United States Department of Labor
Employees' Compensation Appeals Board

J.N., Appellant	)	
and	)	**Docket No. 08-2284**
	)	**Issued: June 11, 2009**
DEPARTMENT OF THE NAVY, BANGOR NAVAL BASE, Bremerton, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 19, 2008 appellant filed a timely appeal of the June 18, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for wage-loss compensation and a January 23, 2008 decision denying his claim for continuation of pay. The Board also has jurisdiction over the July 30, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant is entitled to continuation of pay as he failed to give written notice of injury within the time limitation specified by the Federal Employees' Compensation Act; (2) whether appellant has established that his disability for the period March 26 to April 12, 2007 was causally related to his accepted employment injury; and (3) whether the Office properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 5, 2007 appellant, then a 52-year-old instrument mechanic, filed a traumatic injury claim alleging that on March 23, 2007 he injured his lower back while working on a sail. The Office accepted the claim for temporary aggravation of lumbar radiculitis.

In an April 6, 2007 disability certificate, George N. Wise, a physician's assistant, found appellant disabled for four days and could return to work on April 10, 2007.

In a June 15, 2007 report, Dr. Farrell James, a chiropractor, noted that he saw appellant on March 24, 2007 and diagnosed severe low back pain. He stated that appellant "was very antalgic and had extreme difficulty standing, walking or changing position." At the next visit on April 6, 2007 appellant was given a disability slip.

In a January 23, 2008 decision, the Office found that appellant was not eligible for continuation of pay because his claim was filed more than 30 days after the date of injury. It stated that this decision did not affect his entitlement to compensation benefits.

On April 29, 2008 appellant filed a claim for wage-loss compensation for the period March 26 to April 12, 2007. In an April 28, 2008 report, Dr. James noted that appellant sustained a low back strain on March 23, 2007. He advised that appellant was excused from work from March 23 to April 9, 2007 due to difficulty in walking, changing position or standing and severe low back pain. Dr. James noted that appellant returned to work on March 27, 2007. He stated that the time appellant took off was due to his inability to work as a result of his employment injury.

In an April 6, 2007 emergency medical report, Mr. Wise reported treating appellant for low back pain which was a result of his March 23, 2007 employment injury.

On April 30, 2008 the Office received an April 9, 2007 disability report signed by Dr. David A. Duncan, an attending Board-certified family practitioner, who noted that appellant was disabled for work at least until April 16, 2007 due to severe back pain.

In a letter dated May 8, 2008, the Office informed appellant that the record was insufficient to support his claim for wage-loss compensation for the period March 26 to April 12, 2007. Appellant was advised to submit additional medical evidence to support his claim and given 30 days to provide the requested information. The Office also informed him that physician's assistants and chiropractors were not considered physicians under the Act.

By decision dated June 18, 2008, the Office denied appellant's claim for wage-loss compensation for the period March 26 to April 12, 2007. It found that he failed to submit sufficient medical evidence to establish his disability for work.

On June 24, 2008 appellant requested reconsideration. He resubmitted evidence previously of record.

By decision dated July 30, 2008, the Office denied appellant's request for reconsideration on the grounds that his request neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

The Act[1] and its implementing regulations provide for the continuation of pay in certain circumstances.[2] Specifically, section 8118(a) provides for continuation of pay, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to traumatic injury with his immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of the Act.[3] Section 8122(a)(2) provides that written notice of injury shall be given in writing within 30 days after the injury.[4] Section 10.210(a) of the implementing federal regulations provides in pertinent part:

> "An employee, who sustains a traumatic injury which he or she considers disabling, or someone authorized to act on his or her behalf, must take the following actions to ensure continuing eligibility for continuation of pay. The employee must: (a) [c]omplete and submit Form CA-1 to the employing [establishment] as soon as possible, but no later than 30 days from the date the traumatic injury occurred."[5]

Therefore, to be entitled to continuation of pay, an employee must file a claim on an appropriate form within 30 days after the injury.[6]

The Board has held that the responsibility for filing a claim rests with the injured employee.[7] The Board has also held that section 8122(d)(3) of the Act,[8] which allows the Office to excuse failure to comply with the time limitation provision for filing a claim for compensation because of exceptional circumstances, is not applicable to section 8118(a),[9] which sets forth the filing requirements for continuation of pay.[10] There is no provision in the Act for excusing an

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[1] 5 U.S.C. §§ 8101-8193.

[2] 20 C.F.R. §§ 10.205, 10.220.

[3] 5 U.S.C. § 8118(a); *see also W.W.*, 59 ECAB ___ (Docket No. 08-477, issued May 22, 2008).

[4] 5 U.S.C. § 8122(a)(2); *see also W.W., supra* note 3.

[5] 20 C.F.R. § 10.210(a).

[6] *Laura L. Harrison*, 52 ECAB 515 (2001); *Sylvia P. Blackwell*, 35 ECAB 811 (1984).

[7] *See Catherine Budd*, 33 ECAB 1011 (1982) (continuation of pay denied where employee did not timely file her claim because the employing establishment erroneously told her that her medical records and accident report were sufficient).

[8] 5 U.S.C. § 8122(d)(3).

[9] 5 U.S.C. § 8118(a).

