

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JIMMY C. MOSELEY and DEPARTMENT OF THE AIR FORCE,  
EGLIN AIR FORCE BASE, FL

*Docket No. 99-1432; Submitted on the Record;  
Issued November 21, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained back injury on December 8, 1997, causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for further review of his case on its merits under 5 U.S.C. § 8128(a).

On December 11, 1997 appellant, then a 55-year-old integrated equipment technician, filed a claim alleging that on December 8, 1997 he sustained "lower back pain" while lifting an equipment rack.

In support of his claim, appellant submitted a December 16, 1997 Form CA-16 completed by his treating Board-certified hematologist-oncologist, which noted as history that appellant had a "history of back injury 25 years ago [with] chronic back pain." Dr. Elmer Brestan diagnosed "probable herniated disc," but he did not opine as to any employment causation. Dr. Brestan indicated that appellant was totally disabled from December 8, 1997 to the present. He referred appellant for neurosurgical evaluation.

By letter dated January 30, 1998, the Office requested further information including a physician's opinion supported by medical explanation of how the reported work incident caused or aggravated the claimed injury.

A December 29, 1997 report from Dr. Charles E. Chapleau, a Board-certified neurosurgeon, noted that appellant was evaluated for a herniated lumbar nucleus pulposus (HNP). He indicated that surgical intervention was planned for January 5, 1998, and that appellant should remain off work until that time. Causation of the condition found was not discussed.

By decision dated March 3, 1998, the Office rejected appellant's claim finding that he had failed to establish fact of injury. The Office found that the evidence of record failed to

establish that appellant's claimed condition of a "herniated disc, site unspecified" was related to the December 8, 1997 incident alleged.

By letter dated March 9, 1998, appellant requested reconsideration. In support appellant submitted several reports from Dr. Chapleau.

A December 31, 1997 history and physical report noted that appellant had had "trouble with his back for 25+ years," and that "he has had multiple episodes over the last several months with pain in the left lower extremity, pretty severe." Dr. Chapleau noted that for the preceding three weeks appellant had not been able to stand or work.

In a January 28, 1998 postoperative office note, Dr. Chapleau noted that appellant's wound looked good, that for the preceding week he had had symptoms of cervical radiculopathy and that "he tells me he has been recognized as a job-related injury and he is receiving 63 percent disability payment."

In a February 12, 1998 Form CA-20, attending physician's report, Dr. Chapleau noted as history that appellant "states he was injured on the job"; he diagnosed "HNP L4-5, left," but offered no opinion on causal relation with factors of appellant's federal employment.

Also submitted were a surgical pathology report, an operative report and a surgical radiology report.

By decision dated June 3, 1998, the Office denied modification of the March 3, 1998 decision. The Office found that Dr. Chapleau's reports did not contain a description of the alleged December 8, 1997 employment incident nor provide a diagnosis of any condition caused by that specific incident, but, to the contrary, noted that appellant's back problems had been ongoing for 25-plus years, with multiple episodes over the last several months, which suggested that his symptoms preexisted the alleged December 8, 1997 employment incident. The Office further noted that Dr. Brestan, who examined appellant most contemporaneous with the alleged employment, noted a history of 25 years of chronic back pain, but noted no traumatic incident occurring on December 8, 1997.

On June 18, 1998 appellant faxed the Office a request for reconsideration of the June 3, 1998 decision and he enclosed further medical evidence from Dr. Brestan.

By report dated December 9, 1997, Dr. Brestan noted: "[Appellant] makes an unscheduled visit to the office today because of severe lumbosacral back strain which he incurred after doing some heavy lifting at work." Dr. Brestan noted that appellant's pain was "bilateral and almost radicular in nature around the flanks," and occasionally radiated into the anterolateral left thigh. No muscular weakness was noted and straight leg raising was equivocal bilaterally. He prescribed medication and the application of heat, but did not discuss appellant's disability status for work.

