United States Department of Labor
Employees' Compensation Appeals Board

TED L. BADER, Appellant	)	
and	)	**Docket No. 04-1008**
	)	**Issued: September 2, 2004**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, BORDER PATROL, Havre, MT, Employer	)	

Appearances:
Ted L. Bader, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 8, 2004 appellant filed an appeal of decisions dated February 17, 2004 and September 24, 2003 in which the Office of Workers' Compensation Programs denied that he sustained a recurrence of disability causally related to 1982 and 1988 employment injuries. He also appealed a December 5, 2003 decision in which an Office hearing representative denied his request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the Office's decision denying a review of the written record.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for a review of the written record; and (2) whether appellant met his burden of proof to establish that he sustained a recurrence of disability causally related to 1982 and 1988 employment injuries.

FACTUAL HISTORY

On October 20, 2002 appellant, then a 55-year-old former supervisory border patrol agent, filed a Form CA-2a claim for recurrence of disability alleging that pain in his lower back had been present since the date of a December 5, 1988 employment injury. He indicated that he was presently employed as an investigator by the State of Washington and also received compensation from the Office based on a loss of wage-earning capacity. Appellant stated that he retired on disability on June 23, 1992.[1] In support of the October 20, 2002 recurrence claim, he submitted answers to form questions indicating that the pain in his lower back had been consistent since 1988 and that the physicians who treated his cervical condition also treated his lower back. The employing establishment indicated that appellant retired on June 23, 1992.

The record indicates that on September 7, 1982 appellant sustained an employment-related low back strain when he slipped and fell. He stopped work that day and returned on September 20, 1982;[2] and the claim has been closed since 1993. On December 5, 1988 appellant sustained employment-related sprains of the thoracic region and chest when he slipped on ice and hit his side against a building. He missed two days of work.[3] An Office Form CA-16, dated that day provided a description of the injury as "unknown injury to upper thoracic or lower cervical spine. Slipped on ice when opening trunk of patrol vehicle, fell against building. Pain started in lumbar spine, worked upward." An unsigned medical report[4] dated December 5, 1988 provided the above history of injury and findings of tenderness over the ribs and "somewhat uncomfortable" thoracic spine rotation. It noted that his left leg was two centimeters longer than the right. Thoracic and left pectoral strains were diagnosed. The claim has been closed since 1992.

Appellant filed a claim for a neck and right upper extremity injury sustained while pumping a shotgun during a felony stop on January 3, 1990. He did not stop work.[5] The Office initially accepted that appellant sustained a right arm strain and following review by an Office medical adviser, authorized cervical discectomy at C4-5 and C5-6. Surgery was performed on July 18, 1991 by Dr. Douglas E. Smith, Board-certified in neurosurgery. The accepted conditions were expanded to include aggravation of degenerative joint disease of the cervical

[1] In response to an inquiry, by appellant regarding authorization for a lumbar spine study, by letter dated September 13, 2002, the Office informed appellant regarding the definition of recurrence and had attached a Form CA-2a, along with a recurrence develop letter. The record indicates that appellant had other employment-related injuries. On June 9, 1984 he fell down stairs injuring his right upper back and right hand; on July 11, 1985 he blocked an attempted blow by an assailant, injuring his right forearm; and on August 27, 1985 he tripped and stuck his head. The latter claim has been closed since 1992. Appellant also has a claim for noise-induced hearing loss open for medical care. In a letter dated October 16, 2002, the Office informed him that if he believed his lumbar condition was related to a closed claim, he should file a recurrence claim.

[2] This claim was adjudicated by the Office under file number 130687400.

[3] This claim was adjudicated by the Office under file number 140239279.

[4] The medical report has handwritten notations by two individuals as well as typewritten commentary. The physician is indicated as "JWH."

[5] This claim was adjudicated by the Office under file number 140248502.

spine and cervical radiculopathy. On December 15, 1991 appellant returned to regular duty on a trial basis.[6] In a February 4, 1992 treatment note, Dr. Smith advised that appellant could not continue as a border patrol agent because of increased shoulder pain, numbness and weakness in the right arm when qualifying with firearms. On February 26, 1992 he was granted a schedule award for a 26 percent impairment of the right arm. Appellant retired on disability June 24, 1992 and elected benefits under the Federal Employees' Compensation Act.

