United States Department of Labor
Employees' Compensation Appeals Board

JOSEPH NUNZIATA, Appellant	)	
and	)	**Docket No. 05-1040**
	)	**Issued: March 16, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Long Island, NY, Employer	)	

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Board

DECISION AND ORDER

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

JURISDICTION

On March 8, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 17, 2004 decision, which denied his April 13, 2004 request for reconsideration on the grounds that it was untimely and failed to establish clear evidence of error. Appellant also timely appealed a March 12, 2004 merit decision, which denied appellant's claims for a recurrence of disability on December 5, 2003 and January 14, 2004. 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 on appeal are: (1) whether appellant met his burden of proof to establish recurrences of disability as of December 5, 2003 and January 14, 2004, causally related to his June 24, 2003 employment injury; and (2) whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On June 26, 2003 appellant, then a 56-year-old letter carrier, filed a traumatic injury claim alleging that, on June 24, 2003, he fell when he stepped out of his postal vehicle and injured his left knee in the performance of duty. Appellant stopped work on June 25, 2003. On July 8, 2003 the Office accepted appellant's claim for left knee strain and arthroscopy.[1] The Office also authorized physical therapy. Appellant received appropriate compensation benefits.

In a November 12, 2003 duty status report, appellant's treating physician, Dr. Christopher Durant, a Board-certified orthopedic surgeon, advised that appellant could return to work on November 17, 2003 for four hours a day. He provided restrictions which included lifting no more than 20 pounds, 4 hours a day, sitting with 20- to 30-minute rest periods for no more 4 hours per day, walking for no more than 4 hours per day, with climbing no more than 1 hour a day, no kneeling or bending for more than 3 hours per day, pushing/pulling for more than 3 hours a day and simple grasping, manipulation and reaching for no more than 4 hours per day.

Appellant returned to work on November 17, 2003 in a limited-duty capacity.

On December 9, 2003 appellant filed a notice of recurrence of disability due to his June 24, 2003 employment injury. Appellant alleged that on December 5, 2003 he had a recurrence of his original injury due to standing and twisting and being stuck in his car for three hours due to a snow storm. He alleged that he had to ice his knee as it became swollen. Appellant stopped work on December 6, 2003 and returned on December 9, 2003.

By letter dated December 17, 2003, the Office requested that appellant submit additional evidence.

In a December 17, 2003 duty status report, Dr. Durant reiterated appellant's work restrictions but noted that he needed 20- to 30-minute rest periods after 1 to 2 hours of work and was not allowed to stand while working.

In a January 14, 2004 attending physician's report, Dr. Durant noted the history of injury and checked a box "yes" in response to whether the condition was caused or aggravated by the employment injury. He diagnosed a tear of the posterior horn of the left knee and advised that appellant would need periodic reevaluation. He indicated that appellant was advised that he could not return to work. Dr. Durant completed a duty status report of the same date and advised that "appellant was unable to work until further notice." He requested approval for a magnetic resonance imaging (MRI) scan.[2]

A January 14, 2004 x-ray of the left knee was found to be within normal limits by Dr. Chandra Ganeshkumar, a Board-certified diagnostic radiologist.

[1] The arthroscopy was performed on September 12, 2030, by Dr. Christopher Durant, a Board-certified orthopedic surgeon.

[2] The record also contains a prescription from Dr. Durant dated January 14, 2004; however, it is illegible.

On January 21, 2004 appellant filed a recurrence of disability claim due to his June 24, 2003 employment injury. He alleged that since returning to work his condition had worsened. Appellant indicated that on January 14, 2004 his physician ordered an MRI scan and he was unable to work while waiting for approval. He stopped work on January 14, 2004.

By letter dated February 6, 2004, the Office requested that appellant submit additional evidence.

In an MRI scan dated January 27, 2004, Dr. Jeffrey L. Friedman, a Board-certified diagnostic radiologist, noted that appellant had an interval partial medial meniscectomy without definite tear of the medial meniscal remnant. He also noted that appellant had severe arthrosis of the medial tibiofemoral compartment with further cartilage wear of both the condyle and plateau with more prominent subchondral marrow edema changes.

By letter dated February 23, 2004, appellant alleged that his light-duty position did not comply with his physician's requirements. He also alleged that he could not "rack mail" sitting down and that he stood and twisted four hours a day in violation of his physical restrictions. Appellant alleged that the employing establishment was not complying with the requirements imposed by his physician.

