

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAVERLY V. WHITTLE and U.S. POSTAL SERVICE,
POST OFFICE, Newark, NJ

*Docket No. 00-2242; Submitted on the Record;
Issued May 29, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met this burden of proof to establish that he sustained a recurrence of disability on or after September 22, 1997 due to his August 18, 1994 employment injury; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after September 22, 1997 due to his August 18, 1994 employment injury.

An individual who claims a 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 disability for which compensation is claimed is causally related to the accepted injury.¹ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.² Where no such rationale is present, medical evidence is of diminished probative value.³

On August 18, 1994 appellant, then a 58-year-old custodian, sustained an employment-related lumbosacral strain. He did not lose any time from work but was placed in a limited-duty position; on July 25, 1997 he was released to return to regular work. Appellant stopped work on September 22, 1997 and was placed on leave pending his retirement effective February 27, 1998. He alleged that he sustained a recurrence of disability on September 22, 1997 due to his

¹ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

² *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

³ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

August 18, 1994 employment injury. By decision dated June 17, 1998, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence in support thereof. By decision dated August 9, 1999 and finalized August 12, 1999, an Office hearing representative affirmed the Office's June 17, 1998 decision. By decision dated June 7, 2000, the Office denied appellant's request for merit review of his claim.

The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on or after September 22, 1997 due to his August 18, 1994 employment injury.

In support of his claim, appellant submitted a September 21, 1998 report in which Dr. James S. Paolino, an attending Board-certified orthopedic surgeon, noted that he continued to experience back symptoms. He indicated that upon examination appellant exhibited abnormalities including lumbar spasm with loss of motion and left leg weakness. Dr Paolino stated:

“[A]ppellant is suffering with persistent spondylosis, degenerative disc disease and secondary lumbar neuropathy. Clearly these signs and symptoms began and resulted from the injuries of August 18, 1994. Prior to that date there were no back symptoms or neurological abnormalities. Subsequent to his injuries he has had progressive back symptoms, worsening of his back pain and increasing neuropathy. His findings correlate with the presence of disc degeneration on x-rays.

“[A]ppellant's present disabling spondylosis, lumbar neuropathy due to disc degeneration is permanent and irreversible. These abnormalities are the results of his injuries of August 18, 1994.”

The submission of Dr. Paolino's report is not sufficient to establish that appellant sustained a recurrence of disability on or after September 22, 1997 due to his August 18, 1994 employment injury. Dr. Paolino did not provide adequate medical rationale in support of his apparent conclusion that appellant sustained a recurrence of disability due to his August 18, 1994.⁴ He indicated that appellant's continuing disability was due to degenerative disc disease, spondylosis and lumbar neuropathy sustained on August 18, 1994. However, the Office only accepted that appellant sustained an employment-related lumbosacral strain, *i.e.*, a soft tissue injury and Dr. Paolino did not adequately explain the medical process through which appellant would have sustained such additional conditions on August 18, 1994. Dr. Paolino suggested that appellant's continuing symptoms establish a continuing employment-related cause for his problems. However, the Board has held that the fact that a condition manifests itself or worsens during a period of employment⁵ or that work activities produce symptoms revelatory of

⁴ See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale). Dr. Paolino did not provide a clear opinion regarding the extent of appellant's disability; nor did he clearly indicate when appellant would have sustained an employment-related recurrence of disability.

⁵ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

an underlying condition⁶ does not raise an inference of causal relationship between a claimed condition or disability and employment factors.⁷

In a report dated November 23, 1998, Dr. Calvin C. Matthews, an attending Board-certified orthopedic surgeon, diagnosed chronic low back pain, spinal stenosis, spondylitis, degenerative spine disease and internal derangement of the right knee. He stated that appellant has experienced pain since his August 18, 1994 employment injury and that he experienced “an exacerbation of his symptomatology on September 22, 1997.” Dr. Matthews noted, “The injuries so sustained by [appellant] are within reasonable medical judgment causally related to the work-related accident of August 18, 1994.” Although he indicated that appellant experienced increased symptoms on September 22, 1997, he did not provide a clear opinion that appellant continued to have a disabling lumbosacral strain or otherwise sustained an employment-related recurrence of disability. Dr. Matthews suggested that appellant’s continuing medical problems were employment related, but he did not provide adequate medical rationale to explain how appellant could have sustained such a recurrence of disability on or after September 22, 1997.

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.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees’ Compensation Act,⁸ 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 a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.⁹ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.¹⁰ When a claimant fails to meet one of the above 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.¹¹

⁶ *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

⁷ In a report dated May 14, 1999, Dr. Paolino indicated that, upon examination in January 1999, appellant exhibited findings which were the same as those exhibited in September 1998. He also provided an assessment of the cause of appellant’s condition which was the same as that provided in his September 21, 1998 report. Therefore, the submission of this report would not be sufficient to establish appellant’s recurrence of disability claim.

⁸ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, “[t]he 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).

⁹ 20 C.F.R. §§ 10.606(b)(2).

¹⁰ 20 C.F.R. § 10.607(a).

¹¹ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

In support of his March 2000 reconsideration request, appellant submitted an October 25, 1999 report of Dr. Matthews. In his report, Dr. Matthews indicated that appellant sustained degenerative disc disease on August 18, 1994 and noted that this condition had progressed and continued to cause symptoms. He stated:

“It is reasonable to infer from [appellant’s] history and as a treating physician of [his] and reviewing his records from the dates involved that the progressive degeneration of [appellant’s] back is the sole cause of these particular symptoms that he experienced[.] [A]lthough age-related factors may contribute[,] ... the major injury to [appellant’s] spine was related to the August 18, 1994 [injury] and caused a progressive deterioration of his spine which remains to this date.”

In essence, Dr. Matthews provided an unrationalized opinion that appellant sustained degenerative disc disease on August 18, 1994 and suggested that appellant’s continuing symptoms established a continuing employment-related cause for his condition. Therefore, his report is similar to previously considered medical reports of record. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹² Appellant submitted copies of other medical reports in connection with his reconsideration request, but these reports had already been submitted and considered by the Office.

In the present case, appellant has not established that the Office abused its discretion in its June 7, 2000 decision by denying his request for a review on the merits of its August 12, 1999 decision under section 8128(a) of the Act, because he did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

¹² *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

The decisions of the Office of Workers' Compensation Programs dated June 7, 2000 and dated August 9, 1999 and finalized August 12, 1999 are affirmed.

Dated, Washington, DC
May 29, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member