By report dated December 16, 1997, Dr. Brestan noted that appellant returned with increasing back pain and was unable to sit, drive or work. He diagnosed "Probable herniated

nucleus pulposus or ruptured disc,” and recommended strict bed rest until his neurosurgical consultation.

By report dated December 19, 1997, Dr. Brestan noted that appellant was under his care for a history of cancer of the cecum, but “recently has had severe lumbosacral back strain doing lifting at work.”

By decision dated July 6, 1998, the Office denied appellant’s request for modification finding that the evidence submitted in support was insufficient to warrant modification. The Office found that Dr. Breston did not describe any specific incident or injury occurring on December 8, 1997.

On July 28, 1998 appellant faxed the Office a request for reconsideration.

In support appellant submitted a July 14, 1998 report from Dr. Brestan which noted that he had treated appellant for adenocarcinoma of the cecum and added:

“ [Appellant] has never been treated for back pain until December 9, 1997 when he suddenly incurred left leg pain while doing some heavy lifting at work. The pain radiated in a typical sciatic fashion and made it extremely difficult for him to sit or stand for prolonged periods. He was unable to drive to work and within 10 days an MRI [magnetic resonance imaging] scan of the spine had to be obtained which revealed a herniated lumbar disc with posterolateral extension at L4-5. ... Dr. Charles Chapleau ... removed the disc at laminectomy with excellent result.

“To the best of my knowledge, this problem occurred acutely while at work after doing some heavy lifting. If he has ever had any back pain in the past, he has never sought any treatment from me for this problem prior to December 9, 1997.”

By decision dated August 11, 1998, the Office modified the June 3, 1998 decision to reflect that fact of injury had been established, but it denied the claim on the basis that causal relationship of appellant’s diagnosed HNP at L4-5 with the December 8, 1997 lifting incident had not been established.

By letter dated October 26, 1998, to his Congressional representative, appellant requested reconsideration. In support appellant submitted argument that, although he did state that he had back problems in the past, he never sought treatment prior to the December 8, 1997 injury. Appellant argued that the findings in the August 11, 1998 decision, mandated that his claim be accepted, that his injury was confirmed by MRI to be a herniated disc, that his diagnosed “severe lumbosacral back strain” was determined through MRI to be a disc herniation, which was documented as occurring through his two witness statements and that the Office decisions were inconsistent with each other. Appellant argued that following the December 8, 1997 lifting incident he could not return to work due to a total loss of the ability to conduct normal daily activities and that he did not merely experience an increase in symptoms.

By decision dated January 6, 1999, the Office denied appellant’s request for a further review of his case on its merits, finding that the evidence submitted in support was insufficient to

warrant a reopening appellant's case for further merit review. The Office determined that appellant submitted no new and relevant evidence, advanced no point of law previously unconsidered, nor demonstrated that the Office erroneously applied a point of law.

The Board finds that appellant has failed to establish that he sustained back injury on December 8, 1997, causally related to factors of his federal employment.

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the injury claimed was caused or aggravated by his federal employment. As part of this burden, appellant must submit a rationalized medical opinion, based upon a complete and accurate factual and medical background, showing a causal relationship between the injury claimed and factors of his federal employment.<sup>1</sup> Causal relationship is a medical issue that can be established only by medical evidence.<sup>2</sup>

The December 9, 1997 report from Dr. Brestan, noted only the diagnosis of severe lumbosacral back strain incurred after appellant performed some heavy lifting at work. No specific date and time of injury was identified and an HNP was not diagnosed. Disability for work was also not addressed. Therefore, this report is insufficient to establish appellant's claim.

In a December 16, 1997 form report, Dr. Brestan noted appellant's 25-year history of chronic back pain but again reported no traumatic incident as occurring on December 8, 1997. He diagnosed "probable herniated disc" and provided no discussion of causal relation with any employment factors. As Dr. Brestan did not address the issue in question, this report does not establish appellant's claim. By report dated December 19, 1997, he again diagnosed "severe lumbosacral strain doing lifting at work." No HNP was diagnosed, no specific incident was identified and no discussion of causal relation was provided.

