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

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| **RONALD E. BALLARD, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1420** |
| | ) | **Issued: March 8, 2006** |
| **U.S. POSTAL SERVICE, POST OFFICE, Kalamuth Falls, OR, Employer** | ) | |

*Appearances:*
*Ronald E. Ballard, 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 a merit decision of the Office of Workers' Compensation Programs dated March 22, 2005, denying his claim for compensation from January 8 to 19, 2005 and a nonmerit decision dated May 16, 2005, denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the May 16, 2005 nonmerit decision.

### ***ISSUES***

The issues are: (1) whether appellant was disabled from January 8 to 19, 2005 causally related to his October 28, 2003 employment injury; and (2) whether the Office properly denied his request for merit review of his claim under section 8128.

### ***FACTUAL HISTORY***

The Office accepted that appellant, a 52-year-old letter carrier, sustained a temporary aggravation of osteoarthritis of the shoulder and cervical and thoracic spine causally related to

factors of his federal employment.[1] He began working modified duty with restrictions against overhead work.

In a report dated December 30, 2004, Dr. Ruxandra Costa discussed appellant's complaints of neck and bilateral shoulder pain radiating down to his fingertips. She noted that he worked as a letter carrier and experienced increased symptoms while performing his employment duties. Dr. Costa referred him for objective studies.

In an office visit note dated January 6, 2005, Roger R. Cummings, a physician's assistant, diagnosed osteoarthritis of the cervical and thoracic spine and right shoulder pain. He found that appellant could work 8 hours per day with restrictions against over the shoulder activities and extending his arms past a 45 degree angle with the elbow.

The employing establishment offered appellant a limited-duty job offer which listed the physical requirements of the position as in accordance with the restrictions provided by the January 6, 2005 note from Mr. Cummings. He declined the job offer and provided as a reason that it exceeded his limitations because he could not deliver stamps and express mail locally or work on edit books. Appellant subsequently accepted a revised limited-duty job offer from the employing establishment on January 19, 2005.

In a report dated January 10, 2005, a physical therapist diagnosed cervical spondylosis and noted appellant's complaints of increased pain "in the cervicothoracic junction…." He described the recommended physical therapy.

Appellant filed a claim for compensation on account of disability (Form CA-7), requesting compensation for eight hours per day from January 11 to 19, 2005.[2] His supervisor noted that he requested leave without pay from January 8 to 19, 2005.

By letter dated February 9, 2005, the Office requested that Dr. Charles D. Bury, Board-certified in family practice and appellant's attending physician, provide a comprehensive medical report addressing whether his increased work restrictions from January 8 to 19, 2005 were due to his work injury.[3]

Appellant filed a grievance contending that management failed to provide him with an acceptable limited-duty job offer until January 19, 2005. In a response dated February 9, 2005, Jarita Carter, the postmaster, asserted that the job offer listed the physical requirements and noted that he could be compensated for lost wages through the Office.

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[1] Appellant filed his claim as a notice of recurrence of disability on October 25, 2003 of a July 17, 2001 employment injury. On December 2, 2003 the Office changed the filing to an occupational disease claim based on his description of injury.

[2] Appellant may be entitled to compensation for time lost from work during this period for physical therapy and medical appointments. The current issue, however, is whether he is entitled to compensation for total disability during this period due to increased work restrictions and the failure of the employing establishment to accommodate his restrictions. Appellant can file a claim for lost time due to medical appointments.

[3] By letter received on February 24, 2005, appellant informed the Office that it had failed to include osteoarthritis of the cervical spine as an accepted condition in its February 9, 2005 letter to Dr. Bury.

In a note dated January 18, 2005, Mr. Cummings indicated that appellant could "engage in this duty assignment as long as it falls within restrictions."

By decision dated March 22, 2005, the Office denied appellant's claim for compensation/continuation of pay from January 8 to 19, 2005 on the grounds that the evidence failed to establish that he was disabled due to his October 28, 2003 employment injury. The Office noted that his attending physician failed to respond to its request for a statement describing how the modified position exceeded his work restrictions.

On April 12, 2005 appellant requested reconsideration. He submitted a note dated March 12, 2005 from Mr. Cummings indicating that he released appellant for employment on January 18, 2005 and that he "outlined his work restrictions" because he did not have a position description with his work requirements. In a report dated April 4, 2005, Mr. Cummings noted that appellant declined the January 11, 2005 job offer "because it exceeded work limitation[s] outlined on my note."

A dispute resolution team resolved appellant's grievance on April 4, 2005 after finding that management should stop "rerecording the employee's restrictions" in job offers and instead list the physical requirements of the job.[4] The resolution further noted that appellant did not show that management's error delayed his return to work.

Appellant also resubmitted the physical therapy evaluation dated January 10, 2005 with the addition of a signature by Dr. Costa.

By decision dated May 16, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and insufficient to warrant merit review of the case.

