

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOSEPH WHITE and GENERAL SERVICES ADMINISTRATION,  
MID-ATLANTIC REGION, Florance, NJ

*Docket No. 00-2666; Submitted on the Record;  
Issued August 23, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained a recurrence of disability causally related to the accepted lumbosacral strain of July 27, 1998; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review of his claim under 5 U.S.C. § 8128(a).

The Office accepted that on July 27, 1998, appellant, then a 37-year-old material handler, sustained a lumbosacral strain while performing work duties. Appellant stopped work on July 28, 1998 and returned to light duty on August 3, 1998 for three days and then regular duty.

On February 5, 1999 appellant filed a recurrence of disability claim alleging that his back condition worsened on January 25, 1999 as a result of the July 27, 1998 employment injury. Appellant stopped work on January 26, 1999 and did not return.

In a January 28, 1999 certificate, Dr. Jack Goldstein, an osteopath, reported that appellant suffered a work-related lumbosacral strain and could return to work on February 9, 1999. In a March 6, 1999 report, Dr. Bruce Wulfsberg, a Board-certified orthopedic surgeon, reported that appellant was seen for evaluation and treatment of injuries sustained in a work-related injury initially around July 27, 1998. He noted that appellant suffered a reinjury and increased spasm in his back and that he had an exacerbation around January 28, 1999 and again in February 1999, when he suffered a marked increase in symptoms. Dr. Wulfsberg diagnosed lumbar disc syndrome and sciatica.

In a March 20, 1999 report, he indicated that appellant was seen in a follow-up appointment for a possible herniated lumbar disc and sciatica and that he had been out of work due to related symptoms. Dr. Wulfsberg further recommended a magnetic resonance imaging (MRI) scan and that appellant remain out of work. In treatment notes dated April and May 12, 1999, he indicated that appellant had a work-related injury and had sciatic-like complaints. In a report dated May 14, 1999, Dr. Wulfsberg reported that appellant was disabled from work from

April 20 through May 31, 1999 due to his injury sustained on January 26, 1999 and noted that appellant had a herniated disc diagnosed by an MRI scan.

In a June 2, 1999 report, Dr. Irving Ratner, a Board-certified orthopedic surgeon, reported that he evaluated appellant at Dr. Wulfsberg's request regarding his injury dating back to July 27, 1998. He examined appellant and stated: "It is my opinion that [appellant] is suffering from a significant disc herniation in the right low[er] lumbar region at L5-S1 and that this is the cause of his continued and ongoing symptoms." Dr. Wulfsberg reported that appellant was involved in a position which required repetitive lifting and carrying that resulted in the onset of lower back pain that progressively became severe despite conservative treatment. Dr. Ratner further reported that the low back pain had developed into radiating sciatic pain on the right side, accompanied with numbness and tingling in the SI distribution of the right leg. He concluded by stating that appellant was disabled from gainful employment and would remain disabled until the problem resolved.

In a report dated June 14, 1999, Dr. Ricardo Mabanta, a Board-certified neurologist indicated that appellant had been injured at work and had developed persistent low back pain radiating to the right buttock. He further reported that on January 26, 1999 appellant related that he was lowering a ladder and when he caught it, he developed worsened pain, which then began to radiate down to the right lower extremity. Dr. Mabanta diagnosed lumbar disc disease with herniation and lumbar radiculopathy and indicated his belief that appellant's symptoms were secondary to the disc herniation.

On June 30, 1999 the Office denied appellant's recurrence of disability claim on the grounds that appellant failed to submit rationalized medical opinion evidence of a cause and effect relationship between the medical condition claimed for January 25, 1999 and the originally accepted injury.

On July 13, 1999 appellant requested an oral hearing and submitted additional evidence.

In a July 26, 1999 report, Dr. Goldstein reported that appellant had a history of low back pain dating back to the accident on July 27, 1998 and that he apparently reinjured his low back approximately one week prior to seeing him on January 28, 1999. He indicated that appellant was reevaluated on February 8 and June 4, 1999 and he continued to have some sciatic radiation of pain down the right lower extremity and diminished range of motion and was still unable to work. In an addendum report dated September 22, 1999, Dr. Goldstein stated: "It is my opinion, with reasonable medical certainty that [appellant's] present back conditions are related to those injuries of his present accident." He added that according to appellant's history, he lifted heavy items at work, which resulted in his injury to his lower back. In correspondence dated December 19, 1999, Dr. Wulfsberg recounted appellant's work injury and stated that he had an exacerbation of his back injury on January 27, 1998 and in February 1999. He indicated that as appellant denied any other workers' compensation injuries or other injuries to his back that his disc herniation was apparently either caused or aggravated by the work-related injuries noted previously.

A hearing was held on December 28, 1999. Appellant subsequently submitted additional evidence.

In a report dated January 10, 2000, Dr. Wulfsberg clarified his opinion given in the December 19, 1999 letter. He stated: “After reviewing the medicals that I had and the history and evaluation that I had with [appellant], I would say that within reasonable medical certainty, the herniated disc at L4-5 and L5-S1 were caused by the lifting and carrying he was doing while under the employment of the employing establishment.”

