U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

In the Matter of JAMES HILL and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Jersey City, NJ

*Docket No. 03-776; Submitted on the Record;*
*Issued June 25, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant established that he sustained a recurrence of disability on April 24, 2000 causally related to his July 17, 1990 back injury; and (2) whether the Office of Workers' Compensation Programs properly refused appellant's request for reconsideration.

On July 17, 1990 appellant, then a 48-year-old mailhandler, filed a claim for traumatic injury, Form CA-1, alleging that on that date he injured his back while unhooking a container of mail in the performance of duty. Appellant stopped work on July 17, 1990 and returned to light duty, eight hours a day, on July 26, 1990. The Office accepted appellant's claim for lumbosacral sprain. Appellant sustained a recurrence of disability on September 11, 1991 and returned to light-duty work, eight hours a day on November 4, 1991.[1] On July 31, 1995 appellant stopped work again and filed a claim for a recurrence of disability. In a decision dated February 27, 1996, the Office denied appellant's claim for a July 31, 1995 recurrence. Appellant returned to light-duty work, eight hours a day on October 24, 1995. On January 5, 2000 appellant's treating physician restricted appellant to working light duty, four hours a day.[2] On May 18, 2000 appellant filed another claim for a recurrence of disability beginning April 24, 2000. Appellant returned to limited duty, four hours a day, on June 1, 2000.

In a decision dated November 21, 2000, the Office denied appellant's claim for an April 24, 2000 recurrence of disability. Appellant requested reconsideration and by decision dated March 19, 2001, the Office found the newly submitted evidence and arguments to be insufficient to warrant modification of the prior decision. Appellant filed another request for reconsideration on May 3, 2001 and in a decision dated July 2, 2001, the Office declined to

[1] Appellant's September 11, 1991 claim for a recurrence of disability was approved by the Office on February 3, 1992.

[2] There is no evidence in the record that appellant either claimed, or was paid, compensation by the Office for the additional four hours per day.

modify the prior decision. On August 10, 2001 appellant again requested reconsideration and in a decision dated November 14, 2001, the Office found the newly submitted evidence and arguments to be insufficient to warrant modification of the prior decision. Appellant filed another request for reconsideration on December 13, 2001. In a decision dated March 12, 2002, the Office declined to modify its prior decision. Appellant again requested reconsideration on April 18, 2002 and in a decision dated July 19, 2002, the Office found the newly submitted evidence and arguments to be insufficient to warrant modification of the prior decision. By letter dated October 17, 2002, appellant filed his final request for reconsideration. In a decision dated January 6, 2003, the Office denied appellant's request for reconsideration on the grounds that appellant neither raised substantive legal questions nor included new and relevant evidence and, therefore, his request was insufficient to warrant further merit review of the prior decision. The instant appeal follows.

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a recurrence of disability on April 24, 2000 causally related to his accepted July 17, 1990 lumbar sprain.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements, such that he can no longer perform his light-duty job.[3] The evidence of record does not establish that appellant sustained a recurrence of total disability under either of these two conditions.

The Board finds that the evidence of record fails to establish that there was a change in the nature of appellant's light-duty job requirements, such that he was no longer able to perform the duties of the position.

Appellant alleges that his recurrence of disability was caused by performing the duties of his position. Appellant has held a number of light-duty positions since his original injury and his physical restrictions have been periodically updated by his physician. While changes in the nature and extent of an employee's light-duty requirements can result in a compensable recurrence of disability, not all such changes have this effect. Only changes that cause the light-duty assignment to exceed the employee's work tolerance limitations result in a compensable recurrence of disability.[4] In addition, an employee is not obligated to perform work that does not comply with the physical restrictions established by the medical evidence.[5]

[3] *Robert Kirby*, 51 ECAB 474 (2000); *Fallon Bush*, 48 ECAB 594 (1997); *Terry R. Hedman*, 38 ECAB 222 (1986).

[4] *Kim Kiltz*, 51 ECAB 349 (2000).

[5] *Id.*

With respect to appellant's light-duty job requirements, appellant's supervisor at the time of the recurrence, Judy Wooten, stated that appellant's duties were to "place color code tags on [bulk mail containers] that were stored in the staging area to go out for dispatch. At no time did I give instructions to [him] that would in any way violate his limitations. He was not required to push, pull, or lift any equipment. [He] utilized a chair in this area, in which he sat in between tagging [bulk mail containers]. He was not walking beyond his limitation, for dispatch was between 9:00 [to] 10:00 p.m. and again between 12:00 [to] 1:00 a.m. Prior to dispatch, [he] could be found sitting in his chair or in the cafeteria. Please also note that a regular-duty mailhandler assigned to this area performed the pushing, pulling and replacing of [bulk mail containers]."

Appellant submitted evidence that from May 1998 until the date of his claimed recurrence, he was working in pay location 340 and alleged that his duties included pushing and pulling bulk mail containers and labeling them. Prior to working in pay location 340 from October 24, 1995, appellant worked in the rewrap location fixing torn mail and parcels. In narrative statements submitted in support of his claim, appellant stated that at the time of his recurrence he was on light duty, but was allowed to perform some limited pushing and pulling. Appellant submitted statements signed by 10 coworkers attesting that appellant pushed and pulled mail containers in pay location 340 between May 1998 and April 2000. He stated that his back started to give him problems months before his actual recurrence, resulting in his physician prescribing increased medication and decreased work hours and that on the date of his recurrence, he experienced a severe pain radiating from his back down to his leg on the left side of his body. Appellant did not link the occurrence of pain with the performance of any particular job duty.

