

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY Y. BEGAYE and DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS, CHINLE BOARDING SCHOOL,
Many Farms, AZ

*Docket No. 02-1369; Submitted on the Record;
Issued November 5, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established that he sustained a recurrence of disability from November 1 to December 31, 2000, causally related to an accepted cervical strain, right rotator cuff tear sustained in a February 1, 2000 motor vehicle accident; and (2) whether the Office of Workers' Compensation Programs abused its discretion under section 8128 of the Federal Employees' Compensation Act by denying appellant's April 24, 2001 request for a merit review.

The Office accepted that on February 1, 2000 appellant, then a 42-year-old bus driver, sustained a cervical strain¹ and right rotator cuff tear² when the school bus he was driving was struck from behind by another bus, causing a collision with an automobile stopped in front of appellant's bus. Appellant received continuation of pay from February 2 to March 17, 2000 and compensation for temporary total disability from April 3 to September 30, 2000.

Appellant submitted periodic reports from Dr. Cathie Korey, an attending internist, from March 27 to May 26, 2000, finding him totally disabled for work due to the right rotator cuff tear.³

¹ A February 1, 2000 x-ray of the cervical spine was negative for any abnormalities.

² An April 17, 2000 magnetic resonance imaging (MRI) scan of the left shoulder showed an "[i]nterstitial tear of the rotator cuff in the supraspinatus tendon," and "[r]otator cuff impingement due to degenerative hypertrophy of the acromioclavicular joint, downward sloping acromion and superior migration of the humeral head." On the right, the MRI showed a "[f]ull thickness rotator cuff tear involving the supraspinatus tendon, rotator cuff impingement and a "[d]egenerative subchondral cyst formation in the humeral head."

³ Appellant submitted physical therapy notes dated from late February through May 2000. These notes were not signed by a physician.

In a June 9, 2000 functional capacity evaluation, Gary Saunders, an occupational therapist, stated that appellant reported hyperextending his right knee two weeks before while walking at home.

In a June 12, 2000 report, Dr. Mickey Abeshaus, an attending orthopedic surgeon, diagnosed “[s]ignificant impingement syndrome right shoulder with both clinical and MRI evidence of rotator cuff tear,” attributable to the February 1, 2000 accident. On June 30, 2000 Dr. Abeshaus performed “right shoulder arthroscopy with debridement of partial thickness cuff tear and arthroscopic subacromial decompression.”

In a September 7, 2000 form report, Dr. Korey stated that appellant remained indefinitely disabled for work due to the right shoulder injury and postoperative status.

In September 27 and 28, 2000 reports, Dr. Korey released appellant to light duty as of October 2, 2000, with limitations on “heavy use” of the right arm and shoulder, limited lifting, pulling and pushing with the right arm. She stated that it would “be advisable and preferable if he could avoid repetitive and strenuous work with his right arm for the next several months.” Dr. Korey added that appellant was still undergoing physical therapy two times a week.

Appellant returned to work on October 2 and 3, 2000, driving a school bus. He alleged an increase in his right upper extremity and right leg symptoms and stopped work on October 3, 2000. Appellant used sick leave and leave without pay through October 24, 2000.⁴ He received temporary total disability compensation for the period October 25 to 31, 2000.

On January 25, 2001 appellant claimed wage-loss compensation for the period November 1 to December 31, 2000. In support of his claim for a recurrence of disability, appellant submitted additional medical evidence.

A November 1, 2000 lumbar MRI showed a “[l]eft spondylosis with slight associated spondylolisthesis,” and “L4-5 disc degeneration with a small annular rent.”

In a November 2, 2000 report, Dr. Abeshaus noted appellant’s complaints of right arm, hand and knee pain and swelling. He stated that appellant’s right hand was neurovascularly intact and did not appear to be swollen, and that there was a negative impingement sign in the right shoulder. Dr. Abeshaus noted that an MRI scan of the right knee was normal and that his previous examinations of the knee revealed no abnormalities.

In a November 6, 2000 form report, Dr. Korey noted a partial thickness tear of the left rotator cuff, status post arthroscopic repair of the right rotator cuff and released appellant to full duty effective November 1, 2000.