Dr. Chapleau, in his December 29, 1997 report, evaluated appellant for surgical intervention for an HNP, but failed to address the issue of causation of appellant's HNP. Therefore, this report too is not sufficient to establish appellant's claim. Further, preoperative and postoperative notes and reports from Dr. Chapleau reported a 25-plus year history of back trouble, noted that appellant stated that he was injured on the job, diagnosed an HNP, but likewise failed to address the causation of appellant's HNP. They, therefore, also do not establish appellant's claim.

As appellant has not provided any rationalized medical evidence causally relating the occurrence of his herniated nucleus pulposus to the December 8, 1997 rack lifting incident, he has failed to meet his burden of proof to establish his claim.

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<sup>1</sup> *Steven R. Piper*, 39 ECAB 312 (1987); *see* 20 C.F.R. § 10.110(a). 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 the claimant's diagnosed condition and the implicated employment factor or incident. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 factor or incident identified by appellant. *See Thomas L. Hogan*, 47 ECAB 323 (1996).

<sup>2</sup> *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The Office's regulations pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), state as follows:

“(b) The application for reconsideration, including all supporting documents, must: (1) Be submitted in writing; (2) Set forth arguments and contain evidence that either: (i) Shows that OWCP erroneously applied or interpreted a specific point of law; (ii) Advances a relevant legal argument not previously considered by OWCP; or (iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”<sup>3</sup>

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.<sup>4</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.<sup>5</sup> When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.<sup>6</sup>

By letter faxed to the Office on July 28, 1998 appellant requested reconsideration of the Office's March 3, June 3, July 6 and August 11, 1998 decisions. In support he submitted another report from Dr. Brestan, which claimed that appellant experienced acute left leg pain on December 9, 1997 while at work doing some heavy lifting at work. The Board notes that this was the day following the alleged employment injury and that it documented acute leg pain as opposed to lower back pain appellant originally alleged. The Board further notes that the fact that a condition manifests itself or worsens during a period of employment does not raise an inference of an employment relationship.<sup>7</sup> As he did not address the occurrence of lower back pain on December 8, 1997, instead addressing acute leg pain occurring on December 9, 1997, this report is irrelevant to the lower back injury claim and does not constitute relevant, probative evidence sufficient to reopen appellant's claim for a further review on its merits.

As the issue in question is medical in nature, it can only be established by rationalized medical evidence submitted from a treating physician. The Board has found that the submission

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<sup>3</sup> 20 C.F.R. § 10.606 (b)(1), (2).

<sup>4</sup> 20 C.F.R. § 10.607 (a).

<sup>5</sup> *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> See *Mohamed Yunis*, *supra* note 5; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

<sup>7</sup> *Paul D. Weiss*, 36 ECAB 720 (1985); *Hugh C. Dalton*, 36 ECAB 462 (1985).

of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>8</sup> Consequently, appellant has not presented relevant and pertinent new evidence sufficient to constitute a basis for reopening his claim for further merit review and the Office properly denied appellant's application for reopening his case for a review on its merits.

In the present case, appellant has not established that the Office abused its discretion in its January 6, 1999 decision by denying his request for a review on the merits of its March 3, June 3, July 6 and August 11, 1998 decisions under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, failed to advance a point of law or a fact not previously considered by the Office or failed to submitted relevant and pertinent evidence not previously considered by the Office.

Consequently, the decisions of the Office of Workers' Compensation Programs dated August 11, July 6, June 3 and March 3, 1998 are hereby affirmed.

Dated, Washington, DC  
November 21, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> *Mary Lou Barragy*, 46 ECAB 781 (1995); *Daniel Deparini*, 44 ECAB 657 (1993); *Richard L. Ballard*, 44 ECAB 146 (1992).