The Board finds that the evidence does not support that appellant's light duties changed, and further notes that appellant does not, in fact, appear to be asserting that they did. Rather, appellant attributed his increased pain to having worked outside of his physical restrictions, performing more pushing and pulling than his physician allowed and resulting in an exacerbation of his preexisting back condition. These contention's, however, while relevant to a claim for new injury due to these employment factors are not dispositive in a claim for recurrence of disability.[6]

The Board finds that the medical evidence of record is insufficient to establish that appellant sustained a recurrence of disability. On February 10, 2000 Dr. Clifton O. Howell, appellant's treating Board-certified internist, reduced his work hours from eight to four, with restrictions on standing for more than one hour and walking, twisting, pushing, pulling or stooping for more than three hours. In work excuse slips dated April 28, 2000, Dr. Howell stated that appellant was unable to return to work due to back strain. In a narrative report dated May 9, 2000, Dr. Howell explained that appellant had suffered an exacerbation of his low back syndrome, with pain radiating down his leg upon bending or changing position from lying to sitting, or sitting to standing. In a narrative report dated June 30, 2000, Dr. Howell stated that appellant had exacerbations whenever he lifted heavy objects, twisted or bent and that his

[6] A recurrence of disability means an inability to work after an employee has returned to work caused by a spontaneous change in the medical condition. *See* 20 C.F.R. § 10.5(x).

symptoms recurred suddenly and lasted for prolonged periods. The physician stated that appellant exhibited paraspinal muscle splinting and positive straight leg raising on examination and that his diagnosis was low back syndrome with periodic exacerbations. Dr. Howell stated that appellant had been released to light duty four hours a day on June 1, 2000 but was restricted from lifting more than five pounds, sitting or standing for more than four hours and from climbing, kneeling, bending, stooping, twisting, pulling and pushing. In narrative reports dated November 29, 2000 and April 27 and June 7, 2001, Dr. Howell reiterated that appellant had a recurrence of disability due to an exacerbation of his low back syndrome brought on by the walking, pushing and pulling duties he performed while working in pay location 340.

The Board finds that the medical reports, of Dr. Howell are insufficiently rationalized to establish a change in the nature and extent of appellant's injury-related condition. Dr. Howell did not offer sufficient physical findings or medical rationale in support of his decision to take appellant off work on April 24, 2000 or for his reduction of appellant's hours from eight to four.[7] There is also some question as to whether appellant has additional back conditions, which have not been accepted by the Office.[8] Moreover, none of these reports establishes that appellant sustained a recurrence of disability on April 24, 2000. Dr. Howell attributed appellant's back condition primarily to an exacerbation caused by performing the work of his light-duty position. The Board has held that aggravation or exacerbation of a preexisting injury may constitute a new injury, not a recurrence of disability.[9]

Appellant has not presented rationalized medical evidence showing that his work requirements changed or that his original accepted lumbosacral sprain changed, such that he could no longer perform his light-duty position. Appellant has, therefore, failed to establish that he sustained a recurrence of disability on April 24, 2000 resulting from the July 17, 1990 employment injury.[10]

The Board finds that in its January 6, 2003 decision denying reconsideration, the Office properly refused to reopen appellant's case for reconsideration.

[7] Rationalized medical evidence is medical evidence, which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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 factors identified by the claimant. *Gloria J. McPherson*, 51 ECAB 441 (2000).

[8] A computerized tomography (CT) scan performed August 6, 1990, revealed evidence of a bulging disc at L5-S1, but no evidence of a herniation. Magnetic resonance imaging (MRI) scan performed August 14, 1991 revealed a herniated disc at L5-S1. On September 26, 1991 appellant's treating physician indicated that appellant had a herniated disc at L5-S1 and might require surgery, however, the consulting surgeon opined in an October 3, 1991 report, that the MRI and CT scans revealed no abnormality and that surgery was not recommended.

[9] *See* 20 C.F.R. § 10.104; *Willie J. Clements, Jr.*, 43 ECAB 244, 247 n.8 (1991).

[10] As the office did not adjudicate whether the evidence of record supports a claim of a new injury, the issue is not before the Board in this appeal. *See* 20 C.F.R. § 501.2(c).

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[11] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[12]

In support of his request for reconsideration, appellant submitted a narrative statement, in which he expressed disagreement with the Office's most recent merit decision, but did not submit any new factual or medical evidence. Appellant reasserted that the evidence previously submitted established that he was required to work outside of his restrictions and that his back condition worsened as a result. These arguments were insufficient to require merit review of his claim as these arguments were previously raised by appellant and were addressed in the Office's prior decisions, including the Office's most recent merit decision dated July 19, 2002. The submission of evidence or legal argument, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[13]

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent new evidence not previously considered by the Office, properly refused to reopen appellant's claim for a review on the merits.

[11] 20 C.F.R. § 10.606(b)(2) (1999).

[12] 20 C.F.R. § 10.608(b) (1999).

[13] *Linda I. Sprague*, 48 ECAB 386 (1997); *Bertha J. Soule (Ralph G. Soule)*, 48 ECAB 314 (1997).

The January 6, 2003 and July 19 and March 12, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 25, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member