⁴ In a November 16, 2000 letter, Dr. Korey stated that, when she evaluated appellant on October 2, 2000, she felt that as appellant had “a job transporting children ... an orthopedic surgeon should reevaluate him for his complaints before he returned to work.” She stated that she held appellant off work in September and October 2000 “in the interest of job safety.”

In a December 15, 2000 form report, Dr. Robert J. Bailey, Sr., an orthopedic surgeon, diagnosed soft tissue injuries of the right hand and leg attributable to the February 1, 2000 accident. Dr. Bailey stated that these injuries prevented appellant from driving a bus.

By decision dated February 15, 2001, the Office denied appellant's claim for a recurrence of disability. The Office found that appellant submitted insufficient evidence to establish that his work absence from November 1 to December 31, 2000 was related to the accepted injuries. The Office also noted that appellant had submitted insufficient medical evidence to establish that he sustained a right knee or right hand injury related to the February 1, 2000 accident.⁵

Appellant disagreed with this decision and requested reconsideration in an April 24, 2001 letter. He alleged that he sustained right knee and right hand injuries in the February 1, 2000 accident, which first became apparent in May 2000 while exercising at home. Appellant asserted that the right knee and hand injuries totally disabled him for work on and after November 1, 2000. He submitted additional evidence.

In an April 17, 2001 letter, an attorney asserted that appellant sustained a right knee, right hand and right arm injuries in the February 1, 2000 accident, with sequelae of neck, shoulder, and lumbar pain, headaches and various paresthesias.

Appellant also submitted a March 12, 2001 report from Dr. George R. Swajain, an attending osteopath specializing in orthopedic and hand surgery. Dr. Swajain provided a history of injury and treatment. On examination, he found a moderately positive Tinel's sign on the left, a right-sided misalignment of the temporomandibular joint, a bilaterally positive Adson's sign, a reduced range of cervical motion with paracervical spasm, marked tenderness of the basilar joint of the right thumb, bilaterally positive Faber's tests, bilaterally positive patellar glide and grind tests, worse on the right, a positive Apley's compression test in the right knee, pelvic instability, a lumbar strain and a possible positive impingement test in the right shoulder. Dr. Swajain did not address whether these diagnoses were related to the February 1, 2000 accident or whether appellant was disabled for work on and after November 1, 2000.

By decision dated July 27, 2001, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant reopening the case for a merit review. The Office found that the April 24, 2001 letter did not raise new, relevant legal arguments. The Office further found that Dr. Swajain's report was insufficiently rationalized to establish a worsening of appellant's condition or that the possible left carpal tunnel syndrome was related to the accepted February 1, 2000 accident. The Office noted that, although Dr. Sullivan referred generally to other medical reports of record, that he did not reference specific medical findings to support his opinions.

The Board finds that appellant has not established that he sustained a recurrence of disability from November 1 to December 31, 2000 causally related to the accepted work injuries.

⁵ In a February 16, 2001 letter, appellant alleged that he received inadequate medical care from Drs. Abeshaus and Korey, and was wrongly released to full duty by Dr. Abeshaus.

When a claimant who is on light duty alleges a recurrence of disability, he must show either a change in the nature and extent of the light-duty job requirements, or in the extent of the work-related injury or condition.⁶ To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change, and explaining how and why the accepted injury or condition disabled him for work on and after the date of the alleged recurrence of disability.⁷

In this case, the Office accepted that appellant sustained a cervical strain and right rotator cuff tear in a February 1, 2000 motor vehicle accident and paid compensation for temporary total disability from April 3 to September 30 and October 4 to 31, 2000. Appellant claimed that, when he returned to duty with medical restrictions on October 2 and 3, 2000, he experienced a worsening of right hand and right knee injuries, which he alleged, were also caused by the February 1, 2000 accident.

Appellant submitted several medical reports addressing his condition on and after November 1, 2000. However, these reports do not establish that appellant was disabled for work from November 1 to December 31, 2000.