[10] *Michael R. Hrynchuk*, 35 ECAB 1094 (1984).

employee's failure to file a claim for continuation of pay within 30 days of the employment injury.[11]

ANALYSIS -- ISSUE 1

The record establishes that appellant sustained a traumatic injury on March 23, 2007. Appellant filed a claim for continuation of pay injury on June 5, 2007, more than 30 days later. Because he did not file his claim for continuation of pay within 30 days of the employment injury, the Office properly denied his claim.[12]

Although appellant is barred from receiving continuation of pay, he may still be eligible for compensation benefits under the Act. On January 23, 2008 the Office explained that the decision denying his claim for continuation of pay did not affect his entitlement to wage-loss compensation benefits. Therefore, appellant may still claim wage-loss for disability or for medical treatment rendered due to the effects of the employment injury.

LEGAL PRECEDENT -- ISSUE 2

Under the Act, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.[13] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[14] 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 probative and reliable medical opinion evidence.[15] The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[16]

The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.[17]

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[11] *Robert E. Kimzey*, 40 ECAB 762 (1989).

[12] *Loretta R. Celi*, 51 ECAB 560 (2000).

[13] *See S.F.*, 59 ECAB ___ (Docket No. 08-426, issued July 16, 2008); *Prince E. Wallace*, 52 ECAB 357 (2001).

[14] *Sandra D. Pruitt*, 57 ECAB 126 (, 2005); *Dennis J. Balogh*, 52 ECAB 232 (2001).

[15] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Gary J. Watling*, 52 ECAB 278 (2001).

[16] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Manuel Garcia*, 37 ECAB 767 (1986).

[17] *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for temporary aggravation of lumbar radiculitis. Appellant requested compensation benefits for wage loss from March 26 to April 12, 2007. The issue of whether he sustained disability due to the accepted condition is a medical question that must be established by a physician, who on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning. [18]

The medical evidence addressing appellant's periods of disability consists of an April 9, 2007 disability report by Dr. Duncan, reports dated June 15, 2007 and April 28, 2008 from Dr. James, a treating chiropractor, and an emergency room report and disability slip dated April 6, 2007 by Mr. Wise, a physician's assistant, who indicated that appellant was disabled for four days and could return to work on April 10, 2007. However, a physician's assistant is not a physician as defined under the Act. Their opinions are of no probative value.[19] Therefore, Mr. Wises' opinion has no probative value in establishing whether appellant was disabled for six hours a day due to his accepted employment injury.

Dr. James diagnosed low back strain due to the March 23, 2007 employment injury and opined that appellant was disabled from March 23 to April 9, 2007. In assessing the probative value of chiropractic evidence, such as Dr. James' reports, the initial question is whether the chiropractor is a physician under section 8101(2) of the Act. A chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.[20] As Dr. James did not diagnose a subluxation as demonstrated by x-ray, he is not a physician, as defined, and his reports are of no probative medical value.

Dr. Duncan diagnosed appellant with severe back pain and indicated that he was totally disabled until April 16, 2007. The Board notes that pain is a symptom, not a compensable medical diagnosis and is insufficient to establish the causal relationship between appellant's disability and his accepted condition.[21] Dr. Duncan provided no explanation as to how appellant's disability for work was causally related to his accepted March 23, 2007 employment injury. Moreover, he did not mention the March 23, 2007 employment injury in the disability note. The Board has held that medical reports not containing rationale on causal relation are of diminished probative value.[22] Dr. Duncan provided no supporting medical rationale to support the period of claimed disability.

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[18] *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[19] *J.M.*, 58 ECAB ___ (Docket No. 06-2094, issued January 30, 2007); *Roy L. Humphrey*, 57 ECAB 238 (2005); 5 U.S.C. § 8101(2) of the Act provides as follows: "physician includes surgeons, podiatrists, dentists, clinical psychologist, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law."

[20] *Paul Foster*, 56 ECAB 208 (2004); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[21] *C.F.*, 60 ECAB ___ (Docket No. 08-1102, issued October 10, 2008).

[22] *S.S.*, 59 ECAB ___ (Docket No. 07-579, issued January 14, 2008).

For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[23] The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.[24] The Board finds that there is no such evidence in this case.

LEGAL PRECEDENT -- ISSUE 3

The Act[25] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[26] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[27]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[28]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[29] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[30]

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[23] *Amelia S. Jefferson*, *supra* note 17.

[24] *Sandra D. Pruitt*, *supra* note 14.

[25] 5 U.S.C. §§ 8101 *et seq.*

[26] *Id.* at § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[27] 20 C.F.R. § 10.605.

[28] *Id*. at § 10.606. *See Susan A. Filkins*, 57 ECAB 630 (2006).

[29] *Id.* at § 10.607(a). *See Joseph R. Santos*, 57 ECAB 554 (2006).

[30] *Id.* at § 10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

ANALYSIS -- ISSUE 3

In support of his June 24, 2008 reconsideration request, appellant resubmitted the April 9, 2007 disability report of Dr. Duncan and the April 6, 2007 emergency room report from Mr. Wise. These reports were of record and already considered by the Office. The resubmission of this evidence did not require the Office to conduct further merit review of appellant's claim. The Board has held that repetitious evidence and argument does not require reopening of a claim for further merit review.[31]

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.[32]

CONCLUSION

The Board finds that appellant is not entitled to continuation of pay for his March 23, 2007 employment injury as the claim therefore was untimely filed. The Board further finds that he has not established disability from March 26 to April 12, 2007 due to the accepted March 23, 2007 employment injury. The Board also finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[31] *R.M.*, 59 ECAB ___ (Docket No. 08-734, issued September 5, 2008); *M.E.*, 58 ECAB ___ (Docket No. 07-1189, issued September 20, 2007).

[32] *M.E.*, *supra* note 31 (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 July 30, June 18 and January 23, 2008 are affirmed.

Issued: June 11, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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