

FACTUAL HISTORY

On December 17, 2001 appellant, then a 27-year-old clerk, filed a claim for a traumatic injury occurring that date in the performance of duty. The Office accepted his claim for lumbosacral sprain. Appellant worked in a limited-duty capacity following his employment injury. The Office paid him compensation for intermittent periods of temporary total disability.

On October 18, 2002 appellant filed a recurrence of disability on October 15, 2002 due to his December 17, 2001 employment injury. By decision dated April 3, 2003, the Office denied his claim on the grounds that the medical evidence did not establish that he sustained a recurrence of disability as alleged.

Appellant accepted a limited-duty assignment with the employing establishment on July 2, 2003.¹

In a duty status report dated November 5, 2003, Dr. Diego G. Mastronardi, Board-certified in family practice, diagnosed lumbar strain and found that appellant could work as of October 18, 2002 with listed restrictions.

On January 10, 2004 appellant filed a claim for continuing compensation (Form CA-7) requesting compensation for intermittent periods of temporary total disability from November 4, 2003 to January 2, 2004. In an accompanying time analysis form from the employing establishment, appellant listed the dates that he was either unable to work due to his medical restrictions or was sent home by management. In the certification portion of the forms, an official with the employing establishment requested that the Office “see previous note.”

In correspondence dated January 16, 2004, an official with the employing establishment indicated that it had daily work available for appellant within his restrictions and stated, “Because he is a [part-time flexible] he goes home when the rest of the part-time flexible’s go home. If he is claiming that he is being sent home because we do not have work available for him, that is incorrect.”

By letter dated January 27, 2004, the Office advised appellant that the employing establishment stated that it had work available within his restrictions. The Office further notified him that the medical evidence was insufficient to establish that he was disabled from employment on the claimed dates of disability. The Office requested additional factual and medical information from appellant in support of his claim.

Appellant submitted a report from Dr. Mastronardi dated February 20, 2004, who listed the dates that he missed work and stated, “[Appellant] had an ongoing chronic medical problem, which will often unfortunately require him to miss work. [He] has been under my care during this time and I support his missing work on these days due to medical reasons.”

Appellant further submitted a functional capacity evaluation dated November 11, 2003.

¹ In a progress note dated October 6, 2003, a physician found that appellant had low back pain and could continue light-duty employment. The name of the physician is not legible.

In a decision dated March 2, 2004, the Office denied appellant's claim for compensation beginning November 4, 2003 on the grounds that the medical evidence was insufficient to establish that he was disabled due to his accepted employment injury.

On April 16, 2004 appellant requested reconsideration of the Office's March 2, 2004 decision. He submitted additional evidence in support of his request.

In a decision dated July 26, 2004, the Office denied appellant's April 16, 2004 request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. The Office found that he had requested reconsideration of its April 3, 2003 decision.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under the Federal Employees' Compensation Act² has the burden of proof to establish the essential elements of his claim by the weight of the evidence,³ including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.⁴

Under the Act the term "disability" is defined as the incapacity, because of the employment injury, to earn the wages that the employee was receiving at the time of injury.⁵ An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury has no disability as that term is used in the Act.⁶ Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁷

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence. 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.⁸

² 5 U.S.C. §§ 8101-8193.

³ *Calvin E. King*, 51 ECAB 394 (2000).

⁴ *See Trina Bornejko*, 53 ECAB 400 (2002).

⁵ 20 C.F.R. § 10.5(f); *John M. Richmond*, 53 ECAB 702 (2002); *Prince E. Wallace*, 52 ECAB 357 (2001).

⁶ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁷ *Donald E. Ewals*, 51 ECAB 428 (2000).

⁸ *Claudio Vazquez*, 52 ECAB 496 (2001); *Gary L. Fowler*, 45 ECAB 465 (1994).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbosacral strain due to a December 17, 2001 employment injury. Following his injury, appellant worked in a limited-duty capacity. The Office paid him compensation for intermittent periods of disability. On January 10, 2004 appellant filed a claim for compensation for wage loss for intermittent dates from November 4, 2003 to January 2, 2004 due to his employment injury. He indicated that on the listed dates he was either unable to work within his restrictions or was sent home by management. The employing establishment, however, indicated that there was work available for appellant within his restrictions and that he was sent home when all part-time flexible employees stopped working. The Office advised him to provide evidence regarding the facts surrounding his work stoppage. Appellant did not, however, respond within the time allotted and, thus, has not established that there was no work available within his restrictions for the periods claimed.

Further, appellant has not submitted medical evidence sufficient to establish that he was unable to work for the claimed periods due to the accepted employment injury. In a form report dated November 5, 2003, Dr. Mastronardi diagnosed lumbar strain and found that appellant could work beginning October 18, 2002 with listed restrictions. As Dr. Mastronardi did not find appellant disabled from his limited-duty employment, his report is insufficient to meet his burden of proof.

Appellant submitted a functional capacity evaluation dated November 11, 2003; however, this evidence does not address whether he was able to perform his limited-duty employment from November 4, 2003 to January 2, 2004. The only medical evidence which addresses his ability to work during the period in question is a report dated February 20, 2004 from Dr. Mastronardi, who opined that he missed work on various listed dates “due to medical reasons.” He, however, did not specifically find appellant disabled due to his accepted employment injury, list any findings on physical examination or provide any rationale for his opinion. Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁹ Additionally, findings on examination are generally needed to justify a physician’s opinion that an employee is disabled for work.¹⁰ The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.¹¹ Appellant failed to submit such evidence and, consequently, failed to meet his burden of proof.

⁹ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ *Id.*

¹¹ *Bonnie Goodman*, 50 ECAB 139 (1998).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act¹² does not entitle a claimant to a review of an Office decision as a matter of right.¹³ The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that “An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.” The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹⁴

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁵ the Office’s regulations provide 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 arguments not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 2

The Office issued a merit decision on April 3, 2003 finding that appellant had not established that he sustained a recurrence of disability beginning October 15, 2002. The Office subsequently issued a merit decision on March 2, 2004 denying his claim for compensation for intermittent dates beginning November 4, 2003. On April 6, 2004 appellant requested reconsideration of the Office’s March 2, 2004 decision. In a decision dated July 26, 2004, the Office denied his request for reconsideration of its April 3, 2003 decision on the grounds that it was untimely filed and failed to establish clear evidence of error. Appellant, however, clearly requested reconsideration of the Office’s March 2, 2004 decision rather than the April 3, 2003 decision. As he filed a timely request for reconsideration of the Office’s March 2, 2004 decision, the Office must evaluate the request under the appropriate standard.¹⁸ Accordingly, the case will

¹² 5 U.S.C. § 8128(a).

¹³ *Veletta C. Coleman*, 48 ECAB 367 (1997).

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 8128(a).

¹⁶ 20 C.F.R. § 10.606(b)(2).

¹⁷ 20 C.F.R. § 10.608(b).

¹⁸ As noted above, a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office. 20 C.F.R. § 10.606(b).

be remanded for proper consideration of his timely April 6, 2004 request for reconsideration of the Office's March 2, 2004 decision pursuant to section 10.606(b).¹⁹

CONCLUSION

The Board finds that appellant has not established that he was totally disabled for intermittent dates during the period November 4, 2003 to January 2, 2004, due to his accepted employment injury. The Board further finds that the Office improperly determined that appellant's request for reconsideration was untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 2, 2004 is affirmed and the decision dated July 26, 2004 is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 18, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

A. Peter Kanjorski, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ Subsequent to the Office's July 26, 2004 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).