United States Department of Labor
Employees' Compensation Appeals Board

HORACE L. FULLER, JR., Appellant	)	
and	)	**Docket No. 05-1437**
	)	**Issued: November 2, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Fort Worth, TX, Employer	)	

Appearances:
Horace L. Fuller, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 27, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 16 and December 14, 2004 merit decisions, denying his recurrence of disability claim and a May 5, 2005 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability on or after June 15, 2002 due to his August 23, 2001 employment injury; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 24, 2001 appellant, then a 51-year-old postal clerk, filed a traumatic injury claim alleging that he sustained injury to his left foot at work on August 23, 2001 when he was

getting ice out of a machine and the door fell on his left foot. Appellant did not stop work, but he began working in a light-duty position. On November 6, 2001 he returned to performing regular duty for the employing establishment.

Appellant was initially seen by Dr. Rudolf F. Flasdick, a Board-certified orthopedic surgeon, and Dr. George Niemirowski, a Board-certified occupational medicine physician, who both diagnosed left foot contusion. Dr. Stephen R. Fowler, an attending Board-certified orthopedic surgeon, indicated that x-rays of the left foot taken shortly after August 23, 2001 showed extensive degenerative changes. The x-ray of the left foot showed a possible fracture of the distal metatarsal of the left great toe but that the degenerative changes made this determination difficult.

The Office accepted appellant's claim for left foot contusion and paid appropriate compensation.

Appellant claimed that beginning June 15, 2002, he sustained a recurrence of disability due to his August 23, 2001 employment injury.[1]

In March 26, 2002 reports, Dr. Niemirowski noted that appellant complained of pain in the metatarsal area of his left great toe and indicated that "he wants to be off for a few days." Physical examination of the left great toe revealed a full range of motion with some tenderness at its base and no swelling, erythema or ecchymosis. Dr. Niemirowski diagnosed left foot contusion and indicated that as of March 26, 2002 appellant could perform work which allowed him to sit 90 percent of the time and which did not required squatting, kneeling or climbing stairs or ladders. In an April 9, 2002 response to some questions the Office posed to the physician regarding appellant's condition, Dr. Niemirowski stated that appellant's condition on March 26, 2003 was not due to his August 23, 2001 injury but rather was due to his preexisting nonwork-related arthritis.

Appellant began to be seen by Dr. James E. Elbaor, a Board-certified orthopedic surgeon. In a report dated October 11, 2002, Dr. Elbaor indicated that appellant had degenerative changes and possible trauma in the metatarsophalangeal joint of the great toe of the left foot. He recommended that appellant perform light-duty work.[2] In a report dated October 25, 2002, Dr. Elbaor stated that appellant indicated that he could not go to work, but he posited that he saw no reason that appellant could not work and indicated that he could work eight hours per day with restrictions. In periodic reports through early 2003, Dr. Elbaor recorded brief findings on examination and continued to recommend light-duty work.[3]

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[1] On April 1, 2002 appellant filed an occupational injury claim alleging that his left foot arthritis and a chip in his left great toe were aggravated by standing at work for 10 hours per day 6 days per week. This matter is not the subject of the present appeal.

[2] It appears that appellant was performing light-duty work for the employing establishment at this time. The findings of an October 9, 2002 bone scan revealed isotope uptake about the metatarsophalangeal joint of the great toe of the left foot which was compatible with post-traumatic arthropathy. The findings of October 2, 2002 nerve conduction studies revealed a mild hypoesthetic condition in the peroneal nerves of the left foot.

[3] He began to diagnose hallux rigidus of the metatarsophalangeal joint of the left great toe.

By decision dated April 8, 2003, the Office denied appellant's claim on the grounds that he did not establish that he sustained a recurrence of disability on or after June 15, 2002 due to his August 23, 2001 employment injury.[4]

In a report dated April 21, 2003, Dr. Elbaor noted that appellant had hallux rigidus of the metatarsophalangeal joint of the left great toe and stated: "As I do not know his traumatic history, I cannot say whether this was a preexisting degenerative condition or not. It may have resulted from trauma directly to this region." Dr. Elbaor indicated that he was releasing appellant to regular duty.

Appellant requested a hearing before an Office hearing representative, which was held on October 21, 2003. He testified that he had disabling residuals of his August 23, 2001 employment injury since June 15, 2002. Appellant submitted a November 10, 2003 report from Dr. Elbaor, who indicated that appellant had right knee patellofemoral chondromalacia addition to his left foot problems. He stated: "It is medically probable that he would increase the stress on the right leg/knee after limping on the left foot and great toe as long as he had been doing and therefore he could have sustained a work-connected injury in his right knee on this basis -- that is based on the patient's history and natural history regarding the great toe."

By decision dated and finalized January 9, 2004, the Office hearing representative affirmed the Office's April 8, 2003 decision.

Appellant submitted a February 9, 2004 report in which Dr. Elbaor indicated that appellant stated an ice machine door fell on his foot on August 23, 2001 and stated:

> "This seems reasonable that such a heavy door as the patient describes falling on his foot would precipitate his complaints of pain. It would be helpful if we had x-rays of his left foot and toe prior to the injury to ascertain whether the radiologic changes present now were present prior to the injury.
>
> "Thus, based on the above, and the patient's complaints and history of injury, it would appear that it was a causal relationship."

By decision dated May 17, 2004, the Office affirmed its prior decisions noting that the reports of Dr. Elbaor were not well reasoned on the issue of causal relationship.

