United States Department of Labor
Employees' Compensation Appeals Board

CHRISTOPHER S. EDWARDS, Appellant	)	
and	)	**Docket No. 06-623**
DEPARTMENT OF TRANSPORTATION, PHILADELPHIA INTERNATIONAL AIRPORT, Philadelphia, PA, Employer	)	**Issued: June 9, 2006**

Appearances:
Aaron S. Friedman, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On January 24, 2006 appellant, through his attorney, filed a timely appeal from a June 3, 2005 merit decision of the Office of Workers' Compensation Programs, denying a recurrence of total disability on September 5, 2003. Appellant also appeals the Office's July 8 and November 14, 2005 nonmerit decisions, denying his request for reconsideration of the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained a recurrence of total disability beginning September 5, 2003 causally related to his July 9, 2003 employment injury; and (2) whether the Office properly denied appellant's June 29 and September 1, 2005 requests for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 9, 2003 appellant, then a 42-year-old transportation security screener, filed a traumatic injury claim alleging that on that date he hurt his lower back while moving a heavy bag off a table. He stopped work on the date of injury. Appellant returned to light-duty work on August 21, 2003 based on the physical restrictions set forth by Dr. Joseph A. Jelen, Jr., a Board-certified orthopedic surgeon. He was limited to lifting no more than 10 pounds 8 hours a day. He could sit, stand and walk eight hours a day. Appellant was not permitted to climb or kneel. He could stoop or bend one-half hour a day, twist four hours a day, push/pull six hours a day and perform fine manipulation for only one hour during a work-related activity. Dr. Jelen noted that activities such as, reaching above the shoulder level, driving a vehicle, operating machinery, working in extreme temperatures and high humidity were not required for appellant's job and therefore were not addressed.

By letter dated September 26, 2003, the Office accepted appellant's claim for a lumbosacral strain.

On July 19, 2004 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of total disability on September 5, 2003. He stopped work on September 5, 2003. Appellant attributed the alleged recurrence of total disability to constant repetitive lifting of heavy baggage in an area that did not have a scale which caused his back to go out. He contended that he had constant back pain and that he was overworked. Appellant stated that he worked in poorly ventilated areas that were excessively hot to the point of causing him to pass out.

The employing establishment controverted appellant's claim. It stated on the CA-2a form that he was sent home on September 5, 2003 for falling asleep at a checkpoint and he never returned to work. On December 15, 2003 appellant was terminated by the employing establishment for continuance of absence. In a September 29, 2004 memorandum, the employing establishment stated that appellant was offered light-duty work at a closed checkpoint. No screening functions were required except for standing on the exit lane. Appellant was given a chair on a flat surface for this assignment. No lifting or movement was required. The employing establishment stated that appellant had a problem with the work hours and nothing more. At no time was he instructed to lift bags or assist in any other activity.

On July 19, 2004 appellant filed a claim for compensation (Form CA-7) for the period July 9, 2003 through the filing date of the claim. He submitted Dr. Jelen's August 19, 2003 attending physician's report. He diagnosed a lumbosacral strain and foraminal narrowing at L4-5 and L5-S1. Dr. Jelen indicated with an affirmative mark that the diagnosed conditions were caused by the July 9, 2003 employment injury. He advised appellant that he could return to limited-duty work on August 19, 2003. In an undated attending physician's report received by the Office on March 1, 2005, Dr. Leonard A. Winegrad, a general practitioner, diagnosed a lumbosacral strain/sprain and an illegible condition. He indicated that the diagnosed conditions were caused by the accepted employment injury with an affirmative mark. Dr. Winegrad stated that appellant was totally disabled from July 9, 2003 through the date of his report.

By letter dated April 21, 2005, the Office advised appellant about the factual and medical evidence he needed to submit to establish his claim.

