United States Department of Labor
Employees' Compensation Appeals Board

R.O., Appellant	)	
and	)	**Docket No. 06-1580**
	)	**Issued: November 1, 2006**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Eugene, OR, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 29, 2006 appellant filed a timely appeal of a November 4, 2005 merit decision of the Office of Workers' Compensation Programs denying his claim for compensation and a May 12, 2006 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 has established a lumbar injury in the performance of duty on November 1, 1993; and (2) whether the Office properly refused to reopen the claim for merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 17, 2004 appellant filed an occupational disease claim (Form CA-2) alleging that he sustained a herniated disc and subsequent surgery as a result of a motor vehicle

accident while in travel status on November 1, 1993. Appellant indicated that he reported the accident to the employing establishment and believed a claim form had been filed on his behalf.

The medical evidence indicates that appellant underwent lumbar laminectomy surgery on December 7, 1994 and lumbar fusion surgery on April 2, 1999. Dr. John Serbu, a neurosurgeon, noted in a December 2, 1994 report that appellant had a motor vehicle accident about 12 years prior and another accident on November 1, 1993. He diagnosed S1 radiculopathy.

By decision dated May 6, 2004, the Office denied the claim for compensation. The Office found that the incident had occurred as alleged, but the medical evidence was not sufficient to establish the claim.

Appellant requested reconsideration and submitted additional evidence. A hospital report dated November 1, 1993 contained notes from a nurse indicating that appellant reported that his truck rolled over and he had back and right shoulder pain. Dr. F. Walker, diagnosed cervical strain without providing additional comment.

In a decision dated March 24, 2005, the Office modified the May 6, 2004 decision and denied the claim on the grounds that it was not timely filed. Appellant requested reconsideration and a telephone conference was held regarding notification of the injury to the employing establishment. An employing establishment administrative coordinator indicated that in November 1993 she heard appellant tell his supervisor of the accident.

In a decision dated November 4, 2005, the Office modified the March 24, 2005 decision and denied the claim on the grounds that the medical evidence was not sufficient to establish the claimed condition of herniated L5-S1 disc as causally related to the incident.[1] Appellant again requested reconsideration and argued that the Office had not properly considered a letter from his insurance company regarding the accident.[2] He also argued that the employing establishment had mishandled his claim and should have filed a claim form promptly.

By decision dated May 12, 2006, the Office found that the request for reconsideration was insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which

[1] The Office noted the November 1, 1993 hospital report and the diagnosis of cervical strain and stated that appellant "met his burden of proof that he suffered an injury on [November 1, 1993]."

[2] On October 17, 2005 appellant submitted an April 13, 2004 letter from his automobile insurer indicating that they paid benefits for repairs to the car and medical coverage from a November 1, 1993 accident.

compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

Congress, in providing a compensation program for federal employees, did not contemplate an insurance program against any and every injury, illness or mishap that might befall an employee contemporaneous or coincidental with his or her employment. Liability does not attach merely upon the existence of an employee-employer relation. Instead, congress provided for the payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[5] The phrase while in the performance of duty has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of arising out of and in the course of employment.[6]

ANALYSIS -- ISSUE 1

In the present case, the Office accepted that appellant was involved in a November 1, 1993 motor vehicle accident while in the performance of duty. The claim for a lumbar condition causally related to the incident was denied on the grounds that the medical evidence was insufficient.[7] With respect to a diagnosis of herniated disc or S1 radiculopathy and the need for lumbar surgeries in 1994 and 1999, it is appellant's burden of proof to submit medical evidence establishing these conditions as employment related. None of the medical reports of record discuss causal relationship between a lumbar condition and the November 1, 1993 motor vehicle accident. Dr. Serbu, for example, noted in his December 2, 1994 report that appellant had a prior

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990). To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury. *See John J. Carlone*, 41 ECAB 354, 356-57 (1989); *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2 (June 1995).

[5] *Mary Kokich*, 52 ECAB 239, 240 (2001).

[6] *Kathryn A. Tuel-Gillem*, 52 ECAB 451, 452-53 (2001). In addressing this issue, the Board has stated that to occur in the course of employment, in general, an injury must occur: (1) at a time when the employee may reasonably be said to be engaged in his or her master's business; (2) at a place where he or she may reasonably be expected to be in connection with the employment; and (3) while he or she was reasonably fulfilling the duties of his or her employment or engaged in doing something incidental thereto. *See id*.

[7] The Office noted the diagnosis of cervical strain in the November 1, 1993 hospital report and stated that appellant had met his burden of proof to establish an injury. A claimant cannot meet his burden of proof to establish an injury unless he has established an incident and submitted medical evidence sufficient to establish a diagnosed condition causally related to the employment incident. If the Office is accepting only that a motor vehicle accident occurred, it is incorrect to state that he has met his burden of proof to establish an injury. Since the Office stated that appellant did meet his burden to establish an injury, it appears the accepted injury was a cervical strain.

motor vehicle accident, without providing an opinion regarding causal relationship between the incident and appellant's lumbar condition or the need for surgery.

It is appellant's burden to submit probative medical evidence on causal relationship, with a reasoned medical opinion based on a complete and accurate background. Appellant did not meet his burden of the proof and, therefore, the Office properly denied the claim with respect to a lumbar condition in this case.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act 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."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for reconsideration of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for reconsideration without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[8]

ANALYSIS -- ISSUE 2

Appellant did not submit any new and relevant evidence with respect to the medical issue presented. He discussed the timeliness issue, which was not relevant as the Office did not deny the claim on timeliness grounds in the November 4, 2005 decision. Appellant argued that the Office did not properly consider a letter written by his insurance company regarding the claim, but the insurance letter is not relevant to the underlying issue. As noted the issue is whether the medical evidence establishes a lumbar condition causally related to the employment incident and it must be resolved by the submission of pertinent medical evidence.

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 constitute relevant and pertinent new evidence. Since he did not meet any of the requirements of section 606(b)(2), the Office properly declined to reopen the case for merit review.

[8] *Eugene F. Butler*, 36 ECAB 393 (1984).

CONCLUSION

Appellant did not meet his burden of proof to establish a lumbar condition causally related to his federal employment. On reconsideration, he did not meet the requirements of 20 C.F.R. § 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 12, 2006 and November 4, 2005 are affirmed.

Issued: November 1, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board