

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

CARLTON L. COSBY, Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS ADMINISTRATION MEDICAL )  
CENTER, Richmond, VA, Employer )

---

**Docket No. 04-676  
Issued: July 6, 2004**

*Appearances:*  
*Carlton L. Cosby, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On January 14, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 12, 2003 denying his recurrence of disability claim. He also filed a timely appeal of an Office decision dated December 31, 2003 denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant sustained a recurrence of disability as of July 27, 2001 causally related to a December 9, 1997 back sprain; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On December 11, 1997 appellant, then a 43-year-old food service worker, filed a traumatic injury claim alleging that he injured his back on December 9, 1997 while stocking food. Appellant submitted a March 6, 1998 report from Dr. Leon Brown, an attending Board-certified orthopedic surgeon, who treated appellant on January 9, 1998. On examination Dr. Brown stated that he found a decreased range of motion of the thoracic–lumbar spine to 80 to 85 degrees of flexion and tenderness to palpation over paraspinal muscles. He noted that x-rays of appellant’s spine showed degenerative disc disease. Dr. Brown diagnosed an acute thoracic-lumbar sprain and strain.<sup>1</sup> Appellant remained off work until January 26, 1998 when he returned to his date-of-injury job full time. On July 22, 1999 the Office accepted appellant’s claim for an acute thoracic-lumbar sprain.

On July 27, 2001 appellant stopped work and applied for disability retirement. On May 10, 2002 he filed a claim for a recurrence of total disability effective July 27, 2001 alleging that his back condition worsened when he returned to work and never improved. Appellant submitted a July 27, 2001 report from Dr. Barrington Bowser, an attending Board-certified family practitioner, who stated that appellant experienced continuous low back pain and degenerative disc disease, diabetes mellitus and hypertension and opined that appellant was totally disabled. On April 3, 2002 Dr. Bowser stated that appellant’s degenerative disc disease and discitis would most likely progress and that he would experience a natural downward progression of his diabetes with noncompliance. In an April 29, 2002 report, Dr. Bowser stated that appellant had a lumbar strain, lumbosacral degenerative disc disease and gout due to his 1997 work injury. He also diagnosed noninsulin dependent diabetes mellitus and found that appellant was totally disabled from work.

In a June 12, 2002 letter, the Office referred appellant for a second opinion examination. In a report received on August 5, 2002, Dr. Robert Adelaar, an orthopedic surgeon, stated that appellant presented with back pain radiating down the legs. On examination, the physician found flexion to about 70 degrees, extension to 10 degrees and rotation and lateral bending at 50 percent of normal. Dr. Adelaar noted no evidence of scoliosis, equal leg lengths and stated that both hips and sacroiliac joints moved well. He stated that there was no evidence of atrophy of appellant’s calves and that sensory determination was nondermatomal. Dr. Adelaar also stated that appellant’s motor functions were intact. He diagnosed a chronic lumbar strain superimposed on preexisting degenerative lumbar disc disease and opined that appellant could work light duty. In a July 29, 2002 addendum, Dr. Adelaar stated that he found no ongoing residuals from the accepted 1997 work injury.

In a September 9, 2002 decision, the Office denied appellant’s recurrence of disability claim finding the medical evidence did not support that his disability commencing July 27, 2001 was related to the 1997 back sprain.

---

<sup>1</sup> Appellant’s relevant medical history included preexisting conditions of gout, noninsulin dependent diabetes mellitus and lumbosacral degenerative disc disease.

Appellant requested a hearing and submitted a March 4, 2003 letter from Dan Jacobsen, a licensed clinical social worker, who advised Dr. Bowser that he treated appellant for depression and anxiety. In an August 1, 2003 report, Dr. Bowser noted that appellant had diabetes mellitus, lower back pains, degenerative arthritis and depression and found that he was totally disabled.

In a September 12, 2003 decision, the hearing representative affirmed the September 9, 2002 decision.

Appellant requested reconsideration in an October 3, 2003 letter and resubmitted the July 27, December 17 and 18, 2001 reports of Dr. Bowser. He also submitted an October 1, 2003 report from Dr. Bowser which had not been previously submitted.

In a December 31, 2003 decision, the Office denied reconsideration finding that appellant failed to submit new and relevant evidence or raise a new legal argument.

### **LEGAL PRECEDENT -- ISSUE 1**

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.<sup>2</sup> 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.<sup>3</sup> Where no such rationale is present, medical evidence is of diminished probative value.<sup>4</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.<sup>5</sup> Appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied his claim for compensation.

### **ANALYSIS -- ISSUE 1**

In the present case, appellant has not submitted sufficient rationalized medical evidence that causally relates his back condition on and after July 27, 2001 to the accepted thoracic-lumbar sprain of December 9, 1997. The reports from Dr. Bowser, an attending Board-certified family practitioner, stated that appellant experienced various ailments, including degenerative

---

<sup>2</sup> *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

<sup>3</sup> *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

<sup>4</sup> *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

<sup>5</sup> *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

disc disease and discitis, but none of these reports causally relate these conditions to the accepted 1997 injury. Dr. Bowser indicated in 2001, that appellant had a lumbar sprain due to the 1997 injury, but he failed to explain how appellant continued to have a back sprain or why it worsened in July 2001 after he had returned to work for more than three years. A rationalized explanation is critical as a March 6, 1998 report of Dr. Brown, an attending Board-certified orthopedic surgeon, found that appellant's degenerative disc disease preexisted the accepted injury. Finally, Dr. Adelaar, a Board-certified orthopedic surgeon, who served as an Office referral physician, stated in a July 29, 2002 report that he could find no objective evidence of residuals of appellant's accepted back sprain. He concluded that appellant could work light duty.

### **LEGAL PRECEDENT -- ISSUE 2**

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 regulation 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) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>8</sup> 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.<sup>9</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration of its September 12, 2003 decision. Appellant failed to present new and relevant evidence or raise a new legal argument. In support of his reconsideration request, appellant submitted reports from Dr. Bowser, that were already of record, reviewed by the Office and found insufficient to establish his claim. He also submitted an October 1, 2003 report of Dr. Bowser which had not been previously submitted. However, this report is duplicative of the previously submitted reports. 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.<sup>10</sup>

---

<sup>6</sup> 5 U.S.C. § 8101 *et seq.* 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).

<sup>7</sup> 20 C.F.R. §§ 10.606(b)(2).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

<sup>10</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

**CONCLUSION**

Appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability on or after July 27, 2001 causally related to his accepted 1997 back sprain. The Office did not abuse its discretion in denying appellant a merit review of its September 12, 2003 decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs Office dated December 31 and September 12, 2003 are affirmed.

Issued: July 6, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member