United States Department of Labor
Employees' Compensation Appeals Board

EUGENE NIXON, SR., Appellant	)	
and	)	**Docket No. 05-1902**
	)	**Issued: April 5, 2006**
U.S. POSTAL SERIVCE, POST OFFICE, Honolulu, HI, Employer	)	

Appearances:
Eugene Nixon, Sr., 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 September 14, 2005 appellant filed a timely appeal from the November 18, 2004 merit decision of the Office of Workers' Compensation Programs, denying his claim for compensation for the period May 24 to July 11, 2004, and nonmerit decisions dated March 23, 2005, denying his request for an oral hearing as untimely and a July 1, 2005 denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit denial of the wage-loss compensation claim and the nonmerit decisions in this case.

ISSUES

The issues are: (1) whether appellant has established that his disability for the period May 24 to July 11, 2004 was causally related to his accepted October 3, 3002 employment injuries; (2) whether the Office properly denied appellant s request for a hearing as untimely; and (3) 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 October 4, 2002 appellant, a 63-year-old mail handler, filed an occupational disease claim alleging that on October 3, 2002 he first realized his back problems were employment related. The Office accepted the claim for left sciatica and lumbar strain and paid compensation for periods of disability. Appellant began limited-duty part-time work on December 21, 2002.

On July 27, 2004 appellant filed a claim for compensation for the period May 24 to July 11, 2004.

On July 28, 2004 the Office received a July 8, 2004 disability note from Dr. Peter Diamond, an attending Board-certified orthopedic surgeon. He stated that appellant was totally disabled for the period May 24 to July 11, 2004 and released him to work on July 12, 2004 with restrictions.

In a July 8, 2004 treatment note, Dr. Diamond noted that appellant was "doing well after a brief period of time off work" and the he would "return to work next Monday with previous restrictions on ergonomics."

In treatment notes dated August 26, 2004, Dr. Diamond stated that he had been treating appellant "for some time for chronic lower back pain" and was released to work with restrictions. He noted that appellant "appears today having been taken off of work for the last couple of weeks stating that these restrictions were exceeded while he was at work and that he developed more in the way of back pain." A physical examination showed no radicular or significant neurologic findings.

In a report dated August 27, 2004, Dr. Gabriel W.C. Ma, a second opinion Board-certified orthopedic surgeon, diagnosed a lumbar strain. A physical examination of appellant revealed as follows:

> "Both sciatic notches were nontender to deep palpation. Range of motion demonstrated forward flexion performed slowly but easily to 80 [to] 85 degrees, extension to 25 [to] 30 degrees, lateral flexion to 30 degrees bilaterally and normal rotation of 45 [to] 50 degrees bilaterally. Extreme right lateral flexion elicited slight discomfort in the left lumbosacral junction area."

Dr. Ma concluded that appellant was capable of working eight hours per day with restrictions. He stated:

> "[T]he activities of [appellant's] work are an aggravating factor for an essentially chronic condition of low back strain. As such, he would likely have subjective complaints with little if anything in the way of objective findings."
>
> * * *
>
> "[Appellant] can be expected to have periodic flare-ups of his low back strain condition with resulting disability as a result of temporary exacerbations/

aggravations related to his work activities. This is probably what occurred to result in the period of disability of May 10 to 13, 2004."

In a letter dated October 4, 2004, appellant stated that his lumbar strain had been "exacerbated due to being assigned (continuously) to PL-376, which is the opening unit for the Honolulu Postal Services (mail collection)." He also alleged that his disability for the period May 24 to July 11, 2004 was due to the employing establishment failing to adhere to his restrictions which aggravated his lumbar strain.

On October 15, 2004 the Office requested additional information from Dr. Diamond regarding appellant's disability for the period May 24 to July 11, 2004. The Office requested that he provide contemporaneous medical reports for the period. Dr. Diamond was given 30 days to respond.

In a letter dated October 21, 2004, the employing establishment denied requiring appellant to work outside his restrictions prior to May 24, 2004. It also stated that he "worked primarily in the 020 operation and did very little work, if any, repairing damaged parcels."

In a decision dated November 18, 2004, the Office denied appellant's request for wage-loss compensation for total disability for the period May 24 to July 11, 2004.

Appellant requested an oral hearing on December 29, 2004,[1] which the Office denied as untimely in a March 23, 2005 decision.

On February 16, 2005 appellant accepted a limited-duty job offer.

In a letter dated April 11, 2005, appellant requested reconsideration of the denial of his claim. In support of his request, he submitted a final status report dated April 26, 2005 by Ron Fleck.

On July 1, 2005 the Office denied appellant's request for further merit review of his claim.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,[2] the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[3] Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he was receiving at the time of injury has no disability as that term is used in the Act[4] and

[1] The Board notes the record does not contain the envelope appellant's request was mailed in and that the date of receipt was January 13, 2005.