## ***LEGAL PRECEDENT -- ISSUE 1***

The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.[5]

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[6] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability

[4] On March 18, 2005 the dispute resolution team remanded the case for evidence regarding whether the form used delayed the doctor's decision.

[5] 20 C.F.R. § 10.5(f); *see e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

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

being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[7] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[8]

## ***ANALYSIS -- ISSUE 1***

The Office accepted appellant's claim for a temporary aggravation of osteoarthritis of the shoulder and cervical and thoracic spine. He continued to work with restrictions. On January 24, 2005 appellant filed a claim for compensation for eight hours a day from January 11 to 19, 2005. In order to establish disability for the period claimed, appellant must submit rationalized medical evidence demonstrating that he was disabled from work due to his accepted employment injury.[9]

In support of his claim, appellant submitted a report dated December 30, 2004 from Dr. Costa, who discussed his complaints of radiating neck and shoulder pain which increased with the performance of his job duties. She referred him for objective studies. Dr. Costa did not, however, address whether appellant had any disability from employment and thus, her report is of little probative value. The Board does not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[10]

In an office visit note dated January 6, 2005, Mr. Cummings found that appellant could work 8 hours per day with restrictions against working over his shoulder or extending his arms past a 45 degree angle. In a note dated January 18, 2005, he found that appellant could work in a duty assignment within his restrictions. The reports of a physician's assistant, however, are entitled to no weight as a physician's assistant is not a "physician" as defined by section 8101(2) of the Act.[11]

A physical therapist submitted a report dated January 10, 2005 which noted appellant's complaints of increased cervical pain and outlined a course of physical therapy. A physical therapist's report is not medical evidence. As noted, a physical therapist is not a physician under the Act.[12]

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[7] *Id*.

[8] *Id*.

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

[10] *See Fereidoon Kharabi*, *supra* note 6.

[11] *See* 5 U.S.C. § 8101(2); *Allen C. Hundley*, 53 ECAB 551 (2002).

[12] *See* 5 U.S.C. § 8101(2); *Thomas R. Horsfall*, 48 ECAB 180 (1996).

The record indicates that appellant filed a grievance alleging that the employing establishment failed to provide him with work within his restrictions until January 19, 2005. The current issue, however, is whether probative medical evidence establishes that he was unable to perform his usual employment duties due to his work injury. If the medical evidence establishes that appellant was not able to perform his usual employment due to his work injury, he would be entitled to compensation for any period when he was not provided work within his restrictions by the employing establishment. The Office requested that his attending physician submit the necessary medical evidence required in establishing his claim; however, he failed to respond to the request. An award of compensation may not be based on surmise, conjectures, speculation of appellant's own belief that there is a causal relationship between his claimed condition and his employment.[13] To establish causal relationship, appellant must submit a physician's report in which the physician reviews those factors of employment identified by him as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[14] He failed to submit such evidence and, therefore, failed to discharge his burden of proof.

## ***LEGAL PRECEDENT -- ISSUE 2***

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[15] 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.[16] 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.[17] 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.[18]

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 a case.[19] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[20] While the reopening of a case may be predicated solely

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[13] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[14] *Robert Broome*, 55 ECAB ___ (Docket No. 04-93, issued February 23, 2004).

[15] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides: "The Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

[16] 20 C.F.R. § 10.606(b)(2).

[17] 20 C.F.R. § 10.607(a).

[18] 20 C.F.R. § 10.608(b).

[19] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[20] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[21]

## ***ANALYSIS -- ISSUE 2***

In support of his claim, appellant submitted reports from Mr. Cummings dated March 12 and April 4, 2005. As noted, however, these reports are of no probative value as a physician's assistant is not considered a "physician" under the Act.[22] Thus, this evidence is insufficient to warrant a reopening of his case for review of the merits.

Appellant further submitted the January 10, 2005 physical therapy evaluation with an added signature by Dr. Costa. The report, however, does not address the relevant issue of whether he was unable to perform his usual employment duties from January 8 to 19, 2005. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[23]

Appellant additionally submitted a dispute resolution agreement dated April 4, 2005 which found that management should list the physical requirements of the modified job offers and that he had not show that management's error delayed his return to work. The relevant issue in this case, however, is whether the medical evidence established that he was unable to perform his usual employment from January 8 to 19, 2005. Consequently, the dispute resolution agreement is not probative to the issue in question.

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 new and relevant evidence. As he did not meet any of the necessary regulatory requirements, appellant is not entitled to further merit review.

## ***CONCLUSION***

The Board finds that appellant has not established that he was disabled from January 8 to 19, 2005 causally related to his October 28, 2003 employment injury. The Board further finds that the Office properly denied his request for merit review of his claim under section 8128.

[21] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[22] *See Allen C. Hundley*, *supra* note 11.

[23] *See Ronald A. Eldridge*, *supra* note 20.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 16 and March 22, 2005 are affirmed.

Issued: March 8, 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