Appellant submitted Dr. Jelen's September 8, 2003 report, which found that he sustained several back conditions including, a lumbosacral strain that likely caused nerve irritation in the left leg which made it buckle or give away. He also found that appellant was permanently disabled. Dr. Jelen stated that due to his medications, more than his other abilities, appellant was not permitted to work in his previous fashion until this issue was resolved. Dr. Jelen concluded that appellant may need to apply for permanent disability.

Appellant submitted several medical records from nurses, a physician's assistant, social worker and physical therapists, whose signatures were illegible and addressed treatment he received on intermittent dates from November 12 through 18, 2003 for his back, left lower extremity, insomnia, arm, emotional and chest conditions. He also submitted treatment notes and a report dated November 12 and 13, 2003 of physicians, whose signatures were illegible. Appellant submitted clinic records regarding its case management of his case from November 12 through 17, 2003.

Treatment notes of Dr. James B. Congdon, a Board-certified psychiatrist, covering dates from November 12 through 17, 2003 noted when appellant's medications were ordered and stopped and that he was treated for an emotional condition. In reports dated November 18 and 19, 2003, Dr. Congdon diagnosed bipolar disorder and depression on Axis 1, chronic back pain on Axis 3, moderate to severe on Axis 4 and a global assessment of function (GAF) of 20 at admission and 50 at discharge on Axis 5 from a clinic for psychiatric treatment. No diagnosis was found on Axis 2. His November 13, 2003 report found that appellant had bipolar disorder, depression, episodic ethyl alcohol abuse on Axis 1, a dose-effect factor on Axis 2, herniated discs in the back and neck on Axis 3, severe financial crisis on Axis 4 and a GAF of 30 and 60 during the past year.

An August 26, 2004 medical report of Dr. Nasrat Ghattas, a Board-certified physiatrist, indicated that appellant had experienced back pain for 10 years following a motor vehicle accident. He noted his back symptoms and provided a history of his medical, family and social background. Dr. Ghattas reported his findings on physical examination and diagnosed low back pain "possibly" due to degenerative disc disease and depression. He stated that most of appellant's pain was nociceptive in origin. He was unable to elicit any radicular or neuropathic component of appellant's pain.

A magnetic resonance imaging (MRI) scan was performed by Dr. Donald S. Ostrum, a Board-certified radiologist, on August 12, 2003. He found an old L1 compression fracture and foraminal narrowing at L4-5 and L5-S1 on a degenerative basis.

On September 3, 2004 Bob Filer, appellant's physical therapist, performed a functional capacity evaluation. He reported his findings in various categories, which included appellant's physical limitations. Mr. Filer found no good correlation between the pain rating and observed behavior as appellant moved normally at times and then started to move in a guarded manner at other times. He did not believe his test results were valid due to symptom magnification and inappropriate illness behavior. Mr. Filer opined that appellant had an organic source of pain and

that he was trying hard to convey that he had some type of pain. He noted that during the subjective interview appellant expressed issues he had with the way his case had been handled over the last year.

By decision dated June 3, 2005, the Office denied appellant's recurrence of disability claim. The Office found that the evidence submitted by appellant was insufficient to establish that he sustained a recurrence of total disability on September 5, 2005.

On June 6, 2005 the Office received a May 19, 2005 letter, from Northwestern Human Services, which revealed that appellant had been receiving treatment at its facility since April 1, 2005. He received intensive case management and saw a therapist twice a month to help settle his medical issues, locate a better residence and to be a support system for him.

In a June 29, 2005 letter, appellant, through his attorney, requested reconsideration of the Office's June 3, 2005 decision. Counsel stated: "please find enclosed medical materials received from Northwestern Human Services."

By decision dated July 8, 2005, the Office denied appellant's request for reconsideration on the grounds that it neither raised a substantive legal question nor included new and relevant evidence and, thus, it was insufficient to warrant a merit review of its prior decision.