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Prince E. Wallace*, 52 ECAB 357 (2001).

whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[5]

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.[6] Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.[7] Once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.[8]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[9] 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.[10] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[11]

ANALYSIS -- ISSUE 1

The issue is whether appellant has established that he was totally disabled due to his right knee condition for the period May 14 to July 11, 2004. The Office accepted that he sustained an employment-related lumbar strain and left sciatica and paid compensation for periods of disability.

Dr. Diamond provided an August 26, 2004 report, which noted appellant's employment injury history and that he had been "taken off work for the last couple of weeks" due to

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

[5] *Donald E. Ewals*, 51 ECAB 428 (2000).

[6] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[7] *Tammy L. Medley*, 55 ECAB ____ (Docket No. 03-1861, issued December 19, 2003); *see Donald E. Ewals*, *supra* note 5.

[8] *Bernitta L. Wright*, 53 ECAB 514 (2002).

[9] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[10] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[11] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

increasing back pain because his restrictions were not followed by the employing establishment. In an August 27, 2004 report, Dr. Ma, a second opinion Board-certified orthopedic surgeon, diagnosed a lumbar strain. A physical examination revealed range of motion, which included slow forward flexion of 80 to 85 degrees, 25 to 30 degrees extension, 30 degrees bilateral lateral flexion and normal bilateral rotation. Dr. Ma concluded that appellant was capable of working with restrictions and noted that work activities were an aggravating factor for the chronic condition of low back strain. He opined that appellant could be expected to have periodic flare-ups of his low back strain condition with resulting disability. The Board notes that there is insufficient contemporaneous medical evidence submitted to support disability for the period claimed. The Board finds that, although Drs. Ma and Diamond supported causal relationship in conclusory statements, they failed to provide medical rationale or reasoning, explaining how the duties appellant performed at work caused on contributed to any employment-related disability for the period May 24 to July 11, 2004.[12]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.[13] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[14] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[15] The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

> "If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, etc.), H&R [Hearings and Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."[16]

ANALYSIS -- ISSUE 2

In this case, the 30-day period for determining the timeliness of appellant's hearing request would commence on November 21, 2004, the next business day following the issuance

[12] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[13] 5 U.S.C. § 8124(b)(1).

[14] 20 C.F.R. §§ 10.616, 10.617.

[15] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4 (b)(3) (October 1992).

of the Office's November 18, 2004 decision denying his claim for compensation. The 30 days from November 21, 2004 would be December 21, 2004. Appellant's hearing request would be timely if filed by December 21, 2004.

The Office determined that his request was untimely filed. The Board notes that the Office's procedure manual, Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope. The procedure manual states that timeliness is thus determined by the postmark on the envelope, if available and that otherwise the date of the letter itself should be used. The Board notes that the envelope containing the request was not retained in the record and the letter requesting reconsideration was dated December 29, 2004. Because his request for a hearing was dated and received more than 30 days after the Office issued the November 18, 2004 decision, the Board finds that it was not timely filed and he is not entitled to a hearing as a matter of right. Further, the Office considered appellant's request and correctly advised him that he could equally well address the issue in his case through the reconsideration process. Under these circumstances, the Board finds that the Office properly denied a discretionary hearing on the matter.[17]

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of the Act[18] vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[19]

Section 10.606(b)(2) of Title 20 of the Code of Federal 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 argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[20] Section 10.608(b) provides that, when an application for review of the merits of a claim 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.[21] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether

[17] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., André Thyratron*, 54 ECAB 257 (2002); *Jeff Micono*, 39 ECAB 617 (1988).

[18] 5 U.S.C. § 8128(a) ("[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[19] *Jeffrey M. Sagrecy*, 55 ECAB ___ (Docket No. 04-1189, issued September 28, 2004); *Veletta C. Coleman*, 48 ECAB 367 (1997).

[20] 20 C.F.R. § 10.606(b)(2).

[21] 20 C.F.R. § 10.608(b).

the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[22]

ANALYSIS -- ISSUE 3

Appellant's request for reconsideration dated April 11, 2005 neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second requirements under section 10.606(b)(2).[23]

With respect to the third requirement, constituting relevant and pertinent new evidence not previously considered by the Office, appellant submitted factual and medical evidence, which was previously of record. 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 the case.[24] The April 26, 2005 final status report by Mr. Fleck, although new evidence, does not constitute medical evidence and is not relevant to the underlying issue of whether appellant's disability for the period May 24 to July 11, 2004 was causally related to his accepted October 3, 2002 employment injuries. As appellant did not submit any relevant and pertinent new evidence, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[25]

CONCLUSION

The Board finds that appellant has not established that his disability for the period May 24 to July 11, 2004 was causally related to his accepted October 3, 2002 employment injuries. The Board further finds that the Office properly denied appellant's request for an oral hearing before an Office hearing representative and that it properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

[22] *Annette Louise*, 54 ECAB 783 (2003).

[23] 20 C.F.R. §§ 10.608(b)(2)(i) and (ii).

[24] *Denis M. Dupor*, 51 ECAB 482 (2000).

[25] 20 C.F.R. § 10.608(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 1 and March 23, 2005 and November 18, 2004 are affirmed.

Issued: April 5, 2006
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