

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

STEPHEN G. LETHEM, Appellant)	
)	
and)	Docket No. 05-574
)	Issued: June 15, 2005
U.S. POSTAL SERVICE, SULLIVAN STATION,)	
Denver, CO, Employer)	
)	

Appearances:
Stephen G. Lethem, 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 January 10, 2005 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated October 27, 2004, denying his request for reconsideration and June 7 and 21, 2004 decisions, denying his claim for disability between October 21 and November 15, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of his appeal.

ISSUES

The issues are: (1) whether appellant's disability between October 21 and November 15, 2002 was causally related to his August 6, 2002 employment injury; and (2) whether the Office properly denied his request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 12, 2002 appellant, then a 56-year-old letter carrier, filed an occupational disease claim alleging that on August 6, 2002 he sustained cramping in his hands due to the

repetitive movements required in his job, including bending, lifting, stooping and carrying large packages.

In a report dated October 14, 2002, Dr. Joseph D. Clark, an attending physician, diagnosed Huntington's chorea and dystonia (a muscle disorder) in his hands. In a November 8, 2002 report, he indicated that appellant was able to return to light-duty work on November 11, 2002. However, he also indicated that appellant was only partially disabled between August 28, 2002 and his examination on November 8, 2002, rather than totally disabled until November 11, 2002.

The Office referred appellant to Dr. Duane J. Glatz, a Board-certified neurologist, together with a statement of accepted facts and copies of medical records, for a second opinion evaluation. In reports dated August 5 and 22, 2003, Dr. Glatz provided a history of appellant's problems with cramping of the extremities, course of treatment and findings on physical examination. He stated that the muscle cramping was aggravated by employment activities. Dr. Glatz stated that appellant's Huntington's chorea was asymptomatic and was not related to his dystonia or factors of his employment. He indicated that less strenuous activities at work would reduce the severity of appellant's symptoms but he was capable of working.

By letter dated September 30, 2003, the Office accepted a temporary aggravation of dystonia of the hands, arms and feet.

In a report dated August 28, 2002, received by the Office on October 31, 2003, Dr. William G. Herrera, a Board-certified neurologist, provided findings on physical examination, discussed the status of appellant's Huntington's chorea and indicated that nerve conduction studies and an electromyogram were needed to determine the cause of his extremity cramping.

In reports dated December 20, 2002 to May 5, 2004, Dr. Clark and Dr. Randall J. Bjork, a Board-certified neurologist, described the course of treatment for appellant's accepted dystonia condition and his Huntington's chorea. However, they did not address October 21 to November 15, 2002, the period of disability claimed by appellant.

In two reports dated January 15, 2004, a physician's assistant indicated that appellant was totally disabled from August 6 to November 16, 2002 due to Huntington's chorea and dystonia.

On January 21 and April 26, 2004 appellant filed compensation claims for lost wages for the period October 21 to November 15, 2002.

By decisions dated June 7 and 21, 2004, the Office denied appellant's claim for compensation for the period October 21 to November 15, 2002¹ on the grounds that the evidence did not establish that he was disabled during that period due to his accepted employment injury on August 6, 2002.

¹ In its June 21, 2004 decision, the Office indicated that the period of disability claimed by appellant extended to November 23, 2002.

Appellant requested reconsideration and submitted additional evidence. In reports dated August 9 through 22, 2002, Dr. Michael J. Noble, a Board-certified internist, evaluated appellant's pain and cramping in his legs and arms and indicated that he did not know the cause of this condition. He indicated that appellant was totally disabled from August 6, 2002 to "unclear." In an October 4, 2002 disability certificate, Dr. Noble wrote "Excuse from work through October 18, 2002 due to medical reasons."

In an August 30, 2002 report, Dr. Lauren C. Seeberger, a Board-certified neurologist, provided a history of appellant's Huntington's chorea and the pain and cramping in his extremities. She noted his statement that he had been off work since August 6, 2002 but she did not provide her opinion as to whether appellant was disabled between October 21 and November 15, 2002 due to his accepted dystonia condition.

In a report dated January 15, 2004, Dr. Bjork stated that appellant was seen for a neurological follow-up for his Huntington's disease and short-term memory loss. He did not indicate that appellant was disabled due to his accepted dystonia condition.² In a report dated March 4, 2004, Dr. Bjork described the status of appellant's Huntington's chorea and noted that he was experiencing painful muscle spasms in the cervical and shoulder areas.

Appellant also submitted an October 11, 2004 report from a physician's assistant.³

By decision dated October 27, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence was cumulative or repetitious and was not sufficient to warrant further merit review.⁴

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act⁵ has the burden to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.⁶

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he was disabled for work as the result of an employment injury.⁷

² This report was previously of record but the earlier copy did not have Dr. Bjork's signature.

³ Appellant also submitted medical evidence previously of record.

⁴ Appellant submitted additional evidence subsequent to the Office decision of October 27, 2004. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). Therefore, the Board may not consider this evidence for the first time on appeal.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Joseph W. Kripp*, 55 ECAB ____ (Docket No. 03-1814, issued October 3, 2003); *Walter D. Morehead*, 31 ECAB 188 (1979) (occupational disease or illness).

⁷ *David H. Goss*, 32 ECAB 24 (1980).

Monetary compensation benefits are payable to an employee who has sustained wage loss due to disability for employment resulting from the employment injury.⁸ Whether a particular employment injury causes disability for employment and the duration of that disability are medical issues which must be proved by a preponderance of reliable, probative and substantial medical evidence.⁹

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a temporary aggravation of dystonia of the hands, arms and feet on August 6, 2002. Appellant filed claims for disability for the period October 21 to November 15, 2002.