In a letter dated September 1, 2005, appellant, through his attorney, requested reconsideration of the Office's prior decisions. Counsel advised the Office that on June 2, 2005 he sent medical materials from Northwestern Human Services. He stated that "presently, I enclose materials from Drs. Winegrad and [Joseph W.] Danial [a Board-certified psychiatrist,] which reflect permanent disability for the [appellant]." An August 15, 2005 employability reassessment form accompanied appellant's reconsideration request. In this form, appellant explained that he was unable to return to work despite his physician's opinion that his temporary disability was expected to end by December 30, 2005, because his conditions still existed and he believed they would never cease.

On November 14, 2005 the Office denied appellant's request for reconsideration on the grounds that it neither raised a substantive legal question nor included new and relevant evidence and, thus, it was insufficient to warrant a merit review of its prior decisions.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[1] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the

[1] 20 C.F.R. § 10.5(x).

physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[2]

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[3]

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.[4]

ANALYSIS -- ISSUE 1

In this case, the record shows that following the July 9, 2003 employment-related lumbosacral strain, appellant returned to work in a light-duty capacity on August 21, 2003. He claimed that he sustained a recurrence of total disability causally related to his July 9, 2003 employment injury due to a change in his light-duty work assignment. He stated that he engaged in constant repetitive lifting of heavy baggage in a work area that did not have a scale and was not ventilated and, thus, it was excessively hot which caused him to pass out.

The employing establishment contended that there was no change in appellant's light-duty job requirements. It stated that he was sent home on September 5, 2003 for falling asleep at a checkpoint and never returned to work. His employment was terminated on December 15, 2003 for continually being absent from work. The employing establishment stated that appellant's light-duty work requirements involved working at a closed checkpoint. No screening functions, lifting or movement was required, only standing on the exit lane. At no time was appellant instructed to lift bags or assist in any other activity and he was given a chair on a flat surface while on duty. The employing establishment stated that appellant had a problem with the work hours and nothing more. Based on the employing establishment's statements, the Board finds that appellant's light-duty job requirements did not change. Further, the Board finds that appellant's light-duty position was withdrawn by the employing establishment for reasons of misconduct, his continuance absence from work, which does not constitute a recurrence of disability as noted above.[5] Thus, the issue is whether the medical evidence establishes that appellant was unable to perform the light-duty position beginning September 5, 2005 based on the Form CA-2a he filed.

---

[2] *Id.*

[3] *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[4] *James H. Botts*, 50 ECAB 265 (1999).

[5] *See supra* note 1.

Appellant submitted Dr. Jelen's August 19, 2003 report, which found that he sustained a lumbosacral strain and foraminal narrowing at L4-5 and L5-S1 that were caused by the July 9, 2003 employment injury. This report is of diminished probative value as it predates the alleged recurrence of total disability beginning September 5, 2003 and, thus, fails to address the relevant issue in this case. The Board finds that Dr. Jelen's report is insufficient to establish appellant's claim.

Dr. Jelen's September 8, 2003 report found that appellant sustained a lumbosacral strain that caused nerve irritation in the left leg, which made it buckle or give way and that he was permanently disabled. He further found that appellant may need to apply for permanent disability compensation. Dr. Jelen failed to provide medical rationale explaining how or why appellant's permanent disability was caused by the accepted employment injury.

The medical records from nurses, a physician's assistant, social worker and physical therapists do not constitute probative medical evidence as a nurse,[6] physician's assistant,[7] social worker[8] and physical therapist[9] are not considered a "physician" under the Federal Employees' Compensation Act.

The medical records from physicians whose signatures were illegible cannot be considered competent medical evidence because it is not clear that they are from a physician.[10] Therefore, the Board finds that as this evidence lacks proper identification, it does not constitute probative medical evidence and, thus, does not establish appellant's claim.

