shanley's July 13, 2007 report together with correspondence with his senator and local postmaster.

In a decision dated February 21, 2008, the Office denied appellant's November 24, 2007 request for reconsideration.

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 that caused the illness.[6] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn -- except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force -- or when the physical requirements of such an assignment are altered so that they exceed the employee's established physical limitations.[7] Moreover, when the claimed recurrence of disability follows a return to light-duty work, the employee may satisfy his burden of proof by showing a change in the nature and extent

[6] 20 C.F.R. § 10.5(x) (2008).

[7] *Id.*

of the injury-related condition such that he was no longer able to perform the light-duty assignment.[8]

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing that the recurrence of disability is causally related to the original injury.[9] This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.[10] The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[11]

ANALYSIS -- ISSUE 1

Appellant sustained injury on January 20, 2007, accepted by the Office for left forearm and shoulder sprains and a lumbosacral sprain. He was released to resume his regular employment as of March 29, 2007. Appellant's counsel argued that technically there was no recurrence of disability as the January 20, 2007 fall at work had aggravated a preexisting cervical condition. Counsel also asserted that appellant's treatment records from January 30, February 22 and April 11, 2007 noted his complaints of cervical spine discomfort.

As to the accepted conditions of left forearm contusion, left shoulder sprain and lumbar spine sprain, there is no evidence that these conditions either caused or contributed to appellant's March 20, 2007 work stoppage. Appellant reportedly stopped work that day due to a cough, which is consistent with the history of bronchitis reported by Dr. Johnson. His left shoulder strain and left elbow contusion were found by Dr. Johnson to have completely resolved by February 22, 2007. A week prior to appellant's March 20, 2007 work stoppage, Dr. Johnson had relaxed appellant's back-related lifting restrictions. By March 29, 2007, appellant's low back condition had improved such that he was released to return to his regular employment duties. In an April 11, 2007 report, Dr. Johnson reported minimal back complaints and noted that appellant's back had returned to its preinjury baseline. He again stated that appellant was able to resume his regular work.

Appellant has not alleged and there is no medical evidence to establish that his claimed disability on or after March 20, 2007 was due to the accepted conditions of left forearm contusion, left shoulder sprain and lumbar spine sprain. However, counsel contends that the January 20, 2007 employment-related fall aggravated a preexisting cervical condition. Where a claimant contends that a condition not accepted or approved by the Office was due to his

[8] *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

[9] 20 C.F.R. § 10.104(b); *Carmen Gould*, 50 ECAB 504 (1999); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[10] *See Helen K. Holt, supra* note 9.

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

employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.[12]

Both Dr. Gilman and Dr. Shanley attributed appellant's cervical condition to his January 20, 2007 employment injury. However, neither physician adequately explained the basis for their respective opinions on causal relationship. Furthermore, both physicians relied on incorrect histories. On July 13, 2007 Dr. Shanley indicated that when appellant was seen in the emergency room on January 20, 2007 he did have lower back and neck pain, but that the left elbow, forearm and shoulder were distracting injuries. The emergency room treatment records do not support Dr. Shanley's assertion that appellant had lower back and neck pain when initially seen on January 20, 2007. Appellant's mid-low back pain was first documented a few days after the January 20, 2007 injury. Dr. Shanley appears to have been the first physician to document appellant's complaint of neck pain beginning in April 2007 when he was referred for a cervical MRI scan. She did not adequately explain the nature of appellant's prior cervical condition or treatment in addressing causal relation or contrast the April 12, 2007 cervical MRI scan with any prior diagnostic testing.

Dr. Gilman provided a different account of the onset of appellant's neck pain. He reported that, within a few weeks of starting physical therapy for his lumbar condition, appellant's neck started to bother him. However, appellant's physical therapy records from February 6 to March 16, 2007 do not support this characterization of events.[13] While appellant underwent physical therapy there were no reported incidents of cervical pain by either the therapist or Dr. Johnson. In fact, when Dr. Johnson saw appellant on February 22, 2007, he noted that the cervical spine was nontender with good active range of motion without pain.[14] Dr. Gilman's opinion on causal relationship is deficient as he did not include a full medical history of appellant's cervical condition or explain how the C6-7 disc was caused or contributed to by the accepted injury.

The medical evidence of record does not establish that appellant's January 20, 2007 employment-related fall caused or contributed to his diagnosed cervical condition. Accordingly,

[12] *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

[13] The March 16, 2007 physical therapy treatment notes indicated "[patient] reports still feeling sick, cold." Appellant continued with her exercises despite feeling sick to his stomach. He had similar complaints of "cough" and "fighting a cold" on March 15, 2007. There were no reported complaints specific to appellant's cervical spine.

[14] This is the same February 22, 2007 report that counsel purportedly cites to discredit the Office's assertion that appellant had not complained of his cervical condition prior to April 2007. Counsel also referenced Dr. Johnson's January 30, 2007 treatment notes, which similarly do not support his argument. At that time, appellant complained of "pain in the lower thoracic and lumbar region." However, there was no report of cervical pain or discomfort on or about January 30, 2007. Dr. Johnson's April 11, 2007 report also fails to support counsel's argument. He did not report any cervical complaints. Dr. Johnson did, however, note ongoing problems with dizziness and nausea, the latter of which he indicated was a "nonwork-related problem."

the Office properly denied appellant's claim for recurrence of disability beginning March 20, 2007.

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.[15] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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 Office.[16] 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.[17]

ANALYSIS -- ISSUE 2

Appellant's November 24, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Therefore, 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).[18] He also failed to satisfy the third requirement under section 10.606(b)(2). Appellant did not submit any relevant and pertinent new evidence with his November 24, 2007 request for reconsideration. His correspondence with his senator and his local postmaster is not relevant to the issue on reconsideration. Additionally, Dr. Shanley's July 13, 2007 report was of record and had been considered by the Office. The only new evidence submitted was Dr. Gilman's September 14, 2007 report, which reiterated his June 7, 2007 findings and offered no new opinion regarding causal relationship. Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.[19] Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[20]

[15] 5 U.S.C. § 8128(a) (2000).

[16] 20 C.F.R. § 10.606(b)(2).

[17] *Id.* at § 10.608(b).

[18] *Id.* at § 10.606(b)(2)(i) and (ii).

[19] *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

[20] 20 C.F.R. § 10.606(b)(2)(iii).

CONCLUSION

The Board finds that appellant's claimed recurrence of disability beginning March 20, 2007 is not causally related to his January 20, 2007 employment injury. The Board further finds that the Office properly denied appellant's November 24, 2007 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2008 and September 11, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 7, 2009
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