Appellant continued under the care of Dr. Smith for his cervical spine condition. On August 5, 1992 he noted the complaint of recent mild low back pain. The Office continued to develop the cervical injury claim and referred appellant to Dr. Thomas L. Gritzga, Board-certified in orthopedics, and Dr. W. Frank Emmons, Board-certified in neurosurgery, for second-opinion evaluations regarding his cervical condition. In reports dated January 11 and February 5, 1994, the physicians noted that appellant had sustained numerous injuries and presented with complaints of neck, right shoulder and low back pain. Physical examination demonstrated tenderness over the trapezuis and low lumbosacral spine. Motor and sensory examinations were intact and bilateral straight-leg raising test to 45 degrees demonstrated pain in the low back and down each leg. Diagnoses included cervical and lumbar radiculopathy and further cervical spine surgery was recommended, following which he could return to his former employment without limitations.

In a treatment note dated June 24, 1994, Dr. Smith noted his review of and agreement with the reports of Drs. Gritzga and Emmons, with the exception that he did not agree with their prognosis. He advised that further evaluation of appellant's lumbar pain was needed. A November 2, 1994 magnetic resonance imaging (MRI) scan of the lumbar spine was interpreted by Dr. Peter A. Langhus, Board-certified in diagnostic radiology, as demonstrating mild osteoarthritis with changes of degenerative disc disease at L3-4 and L4-5 and a small 3 millimeter central and left herniation at L5-S1. In a treatment note dated November 5, 1994, Dr. Smith advised that he reviewed the MRI scan findings. In a work capacity evaluation dated May 31, 1995, he provided neck restrictions and advised that otherwise appellant could work eight hours per day. On August 31, 1995 he was referred to vocational rehabilitation. In a note dated October 9, 1995, Dr. Smith noted that appellant was complaining of lumbar and lower extremity pain and numbness in his legs. He continued to submit reports regarding appellant's cervical spine condition. Dr. Smith next referred to low back pain without radiation in a treatment note dated October 6, 1997 and noted significant deterioration in the cervical spine.

On September 10, 1999 the Office notified appellant that it proposed to reduce his wage-loss compensation based on his reemployment as an investigator for the State of Washington.[7] By decision dated October 28, 1999, the Office determined that appellant's earnings as an

[6] Psychotherapy was also authorized following a traumatic incident that occurred while appellant was hospitalized.

[7] In a decision dated August 21, 1997, the Office adjusted appellant's compensation to reflect his self-employment as a surety agent. In a decision dated February 26, 1999, the Office determined that the August 21, 1997 decision had been issued in error.

investigator, effective May 24, 1999, fairly and reasonably represented his wage-earning capacity.[8]

By letter dated January 18, 2001, the Office requested that appellant furnish updated medical information regarding his cervical spine condition. He submitted a February 14, 2001 report in which Dr. Timothy D. Steege, Board-certified in neurosurgery, noted complaints of numbness in the forearms and hands and neck and right shoulder pain. Physical examination revealed normal strength in the lower extremities, normal gait and negative straight-leg raising test. Dr. Steege concluded that appellant's cervical spine condition, as related to the 1990 employment injury, was unlikely to change.

By report dated July 19, 2002, Dr. Peter G. Brown, a neurosurgeon, noted appellant's chief complaint of neck pain. He noted a history that appellant sustained a work injury to the cervical spine in 1991 for which he underwent surgery and a several month history of pain in the anterior thighs when walking uphill. The physician diagnosed chronic neck and arm pain and advised that the lumbar pain was "probably a separate issue" which needed evaluation. In an attached work capacity evaluation, Dr. Brown advised that appellant could not lift above the shoulder, twist, perform repetitive movements of the elbow, lift, squat or kneel. In an August 27, 2002 treatment note, Dr. Brown advised that flexion/extension lumbar x-rays revealed good range of motion without any evidence of disc height loss. He recommended MRI scan evaluation. An MRI scan of the lumbar spine dated September 13, 2002 was read by Dr. Steven A. Bell, Board-certified in diagnostic radiology, as showing no evidence of spinal stenosis or nerve root impingement with degenerative facet joint changes present at L4-5 and L5-S1 and a small left-sided annular tear at L5-S1. In a September 27, 2002 clinic note, Dr. Brown noted appellant's complaints of chronic midline cervical and lumbar pain. He advised that appellant should be symptomatically treated for spinal degenerative disease and sought authorization of bilateral lumbar facet blocks.