By decision dated February 28, 2000, an Office hearing representative determined that appellant failed to prove that his back condition beginning January 25, 1999 was caused by the accepted employment injury. The Office hearing representative affirmed the prior decision and also found that appellant further failed to establish that his back condition commencing January 25, 1999 was caused by a new occupational disease or traumatic injury claim.

On May 8, 2000 appellant through counsel requested reconsideration and submitted additional evidence. By decision dated May 18, 2000, the Office denied appellant’s request for review of the merits on the grounds that the evidence was insufficient to warrant a merit review.

The Board finds that appellant failed to meet his burden of proof in establishing a recurrence of disability on January 25, 1999 causally related to his July 27, 1998 employment injury.

Where appellant claims recurrence of disability due to an accepted employment-related injury, has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which he claims compensation is causally related to the accepted injury.<sup>1</sup> 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 and supports that conclusion with sound medical reasoning.<sup>2</sup> An award of compensation may not be made on the basis of surmise, conjecture or speculation or on appellant’s unsupported belief of causal relation.<sup>3</sup>

The medical evidence does not establish a causal relationship between appellant’s January 25, 1999 alleged recurrence of disability and his July 27, 1998 accepted employment injury. Dr. Wulfsberg failed to explain why and how appellant’s original employment injury caused the diagnosed condition of herniated disc, lumbar disc syndrome and sciatica and the resulting periods of total disability. The report of Dr. Ratner dated June 2, 1999, is insufficient to establish causal relationship because he relates appellant’s ongoing symptoms of back pain and progressively worsened pain to the diagnosed disc herniation, a condition which has not been accepted by the Office. Dr. Ratner did not relate appellant’s current condition to the accepted employment injury of July 27, 1998, at which time appellant sustained a lumbosacral strain.

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<sup>1</sup> *Alfredo Rodriguez*, 47 ECAB 437 (1996); *Jose Hernandez*, 47 ECAB 288 (1996).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

Dr. Mabanta's June 14, 1999 report is also insufficient to establish that appellant sustained a recurrence of disability, because it indicates that appellant's condition was caused by a separate injury involving a ladder at work and not the implicated factors of progressive back pain. Moreover, Dr. Goldstein's reports are insufficient to support appellant's claim. In his July 26, 1999 report, Dr. Goldstein's opinion that appellant's herniated disc was apparently caused by his 1998 injury is speculative and equivocal in nature and thus of little probative value.<sup>4</sup> His addendum report does not provide an explanation as to how the diagnosed disc herniation, which has not been accepted by the Office, was caused by the July 27, 1998 employment injury. The Board has found that the opinion of a physician supporting causal relationship must be one of reasonable medical certainty, explained by medical rationale and based on a complete and accurate factual background.<sup>5</sup> Dr. Goldstein has not provided such evidence in this case.

Appellant has failed to meet his burden of proof in establishing disability on or after January 25, 1999 causally related to his employment as he has failed to submit any rationalized medical opinion evidence necessary to establish the claim. Without this medical evidence, appellant has not established his claim for recurrence of disability on or after January 25, 1999.

The Board further finds that the Office properly exercised its discretion in refusing to reopen appellant's case for further review of the merits.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>6</sup> the Office's regulations provide that a claimant must:

“(1) Show that the Office erroneously applied or interpreted a specific point of law;

“(2) Advance relevant legal argument not previously considered by the Office; or

“(3) Submit relevant and pertinent new evidence not previously considered by the Office.”<sup>7</sup>

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<sup>4</sup> *Alberta S. Williamson*, 47 ECAB 569 (1996).

<sup>5</sup> *Connie Johns*, 44 ECAB 560 (1993).

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> 20 C.F.R. §§ 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim, which does not meet one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>8</sup>

In this case, appellant's counsel filed a request for reconsideration of the February 28, 2000 decision, on May 8, 2000. Appellant submitted an additional medical report by Dr. Wulfsberg dated April 26, 2000, in support of his request. He discussed again the work injury on July 27, 1998 and that appellant had exacerbations and further work injuries in January 1999. Specifically, Dr. Wulfsberg noted that in January 1999, appellant's back condition had further pain with lifting and carrying at work and on or around that time, he moved a ladder, which also exacerbated his pain. He further stated: "Again, within reasonable medical certainty, [appellant] did not have significant back problems before his initial work injury on July 27, 1998. He also had exacerbatons at work later in January 1999. Within reasonable medical certainty, I feel that the disc herniation that he has is causally related to the work-related injury mentioned above."

The argument made by Dr. Wulfsberg on reconsideration essentially repeated the content of earlier reports and discussed evidence previously considered by the Office. The submission of evidence which repeats or duplicates evidence already in the case record, does not constitute a basis for reopening a case.<sup>9</sup> Consequently, appellant is not entitled to a review of the merits of the claim based upon any of the above-noted requirements under 10.606(b). Accordingly, the Board finds that the Office did not abuse its discretion in denying appellant's May 8, 2000 request for reconsideration.

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<sup>8</sup> 20 C.F.R. § 10.608(b).

<sup>9</sup> See *Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

The May 18 and February 28, 2000 decisions of the Office of Workers Compensation Programs are hereby affirmed.

Dated, Washington, DC  
August 23, 2001

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Priscilla Anne Schwab  
Alternate Member