United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 09-1333**
	)	**Issued: April 5, 2010**
DEPARTMENT OF THE NAVY, NAVAL SUBMARINE BASE, Groton, CT, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' November 18, 2008 decision denying his recurrence claim and a March 5, 2009 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant established a recurrence of his accepted employment injury; and (2) whether the Office properly refused to reopen his case for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 1, 2007 appellant, then a 62-year-old fuel systems foreman, filed an occupational disease claim alleging that on June 11, 1997 he got caught on a seat belt while getting out of a fuel truck. He fell on the cement loading platform and injured his head. Appellant stated that he had dizzy spells thereafter and his symptoms had not subsided in the

years since his injury. He stated that he was unable to walk a straight line. Appellant retired from the employing establishment on April 2, 1999. He began working for a Department of Veterans Affairs (VA) Medical Center on October 15, 2006.

Appellant submitted employing establishment health unit records. A June 11, 1997 progress note referenced the June 11, 1997 incident at work. The provider documented a normal neurological examination and diagnosed a right forehead laceration and contusion. A November 5, 1997 progress note indicated that appellant was seen for right leg numbness and dizzy spells. An impression of peripheral neuropathy was listed and appellant was prescribed Neurontin.

Appellant submitted records from the VA. A November 13, 2000 progress note stated that appellant was seen for follow-up on "presyncopal episodes that have been occurring since March 2000. Had w/u at St. Anthony's -- told were possibly related to alcohol withdrawal -- had MRI [magnetic resonance imaging] [scan] brain -- was originally told had hemorrhage and then told later was normal. Had recent normal holter and echocardiogram [EKG]. Reports drinks 1 [to] 3 drinks qd. Last presynocopal episode was October 21, 2000 that occurred while preparing a meal." A November 24, 2000 EKG and cardiac stress tests were reported as normal. A November 24, 2003 progress note advised that appellant had cramping in his right calf while walking one-half mile and dizziness for one and one-half year's duration. A January 28, 2004 progress note listed a history of syncopal episodes over a two-year period. "Today [appellant] experienced a brief episode of being unable to speak and then his legs got weak. [Appellant] did not lose consciousness. He is in the process of being worked up for this and so far has had a normal echo and holter monitor." It was noted that appellant denied any head trauma, visual or hearing disturbance, nose or throat problems. A June 14, 2005 electroencephalography (EEG) was normal.

The employing establishment controverted the claim on the basis that it was not timely filed.

On February 15, 2008 the Office accepted the claim for open wound of scalp without complications and contusion of face, scalp and neck except eyes.[1]

In a letter dated February 15, 2008, the Office advised appellant that his claim for additional medical care for dizzy spells constituted a recurrence claim of disability. Appellant was advised that medical evidence was needed to establish a causal relationship between his dizziness and neurological problems and the work injury of June 11, 1997.

In a February 14, 2008 report, Dr. Mark Hammett, Board-certified in occupational medicine and an employing establishment physician, reviewed appellant's medical records. He advised that there was no relationship between appellant's dizziness and the employment injury.

[1] The Office noted that the employing establishment had knowledge of the June 11, 1997 work injury as appellant was seen in the employing establishment's health unit immediately after the incident and was diagnosed with the accepted conditions. Thus, it found appellant had timely filed his claim.

Dr. Hammett noted that the medical record established that appellant had been evaluated for alcohol withdrawal, glaucoma and was on medication to control intraocular pressure. He stated:

> "Aside from the fact that no doctor has ever associated [appellant's] complaint of persistent dizziness to an occupational injury that occurred in 1997, the differential diagnoses for 'dizziness' is huge. The causes can be divided into central nervous system disorders, vestibular disorders, psychogenic causes, systemic causes and medications. [Appellant's] medical record includes a number of clues where to look for the cause that does not involve a bump in the head that occurred almost 11 years ago. Very few of the potential causes have been followed up, but a history of alcohol abuse with the question of an episode of withdrawal is a good starting place. Glaucoma is also a reason for chronic dizziness."

In a June 13, 2008 decision, the Office denied appellant's recurrence of disability claim. The medical evidence of record was found insufficient to establish that his current medical condition was related to the June 11, 1997 work injury.