Appellant filed the aforementioned recurrence claim, alleging that his low back condition was causally related to the 1988 employment injury. By letter dated July 29, 2003, the Office informed him that the medical evidence of record was insufficient to establish that his low back condition was caused by either the 1982 or 1988 injury. Appellant was informed of the type of medical evidence to submit.

Appellant submitted a November 7, 2002 treatment note in which Dr. Brown provided a history that he reported that "his pain has not recurred, rather it has been fairly chronic since his injury in 1988." The physician further stated that appellant reported that he injured his neck and lower back at the same time, but the claim did not cover the lumbar injury and that he described debilitating pain in his neck and lower back. Dr. Brown advised that appellant was suffering from fairly chronic pain in both his neck and low back.

By decision dated September 24, 2003, the Office denied the recurrence claim, stating that the medical evidence of record was insufficient to establish that appellant's low back condition was causally related to either the 1982 or 1988 employment injuries. Following an

[8] The record indicates that an overpayment in compensation in the amount of $13,491.76 was waived by the Office.

October 23, 2003[9] inquiry by appellant, that was received by the Office on October 28, 2003, in a letter dated November 4, 2003, the Office informed him to follow the appeal rights enclosed with the September 24, 2003 decision.

On November 13, 2003 appellant requested a review of the written record and submitted reports from Dr. Brown dated August 26 and October 13, 2003. By decision dated December 5, 2003, an Office hearing representative denied his request as untimely filed.

On December 26, 2003 appellant requested reconsideration,[10] stating that the Office failed to review Dr. Brown's August 26, 2003 report. In a merit decision dated February 17, 2004, the Office reviewed both the August 26 and October 13, 2003 reports of Dr. Brown and found that the medical evidence of record was insufficient to establish that appellant sustained a recurrence of disability due to either his 1982 or 1988 employment injuries.

LEGAL PRECEDENT -- ISSUE 1

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[11] The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[12]

ANALYSIS -- ISSUE 1

The Office denied appellant's request for a review of the written record on the grounds that it was untimely filed.[13] In a December 5, 2003 decision, the Office found that appellant was not, as a matter of right, entitled to a hearing since his request, postmarked November 18, 2003, had not been made within 30 days of its September 24, 2003 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue in the instant case could be addressed through a reconsideration application. The Board finds that as his request for a hearing was postmarked on November 18, 2003 and was made more than 30 days after the date of issuance of the Office's

[9] The letter is dated October 23, 2002; this is considered a typographical error.

[10] The request was actually dated December 26, 2002. This appears to be a typographical error.

[11] *Marilyn F. Wilson,* 52 ECAB 347 (2001).

[12] *Id.*

[13] The Board notes that the December 5, 2003 decision was couched in terms of a denial of appellant's request for a hearing rather than as a request for a review of the written record. As the standard of review for timeliness of a request for a hearing and a request for a review of the written record is identical, this error is deemed harmless. 20 C.F.R. § 10.616.

September 24, 2003 decision, the Office was correct in finding that appellant was not entitled to a hearing as a matter of right.

The Office has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right. In the December 5, 2003 decision, the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of whether he established a recurrence of disability could be addressed through a reconsideration application. The only limitation on the Office's authority is reasonableness; abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[14] In the present case, the evidence of record does not indicate that the Office did not abuse its discretion in denying appellant's hearing request.

LEGAL PRECEDENT -- ISSUE 2

When a claimant alleges a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury. Moreover, sound medical reasoning must support the physician's conclusion.[15] The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury. In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal and the opinion should be expressed in terms of a reasonable degree of medical certainty.[16]

ANALYSIS -- ISSUE 2

On September 7, 1982 appellant sustained an employment-related low back strain and on December 5, 1988 employment-related sprains of the thoracic region and chest. After each of these injuries he returned to regular duty. On January 3, 1990 appellant sustained employment-related aggravation of degenerative joint disease of the cervical spine and cervical radiculopathy which necessitated surgery and his eventual retirement from the employing establishment in June 1992. On May 24, 1999 he began work as an investigator for the State of Washington and continued in that position. By decision dated October 28, 1999, the Office determined that appellant's actual earnings as an investigator, effective May 24, 1999, fairly and reasonably represented his wage-earning capacity. On October 20, 2002 he filed a recurrence of disability

[14] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[15] *Ricky S. Storms*, 52 ECAB 349 (2001).

[16] *Id.*

claim alleging that pain in his lower back had been present continuously since his December 5, 1988 employment injury.

