

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROSALIND NUNNERY and U.S. POSTAL SERVICE,  
POST OFFICE, New Orleans, LA

*Docket No. 03-1589; Submitted on the Record;  
Issued September 22, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay for the period January 15 to 24, 2003; and (2) whether the Office properly refused to open appellant's claim for a merit review.

On February 5, 2003 appellant, a 43-year-old clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she tripped and injured her left arm on January 14, 2003 in the performance of duty. She stopped work on January 15, 2003 and returned to work on January 26, 2003. The Office accepted appellant's claim for a left elbow contusion.

Emergency room records, dated January 14, 2003, indicated that appellant presented with a contusion and left elbow pain, s/p fall and a boil on her left elbow for three days.

In a report dated January 14, 2003, Dr. Timothy Gerard, an emergency room physician, indicated that appellant had a left elbow contusion and a lesion or cellulitis. Dr. Gerard also indicated that appellant's lesion preexisted her fall and stated that appellant could return to work on January 14, 2003 with no limitations.

In a January 27, 2003 report,<sup>1</sup> Dr. Evans noted that he saw appellant on January 14, 2003 and diagnosed a left elbow/left forearm abscess. He indicated that appellant had sustained trauma to her left forearm and subsequently developed an abscessed lesion. Dr. Evans explained that, based on the history of injury, the development of this lesion was "quite plausible." He stated that, because of the severity of the abscess, appellant was disabled and unable to work. Dr. Evans indicated that appellant would probably remain disabled for the rest of the week and

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<sup>1</sup> The record also contains prescription pad notes from Dr. Henry M. Evans, a Board-certified general practitioner, that are difficult to decipher; however, they appear to indicate that appellant was disabled for work for the period January 14 to 24, 2003.

in all likelihood, might not return until January 19, 2003. In a second report dated January 27, 2003, he indicated that he continued to see appellant due to painful swelling in her left arm and noted that she was being treated with antibiotic. Dr. Evans noted that he would see appellant in four days for a new assessment and if the lesion had resolved, she should be able to return to work.

In a decision dated March 28, 2003, the Office denied appellant's claim for continuation of pay for the periods January 15 to 24, 2003 on the grounds that the medical evidence of record failed to establish that she was disabled from work as a result of her accepted employment injury.

Appellant subsequently requested reconsideration on April 24, 2003 and submitted additional evidence, including copies of material previously submitted.

In a March 31, 2003 report, Dr. Evans repeated the history contained in his previous reports and diagnosed status post-traumatic left elbow abscess/cellulitis, resolved.

In a May 15, 2003 report, Dr. Paul Gailunais, a general practitioner, indicated that appellant presented to the office on April 30, 2003 in follow up to her work-related injury. Dr. Gailunais explained that, three days prior to appellant's injury, she had developed a swelling over her left elbow, which was described as a "boil." He noted that on January 13, 2003 appellant struck her elbow at work and was treated with an incision and drainage. The following day, appellant was treated and he noted that she was treated until April 30, 2003 when appellant "was found to have only an old, black, dime size scar on the outer aspect of the left elbow." Dr. Gailunais concluded his report by explaining that, although the boil preexisted the work injury, it was significantly worsened by the on-the-job injury.

In a decision dated May 21, 2003, the Office denied appellant's request for a merit review of its March 28, 2003 decision on the grounds that she neither raised any substantive legal questions nor submitted new and relevant evidence.

The Board finds that the Office properly denied appellant's claim for continuation of pay for the period January 15 to 24, 2003.

Every injury does not necessarily cause disability for employment.<sup>2</sup> When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to continuation of pay<sup>3</sup> or monetary compensation for any loss of wage-earning capacity resulting from such incapacity.<sup>4</sup>

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<sup>2</sup> As used in the Federal Employees' Compensation Act the term "disability" means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. 20 C.F.R. § 10.5(17). The general test in determining loss of wage-earning capacity is whether the employment-related impairment prevents the employee from engaging in the kind of work he was doing when he was injured. *See Frazier V. Nichol*, 37 ECAB 528, 540 (1986).

<sup>3</sup> The Act provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a reasoned medical opinion that supports a causal connection between the claimed disability and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain medically how the claimed disability is related to the injury.<sup>5</sup>

In the present case, appellant met her burden of proof in establishing that she sustained a left elbow contusion in the performance of duty on January 14, 2003 and the Office accepted appellant's claim for that condition. However, to establish entitlement to continuation of pay, it is insufficient for an employee merely to establish that she sustained a work-related injury. Continuation of pay or monetary compensation benefits are paid to an employee who has sustained wage loss due to disability for employment resulting from the traumatic employment injury.<sup>6</sup>

In the present case, appellant did not submit sufficient medical evidence to establish that she was totally disabled from January 15 to 24, 2003 due to the accepted employment injury.