A November 1, 2000 lumbar MRI scan showed a left-sided spondylolisthesis and “L4-5 disc degeneration with a small annular rent.” This report does not mention the February 1, 2000 accident or contain medical rationale explaining how and why the demonstrated degenerative disc disease, annular rent or spondylolisthesis were related to the accepted accident or other work factors.

Dr. Abeshaus, an attending orthopedic surgeon, stated in a November 2, 2000 report that appellant’s right hand and knee appeared normal in all respects, with no sign of impingement in the right shoulder. He did not opine that appellant was disabled for work due to any cause or that he had any work-related residuals.

Similarly, in a November 6, 2000 report, Dr. Korey, an attending internist, released appellant to full duty effective November 1, 2000. She noted a partial thickness tear of the left rotator cuff and status post arthroscopic repair of the right rotator cuff, but did not opine that these conditions were in any way disabling.

In a December 15, 2000 form report, Dr. Bailey, an orthopedic surgeon, found that appellant was medically unable to drive a bus due to soft tissue injuries of the right hand and leg which he attributed to the February 1, 2000 accident. There is no indication of record that Dr. Bailey was an authorized attending physician. Arguendo, Dr. Bailey did not provide medical rationale explaining how and why the February 1, 2000 accident would have caused a right-hand or leg injury. Without such rationale, his opinion is of very little probative value in establishing causal relationship in this case.⁸

⁶ *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222, (1986).

⁷ *James H. Botts*, 50 ECAB 265 (1999).

⁸ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

Consequently, appellant failed to establish that he sustained a recurrence of disability on and after November 1, 2000 as he submitted insufficient rationalized medical evidence to establish that he was disabled for work on and after that date due to the accepted injuries.

Regarding the second issue, the Board finds that the Office in its July 27, 2001 decision properly denied appellant's request for reconsideration on its merits under 5 U.S.C. § 8128(a), on the basis that his request for reconsideration did not meet the requirements set forth under section 8128.⁹

Under section 8128(a) of the Act,¹⁰ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹¹ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a point of law; or

“(ii) Advances a relevant legal argument not previously considered by the Office;
or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office].”¹²

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹³

Appellant submitted three documents in support of his request for reconsideration: his April 24, 2001 letter; the April 17, 2001 attorney's letter; the March 12, 2001 report of Dr. Swajain, an attending osteopath.

Appellant's April 24, 2001 letter alleges that he sustained right knee and right hand injuries in the February 1, 2000 accident, which disabled him from all work on and after November 1, 2000. The April 17, 2001 letter from an attorney additionally alleges that appellant experienced headaches, paresthesias, neck, shoulder and lumbar pain related to the February 1, 2000 accident, which disabled him for work from November 1 to December 31, 2000. The Board finds that neither of these letters provides new medical evidence or legal argument relevant to the critical issue of causal relationship. Therefore, the letters are irrelevant to the

⁹ See 20 C.F.R. § 10.606(b)(2)(i-iii).

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b) (1999).

¹² 20 C.F.R. § 10.606(b).

¹³ 20 C.F.R. § 10.608(b).

critical issue in the case of establishing a causal relationship between accepted work factors and a disability for work from November 1 to December 31, 2000. Thus, they are insufficient to require the Office to reopen appellant's claim for a merit review.

Dr. Swajain's March 12, 2001 report diagnosed right knee, right arm and lumbar injuries, and possible left carpal tunnel syndrome. However, he did not explain how and why the February 1, 2000 accident would cause or aggravate any of these conditions, none of which was accepted by the Office. As the critical issue in the case at the time appellant requested reconsideration was causal relationship, this lack of rationale severely diminishes the probative value of the report in establishing causal relationship and therefore its relevance in the request for a merit review.¹⁴ Additionally, Dr. Swajain did not address whether appellant was disabled for work for any period. Therefore, his report is of no probative value in establishing whether appellant was disabled for work on and after November 1, 2000 due to work factors. Dr. Swajain's report is thus irrelevant to the critical issues in the case, and therefore insufficient to warrant a review of the case on the merits.

The decisions of the Office of Workers' Compensation Programs dated July 27 and February 15, 2001 are hereby affirmed.

Dated, Washington, DC
November 5, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

¹⁴ *Lucrecia M. Nielsen, supra* note 8.