On July 10, 2008 appellant requested a review of the written record. In an undated statement, he denied being treated for alcohol withdrawal. Appellant noted that he was diagnosed with glaucoma at age 39, but had never been told that the condition had any bearing on his dizziness. He reiterated that he could not walk a straight line. Although appellant had been treated at the VA for the prior seven years, the doctors knew very little about his condition. No additional medical evidence was received.

By decision dated November 18, 2008, an Office hearing representative affirmed the June 18, 2008 decision.

On February 17, 2009 appellant requested reconsideration and indicated his disagreement with Dr. Hammett's report. By decision dated March 5, 2009, the Office denied appellant's request for reconsideration on the grounds that it was insufficient to warrant further merit review of his claim.[2]

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability is the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment, which caused the illness. The term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her 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

[2] On appeal, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

requirements of such an assignment are altered so that they exceed his or her established physical limitations.[3]

A recurrence of a medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a need for further medical treatment after release from treatment, nor is an examination without treatment.[4]

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 she claims compensation is causally related to the accepted employment injury.[5] Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her employment injury.[6] 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.[7] Moreover, the physician's conclusion must be supported by sound medical reasoning.[8]

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[9] 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.[10] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[11]

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[3] 20 C.F.R. § 10.5(x).

[4] *Id.* at § 10.5(y).

[5] *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

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

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

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

[9] *See Ricky S. Storms*, *supra* note 7; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

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

[11] *See Ricky S. Storms*, *supra* note 7; *Morris Scanlon*, 11 ECAB 384, 385 (1960).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an open wound of the scalp without complications and a contusion of the face, scalp and neck except eyes on June 11, 1997 while in the performance of duty. It adjudicated his subsequent claim of dizziness due to the June 11, 1997 employment injury as a recurrence of disability. The Board finds that appellant has failed to submit sufficient medical evidence to establish that his claimed recurrence was caused or aggravated by his accepted injury.

The medical evidence from the employing establishment and the VA does not address the cause of appellant's chronic dizziness or reference his June 11, 1997 work injury. None of the medical providers explained how appellant's chronic dizziness was due to the incident accepted in this case. As the medical records failed to address the causal relationship between appellant's condition and the accepted incident, the Board finds this evidence to be of diminished probative value and insufficient to establish appellant's claim.[12]

In a February 14, 2008 report, Dr. Hammett reviewed the history of the June 11, 1997 incident, and appellant's medical records. He also reviewed appellant's medical records from the VA documenting his complaints of dizziness. Dr. Hammett advised that there was no relationship between appellant's dizziness and the employment injury. He noted that no physician had associated appellant's complaint of persistent dizziness to the 1997 occupational injury. Dr. Hammett stated that the cause of appellant's chronic dizziness had never been investigated and that the causes for dizziness arose from multiple conditions. He suggested that appellant's medical history of alcohol abuse with a questionable episode of withdrawal and glaucoma were possible causes for appellant's chronic dizziness.

Appellant was notified by Office letter dated February 15, 2008 that he was required to submit medical evidence containing a diagnosis and a physician's opinion regarding the cause of his ongoing dizziness. He failed to submit sufficient medical evidence to establish that his chronic dizziness was caused or aggravated by the June 11, 1997 work injury. Appellant has not met his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[13] the Office's regulations provide that the evidence or argument submitted by 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

[12] *See S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[13] 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).

[14] 20 C.F.R. § 10.606(b)(2).

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 on the merits.[16]

ANALYSIS -- ISSUE 2

Appellant's reconsideration request 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. While appellant noted his disagreement with Dr. Hammett, this general disagreement is insufficient to demonstrate that the Office erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered by the Office. Consequently, he 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 did not submit relevant and pertinent new evidence not previously considered by the Office. The Board notes that the underlying issue is medical in nature. However, appellant did not provide any new medical evidence. While he noted his disagreement with Dr. Hammett's report, he did not submit any new medical evidence addressing the cause of his dizziness. Consequently, appellant is not entitled to a merit review based on the third criterion, noted above.

Because appellant has not satisfied any of the above-mentioned criteria, the Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim.

CONCLUSION

The Board finds that appellant failed to establish that he sustained a recurrence causally related to his accepted June 11, 1997 employment injury. 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).

[15] *Id*. at § 10.607(a).

[16] *Id*. at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated March 5, 2009 and November 18, 2008 are affirmed.

Issued: April 5, 2010
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