Appellant submitted an emergency room report from Dr. Gerard dated January 14, 2003 wherein he noted that appellant had a preexisting lesion and indicated that appellant could return to work on January 14, 2003. Based on this report, appellant was deemed medically able to return to full-duty work on January 14, 2003.

Appellant subsequently submitted a January 27, 2003 report from Dr. Evans wherein he indicated that he treated appellant on January 14, 2003 for complaints of swelling of her left arm and elbow. He diagnosed a left forearm abscess and opined that it was plausible that the lesion occurred due to appellant's injury. The Board has held that an opinion which is speculative in nature has limited probative value in determining the issue of causal relationship.<sup>7</sup> Further, he does not explain how appellant was disabled in light of Dr. Gerard's report finding that the lesion preexisted the injury and that appellant could return to full duty as of January 14, 2003. Absent a definitive explanation on causal relationship, this report without supporting rationale is of little probative value and is insufficient to discharge appellant's burden of proof.<sup>8</sup>

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claim for a period of wage loss due to a traumatic injury with [his] immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a) of this title." 5 U.S.C. § 8118(a).

<sup>4</sup> *Bobby W. Hornbuckle*, 38 ECAB 626 (1987); 20 C.F.R. § 10.201.

<sup>5</sup> *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

<sup>6</sup> 20 C.F.R. § 10.200(a)-(c).

<sup>7</sup> See *Vaheh Mokhtarians*, 51 ECAB 190, 195 n.8 (1999); *William S. Wright*, 45 ECAB 498, 504 (1994); *Arthur P. Vliet*, 31 ECAB 366 (1979).

<sup>8</sup> *Marilyn D. Polk*, 44 ECAB 673 (1993).

The evidence required to establish causal relationship in this case is rationalized medical opinion evidence. Appellant must submit a reasoned medical opinion that supports a causal connection between her claimed period of disability from January 15 to 24, 2003 and her left elbow contusion.<sup>9</sup> She has submitted no such evidence and has, therefore, not met her burden of proof to establish entitlement to continuation of pay. As noted earlier, it is not sufficient for an employee merely to establish that she sustained a work-related injury. The employee must submit rationalized medical evidence to show that she could not work and was totally disabled during the period in question as a result of her injury.

As appellant has failed to provide medical evidence establishing that her claimed disability from work for the dates of January 15 to 24, 2003 was causally related to her January 14, 2003 employment injury, the Office properly denied continuation of pay.

The Board further finds that the Office properly refused to reopen appellant's claim for merit review.

Section 8128(a) of the Act<sup>10</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>11</sup> Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>12</sup> The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific 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.<sup>13</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.<sup>14</sup>

In support of her request for reconsideration, appellant submitted duplicate copies of medical evidence already contained in the record and considered by the Office prior to its May 21, 2003 decision denying her request for a merit review. She also submitted duplicate copies of her prior responses, copies of correspondence between herself and the Office and the Office's decisions that were previously of record. Appellant also submitted two new reports dated March 31 and May 14, 2003. In the March 31, 2003 report, Dr. Evans referred to his

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<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. §§ 8101-8193.

<sup>11</sup> 5 U.S.C. § 8128(a) (“[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

<sup>12</sup> 20 C.F.R. § 10.608(a) (1999).

<sup>13</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>14</sup> 20 C.F.R. § 10.608(b).

previous reports and repeated the chronology contained therein. He did not provide any new evidence. Dr. Gailunais repeated the chronology of events but used the wrong date of injury. He indicated that appellant struck her elbow at work on January 13, 2003 instead of the reported date of injury which was January 14, 2003.<sup>15</sup> Further, he indicated that appellant's boil was worsened by the trauma of striking her arm at her job. However, neither physician provided an opinion with respect to whether appellant was disabled such that she could not perform her duties for the time period from January 15 to 24, 2003. These reports are repetitious of the previous reports. The Board has held that material, which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.<sup>16</sup> Thus, the duplicate medical evidence submitted by appellant, as well as the reports of Dr. Evans and Dr. Gailunais, is insufficient to require the Office to reopen appellant's claim. Further, they are not relevant because neither report addressed the time frame of whether appellant was disabled from January 15 to 24, 2003.

The Office correctly noted that appellant did not provide any new and relevant evidence or raise any substantive legal arguments not previously considered sufficient to warrant a merit review. Appellant also did not argue that the Office erroneously applied or interpreted a point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the requirements under 20 C.F.R. § 10.606(b)(2). Accordingly, the Board finds that the Office acted within its discretion in denying appellant's request for reconsideration.

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<sup>15</sup> Medical evidence predicated on unsubstantiated diagnoses or inaccurate factual or medical history is of diminished probative value. *See Bille C. Rae*, 43 ECAB 192 (1991).

<sup>16</sup> *James A. England*, 47 ECAB 115 (1995).

The decisions of the Office of Workers' Compensation Programs dated May 21 and March 28, 2003 are affirmed.

Dated, Washington, DC  
September 22, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member