Dr. Winegrad's March 1, 2005 report found that appellant sustained a lumbosacral strain/sprain and an illegible condition. He indicated with an affirmative mark that his conditions were caused by the July 9, 2003 employment injury. Dr. Winegrad's report is insufficient to establish appellant's claim. A report which only addresses causal relationship with a check mark without more by way of medical rationale explaining how the incident caused the injury, is insufficient to establish causal relationship and is of diminished probative value.[11]

Dr. Congdon's treatment notes and reports found that appellant sustained, among other things, an emotional condition and herniated discs in his back and neck. He failed to address whether the diagnosed conditions and any resultant disability were caused by the July 9, 2003 employment injury. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relation.[12] The Board

[6] 5 U.S.C. § 8101(2); *see also Vicky L. Hannis*, 48 ECAB 538, 540 (1997).

[7] 5 U.S.C. § 8101(2)*; Ricky S. Storm*s, 52 ECAB 349 (2001).

[8] 5 U.S.C. § 8101(2); *Ernest St. Pierre*, 51 ECAB 623 (2000).

[9] 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000).

[10] *Vickey C. Randall*, *supra* note 9; *Merton J. Sills*, 39 ECAB 572 (1988) (reports not signed by a physician lack probative value).

[11] *See Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

[12] *Willie M. Miller*, 53 ECAB 697 (2002).

finds that Dr. Congdon's treatment notes and reports are insufficient to establish that appellant sustained a recurrence of total disability on September 5, 2003 due to the accepted work injury.

Dr. Ghattas' finding that appellant's low back pain was "possibly" due to degenerative disc disease and depression is speculative and is therefore of diminished probative value.[13] Further, he did not opine that appellant was totally disabled beginning September 5, 2003 due to the accepted employment injury. Dr. Ghattas' opinion is insufficient to establish appellant's claim.

The Board finds that appellant has not established a change in the nature and extent of his light-duty work beginning September 5, 2003. Further, the Board finds that he has not submitted sufficiently rationalized medical evidence establishing that he was totally disabled beginning September 5, 2003 due to his July 9, 2005 employment-related lumbosacral strain. Therefore, the Board finds that appellant has not established a recurrence of total disability beginning September 5, 2005 causally related to his accepted employment injury.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[14] the Office's regulations provide that 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.[15] 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.[16] 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 of the merits.

ANALYSIS -- ISSUE 2

In a June 3, 2005 decision, the Office found that appellant did not sustain a recurrence of total disability beginning September 5, 2003 causally related to his July 9, 2003 employment-related lumbosacral strain. Appellant disagreed with this decision and requested reconsideration on June 29 and September 1, 2005. Thus, the relevant underlying issue in this case is whether appellant sustained a recurrence of totally disabled beginning September 5, 2003 due to the accepted employment injury.

In support of the June 29, 2005 request for reconsideration, appellant submitted a May 19, 2005 letter from Northwestern Human Services, which provided a history and

[13] *See Jennifer Beville*, 33 ECAB 1970 (1982); *Leonard J. O'Keefe*, 14 ECAB 42 (1962).

[14] 5 U.S.C. §§ 8101-8193. 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).

[15] 20 C.F.R. § 10.606(b)(1)-(2).

[16] *Id*. at § 10.607(a).

description of his psychiatric treatment. The Board finds that this evidence does not constitute a basis for reopening the case for further merit review, as it does not address the relevant medical issue of causal relation.[17] Further, contrary to appellant's counsel's statement that he submitted materials from Northwestern Human Services along with the June 29, 2005 reconsideration request, the record does not contain such evidence.

In support of the September 1, 2005 request for reconsideration, appellant's counsel stated that on June 2, 2005 he submitted medical materials from Dr. Winegrad and Dr. Danial regarding appellant's permanent disability. The Board notes that no such evidence was submitted along with appellant's reconsideration request.

The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Further, he did not submit any relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he was not entitled to a merit review.[18]

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a recurrence of total disability beginning September 5, 2003 causally related to his July 9, 2003 employment injury. The Board further finds that the Office properly denied appellant's June 29 and September 1, 2005 requests for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the November 14, July 8 and June 3, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 9, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[17] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

[18] *See James E. Norris*, 52 ECAB 93 (2000).