In a May 26, 2004 report, Dr. Elbaor stated that, based on the history, it appeared that appellant had a traumatic injury on August 23, 2001 directly to the metatarsophalangeal joint of the left great toe which "very well probably" caused hallux rigidus and degenerative changes of the toe.

By decision dated September 16, 2004, the Office affirmed its prior decisions.

[4] In its decisions, the Office identified various dates that appellant claimed his recurrence of disability began, but the record reveals that he claimed the recurrence began on June 15, 2002.

Appellant indicated that a prior report of Dr. Elbaor incorrectly listed the date of his employment injury as August 21, 2001. He submitted a September 29, 2004 report in which Dr. Elbaor confirmed that the date of injury was August 23, 2001 and he again requested reconsideration of his claim.

By decision dated December 14, 2004, the Office affirmed its prior decisions.

In January 2005, appellant requested reconsideration of his claim indicating that he sustained disability in 2002 due to his August 23, 2001 employment injury. He submitted several medical reports which had previously been submitted and considered by the Office.

By decision dated May 5, 2005, the Office denied appellant's request for reconsideration.

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.[5] 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.[6] Where no such rationale is present, medical evidence is of diminished probative value.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left foot contusion when an ice machine door fell on his foot on August 23, 2001. On November 6, 2001 he returned to performing regular duty for the employing establishment. Appellant claimed that he sustained a recurrence of disability on June 15, 2002 due to his August 23, 2001 employment injury. The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on June 15, 2002.

Appellant submitted a February 9, 2004 report in which Dr. Elbaor, an attending Board-certified orthopedic surgeon, indicated that it seemed reasonable that the door that he described as falling on his foot on August 23, 2001 "would precipitate his complaints of pain." Dr. Elbaor indicated that appellant's left foot condition required work restrictions. In a May 26, 2004 report, Dr. Elbaor stated that, based on the history, it appeared that appellant had a traumatic injury on August 23, 2001 directly to the metatarsophalangeal joint of the left great toe, which "very well probably" caused hallux rigidus and degenerative changes of the toe.

[5] *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

[6] *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[7] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

These reports, however, are of limited probative value on the issue of the present case. Dr. Elbaor did not provide adequate medical rationale in support of his conclusion on causal relationship.[8] He did not describe the medical mechanism through which the August 23, 2001 injury could have caused disability on or after June 15, 2002. Appellant's claim was accepted for left foot contusion and, although Dr. Elbaor suggested that a more serious injury occurred on August 23, 2001, he did not adequately explain why this would be the case. Dr. Elbaor made note of positive findings on diagnostic testing, but he provided no explanation for his apparent opinion that they were related to the August 23, 2001 employment injury.[9] In fact, in his February 9, 2004 report, he acknowledged "that it would be helpful if we had x-rays of his left foot and toe prior to the injury to ascertain whether the radiologic changes present now were present prior to the injury." He did not adequately explain why appellant's continuing problems were not due to the preexisting nonwork-related degenerative process of the left foot or some other nonwork-related condition.

Moreover, in a prior report, Dr. Elbaor expressed an equivocal opinion regarding the cause of appellant's continuing left foot problems. In his April 21, 2003 report, he stated: "As I do not know his traumatic history, I cannot say whether this was a preexisting degenerative condition or not. It may have resulted from trauma directly to this region." The Board notes that it appears that Dr. Elbaor's opinion on causal relationship is based more on appellant's own belief that his August 23, 2001 injury continued to cause disability than on any objective medical evidence.[10]

Appellant also submitted March 26, 2002 reports in which Dr. Niemirowski, an attending physician Board-certified in physical medicine and rehabilitation, recommended work restrictions. In a note completed in April 2002, Dr. Niemirowski stated that appellant's condition on March 26, 2003 was not due to his August 23, 2001 injury but rather was due to his preexisting nonwork-related arthritis.

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.[11] 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.

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[8] *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

[9] The findings of x-ray testing of the left foot taken shortly after August 23, 2001 showed extensive degenerative changes and a possible fracture of the distal metatarsal of the left great toe. The findings of an October 9, 2002 bone scan revealed isotope uptake about the metatarsophalangeal joint of the great toe of the left foot, which was compatible with post-traumatic arthropathy.

[10] The record also contains a November 10, 2003 report in which Dr. Elbaor suggested that appellant's right knee problems were related to an employment-related left foot problem, but he did not explain why he felt the left foot problem was employment related.

[11] *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

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,[12] the Office's regulations provide that the evidence or argument submitted by 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.[13] 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.[14] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[15]

ANALYSIS -- ISSUE 2

In January 2005, appellant requested reconsideration of his claim. He submitted several medical reports, but these reports had previously been submitted and considered by the Office. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[16] Appellant argued that he sustained disability in 2002 due to his August 23, 2001 employment injury, but he had previously made similar arguments.

Appellant has not established that the Office improperly denied his request for further review of the merits of his claim under section 8128(a) of the Act, because the evidence and argument he submitted did not to 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 constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after June 15, 2002 due to his August 23, 2001 employment injury. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[12] 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).

[13] 20 C.F.R. § 10.606(b)(2).

[14] 20 C.F.R. § 10.607(a).

[15] 20 C.F.R. § 10.608(b).

[16] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 5, 2005 and December 14 and September 16, 2004 decisions are affirmed.

Issued: November 2, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board