By decision dated March 12, 2004, the Office denied appellant's claim for a recurrence of disability on December 5, 2003 and January 14, 2004.

By letter dated April 10, 2004, appellant requested reconsideration and submitted additional arguments and evidence, including numerous physical therapy reports and reports from Dr. Durant dated February 11 and March 26, 2004. He also submitted a narrative, which included his argument that he believed his claim was denied because his doctor's reports were not received in time.

By decision dated June 17, 2004, the Office denied appellant's request for reconsideration on the grounds that it failed to establish clear evidence of error.

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. 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 physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[3]

[3] 20 C.F.R. § 10.5(x).

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantive evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements.[4]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence.[5] This consists of 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.[6] His opinion 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.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left knee sprain in the performance of duty on June 24, 2003. After appellant claimed recurrences of disability on December 5, 2003 and January 14, 2004, the Office advised appellant of the medical and factual evidence needed to establish his claim. However, appellant did not submit sufficient medical evidence to establish that his disability on or after those dates was related to the accepted injury.

The Board notes that there is no evidence showing a change in the nature and extent of the light-duty job requirements. Although appellant alleged that he could not continue his light duties as they violated his physician's restrictions, he submitted insufficient evidence to support his contention.

In a January 14, 2004 attending physician's report, Dr. Durant checked a box "yes" in response to whether the condition was caused or aggravated by the employment injury. However, this is insufficient as the Board has held that an opinion on causal relationship which consists only of a physician checking "yes" on a medical form report without further explanation or rationale is of little probative value.[8] Other reports from Dr. Durant did not specifically support causal relationship between appellant's claimed disability and his accepted work injury.

[4] *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[5] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[6] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[7] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[8] *Alberta S. Williamson*, 47 ECAB 569 (1996).

Appellant bears the burden of proof in establishing causal relationship for conditions not accepted by the Office.[9]

The medical reports of record do not address whether appellant was disabled on December 5, 2003 or January 14, 2004, due to the accepted employment injury. The record also contains reports from nurses and physical therapists. However, health care providers such as nurse and physical therapists are not physicians under the Federal Employees' Compensation Act. To the extent that they rendered opinions on causal relationship, these reports do not constitute competent medical evidence and have no weight or probative value.[10]

As appellant did not submit sufficient evidence to establish that he sustained a recurrence of disability beginning December 5, 2003 and January 14, 2004, causally related to the work injury of June 24, 2003, he did not meet his burden of proof in establishing his claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[11] vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[12]

The Office's imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of discretionary authority granted the Office under section 8128(a).[13] This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus, section 10.607(a) of the implementing

---

[9] *See Jaja K. Asaramo*, 55 ECAB ___ (Docket No. 03-1327, issued January 5, 2004) (where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury).

[10] *Jan A. White*, 34 ECAB 515, 518 (1983). *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[11] 5 U.S.C. §§ 8101-8193.

[12] 5 U.S.C. § 8128(a).

[13] *Diane Matchem*, 48 ECAB 532, 533 (1997); *see Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

regulation provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[14]

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.[15]

ANALYSIS -- ISSUE 2

In its June 17, 2004 decision, the Office improperly determined that appellant failed to timely file his request for reconsideration. The Office rendered its most recent merit decision on March 12, 2004. Appellant's April 10, 2004 letter requesting reconsideration was submitted within a year of the decision and was, therefore, timely. As appellant's request was timely, the Office improperly denied her reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year.[16]

Since the Office erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.[17] The Board will set aside and remand the June 17, 2004 decision, which denied appellant's April 10, 2004 request for failing to establish clear evidence of error. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish a recurrence of disability beginning May 15, 2004 causally related to the July 31, 2003 employment injury. The Board also finds that the June 17, 2004 decision, which denied appellant's April 10, 2004 request as failing to establish clear evidence of error must be set aside and remanded for review under the proper standard.

[14] 20 C.F.R. § 10.607(a).

[15] 20 C.F.R. § 10.607(b).

[16] *See Donna M. Campbell***,** 55 ECAB __ (Docket No. 03-2223, issued January 9, 2004).

[17] *See id.*

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further action consistent with this order. The March 12, 2004 decision is affirmed.

Issued: March 16, 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