In an August 28, 2002 report, Dr. Herrera discussed the status of appellant's nonwork-related Huntington's chorea and indicated that tests were needed to determine the cause of his upper extremity cramping. However, the physician did not state that appellant was disabled between October 21 and November 15, 2002 due to his August 6, 2002 employment injury. Therefore, this report is not sufficient to establish that appellant sustained a work-related disability for that period.

In reports dated October 14 and November 8, 2002, Dr. Clark diagnosed Huntington's chorea and dystonia and indicated that appellant was able to return to light-duty work on November 11, 2002. However, he did provide a rationalized medical opinion explaining how appellant's disability until November 11, 2002 was causally related to his accepted employment injury, temporary aggravation of dystonia of the hands, arms and feet. Therefore, these reports are not sufficient to establish that appellant's disability between October 21 and November 15, 2002, was causally related to his August 6, 2002 employment injury.

In reports dated December 20, 2002 to May 5, 2004, Drs. Clark and Bjork described the treatment for appellant's accepted dystonia condition and his nonwork-related Huntington's chorea. However, they did not opine that appellant was disabled between October 21 and November 15, 2002 due to his employment injury. Therefore, these reports are not sufficient to discharge appellant's burden of proof.

In reports dated August 5 and 22, 2003, Dr. Glatz stated that muscle cramping of appellant's extremities was aggravated by his employment activities. He indicated that less strenuous activities would reduce the severity of his symptoms but he was capable of working. Dr. Glatz did not opine that appellant was disabled between October 21 and November 15, 2002 due to his August 6, 2002 employment injury. Therefore, these reports do not establish that appellant sustained a work-related disability for that period.

In two reports dated January 15, 2004, a physician's assistant indicated that appellant was totally disabled from August 6 to November 16, 2002 due to Huntington's chorea and dystonia. The Board notes that reports from a physician's assistant are of no probative value on the issue

⁸ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

⁹ *Edward H. Horten*, 41 ECAB 301 (1989).

of causal relationship under the Act.¹⁰ A “physician” includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law and chiropractors only to the extent that their reimbursable services are limited to treatment of a subluxation as demonstrated by x-ray to exist.¹¹ Lay individuals such as physician’s assistants, nurse practitioners and social workers are not competent to render a medical opinion.¹² Therefore, the January 15, 2004 reports, from the physician’s assistant, are not sufficient to establish that appellant sustained a work-related disability from October 21 to November 15, 2002.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees’ Compensation Act provides that the Secretary of Labor may review an award for or against payment of compensation on her own motion or on application. The Secretary, in accordance with the facts on review, may end, decrease, or increase the compensation previously awarded; or award compensation previously refused or discontinued.¹³

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (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 evidence not previously considered by the Office.¹⁴ 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.¹⁵ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reviewing the merits of the claim.¹⁶

ANALYSIS -- ISSUE 2

In reports dated August 9 through 22, 2002, Dr. Noble indicated that he did not know the cause of appellant’s cramping in his extremities. He indicated that appellant was totally disabled from August 6, 2002 to “unclear.” As he did not opine that appellant was disabled between October 21 and November 15, 2002 due to his August 6, 2002 employment injury, these reports do not constitute relevant and pertinent evidence not previously considered by the Office. In an October 4, 2002 disability certificate, Dr. Noble wrote “Excuse from work through October 18, 2002 due to medical reasons.” However, no specific medical condition was provided.

¹⁰ *Supra* note 5.

¹¹ 5 U.S.C. § 8101(2).

¹² *See Robert J. Krstynen*, 44 ECAB 227 (1992).

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(2).

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ 20 C.F.R. § 10.608(b); *see also Ronald A. Eldridge*, 53 ECAB 218 (2001).

Therefore, this disability certificate does not constitute relevant and pertinent evidence not previously considered by the Office.

In an August 30, 2002 report, Dr. Seeberger provided a history of appellant's Huntington's chorea and the pain and cramping in his extremities. She noted his statement that he had been off work since August 6, 2002, but she did not provide a medical opinion as to whether appellant was disabled between October 21 and November 15, 2002 due to his accepted dystonia condition. Therefore, this report does not constitute relevant and pertinent evidence not previously considered by the Office.

In a report dated January 15, 2004, Dr. Bjork stated that appellant was seen for a neurological follow-up for his Huntington's disease and short term memory loss. He did not indicate that appellant was disabled due to his accepted dystonia condition. In a March 4, 2004 report, Dr. Bjork noted that appellant was experiencing painful muscle spasms in the cervical and shoulder areas. However, he did not indicate the cause of the spasms or indicate that appellant was disabled between October 21 and November 15, 2002 due to his August 6, 2002 employment-related dystonia. As these reports did not address the issue of whether appellant was totally disabled between October 21 and November 15, 2002 due to his August 6, 2002 employment injury, they do not constitute relevant and pertinent evidence not previously considered by the Office.

Appellant also submitted a report from a physician's assistant. As noted above, reports from a physician's assistant are of no probative value and therefore this report does not constitute relevant and pertinent evidence not previously considered by the Office.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent evidence not previously considered by the Office, the Office properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that he was disabled between October 21 to November 15, 2002 due to his August 6, 2002 employment injury, a temporary aggravation of dystonia of the hands, arms and feet. The Board further finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 27 and June 21 and 7, 2004 are affirmed.

Issued: June 15, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member