The Board notes that this is not a case in which appellant is requesting a resumption of compensation for either partial or total wage loss as, at the time the claim was filed on October 20, 2002 he continued to work full time as an investigator for the State of Washington. Rather, he is contending that his low back condition was caused by the 1982 and 1988 work injuries. The Board, therefore, finds that the Office properly adjudicated the instant claim as a recurrence.[17]

The first mention in a medical report regarding appellant's low back subsequent to the 1988 injury is contained in a treatment note dated August 5, 1992. Dr. Smith, appellant's attending neurosurgeon, stated that appellant was complaining of recent mild low back pain. There is an absence in the case record of any bridging symptoms between appellant's December 1988 low back injury and the 1992 report and none of the medical evidence of record provide a discussion of the absence of any bridging symptoms or evidence of medical treatment for this period of almost four years.[18]

In reports dated January 11 and February 5, 1994, Drs. Gritzga and Emmons noted appellant's complaint of low back pain and a positive straight-leg raising test and a November 2, 1994 MRI scan demonstrated mild osteoarthritis with degenerative changes and L3-4 and L4-5 with a small herniation at L5-S1. In October 1995, Dr. Smith again noted appellant's complaints of low back pain with lower extremity pain and numbness, but did not again mention low back symptomatology until October 1997. In a February 14, 2001 report, Dr. Steege noted a negative straight-leg raising test. Appellant came under the care of Dr. Brown, who provided a July 19, 2002 treatment note, in which he reported a history of a 1991 employment injury with a recent onset of anterior thigh pain when walking uphill and advised, in July 2002, that appellant's lumbar pain needed further evaluation. A September 13, 2002 MRI scan of the lumbar spine again demonstrated degenerative changes with a small tear at L5-S1.

While the above medical reports demonstrate that beginning in 1992, appellant had complaints of low back pain with findings on an MRI scan first demonstrated in 1995, none of these reports contain an opinion regarding causal relationship. The Board has long held that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[19]

In a November 7, 2002 treatment note, Dr. Brown reported that appellant stated that he injured his neck and lower back at the same time and his low back pain had been continuing since 1988. He advised that appellant was suffering from chronic neck and low back pain. In reports dated August 26 and October 13, 2003, Dr. Brown provided a brief opinion without

[17] *Compare Sharon C. Clement*, 55 ECAB __ (Docket No. 01-2135, issued May 18, 2004).

[18] *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[19] *Michael E. Smith*, 50 ECAB 313 (1999).

further explanation that both his neck and back injuries were a "direct result of his occupation." Medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relationship.[20] As noted above, medical evidence of bridging symptoms between the claimed recurrence and the accepted injury must support the physician's conclusion of a causal relationship. The record is devoid of medical evidence regarding appellant's low back condition between December 1988 and August 1992 and, again, there is no mention of any low back problems from shortly before his retirement from federal service in June 1992 until the second-opinion examinations in 1994.[21]

It is well established that medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value.[22] It is unclear from the medical record whether Dr. Brown had an accurate history of appellant's employment duties or the employment injuries he sustained, as the physician first reported a 1991 cervical injury and then made brief mention of a 1988 injury. Furthermore, in none of his reports did Dr. Brown exhibit a knowledge of how any of appellant's employment injuries occurred. The Board finds Dr. Brown's reports of diminished probative value insufficient to meet appellant's burden to establish that he sustained a recurrence causally related to the 1982 or 1988 employment injuries.[23]

To the degree that appellant is contending that he also injured his lower back on January 1, 1990, it is noted that on his claim form for that injury, appellant made no mention of a low back injury stating: "As I operated slide on shotgun I felt a tearing sensation through my entire right arm, from neck to wrist" and related symptoms of surface numbness, interior pain, loss of control in right arm and hand. Moreover, the contemporaneous medical evidence contains no mention of a low back condition. The record, therefore, does not support that appellant also injured his lower back on January 1, 1990.

CONCLUSION

The Board finds that appellant has not submitted rationalized medical evidence establishing that he sustained a recurrence causally related to either his 1982 or 1988 employment injuries.

[20] *Albert C. Brown*, 52 ECAB 152 (2000).

[21] *Robert H. St. Onge*, *supra* note 18.

[22] *Douglas M. McQuaid*, 52 ECAB 382 (2001).

[23] *Ricky S. Storms*, *supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 17, 2004 and December 5 and September 24, 2003 be affirmed.

Issued: September 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member