

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

D.B., Appellant

and

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Everett, WA,
Employer**

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**Docket No. 06-771
Issued: September 6, 2006**

Appearances:

D.B., 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 February 8, 2006 appellant filed a timely appeal of the October 11, 2005 merit decision of the Office of Workers' Compensation Programs, denying wage-loss compensation for total disability during the period April 11 through 27, 2005 and a November 7, 2005 nonmerit decision, which denied 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.

ISSUES

The issues are: (1) whether appellant has established intermittent disability during the period April 11 through 27, 2005 due to his accepted employment injuries of January 27, 2005; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 28, 2005 appellant, then a 58-year-old electrical engineer, filed a traumatic injury claim alleging that on January 27, 2005 he felt a bulge in his lower stomach area and sharp pain in his back while shifting a load on a pallet. He stopped work on January 28, 2005 and returned to work on February 7, 2005. Appellant stopped work again on March 16, 2005 and returned to work on March 19, 2005.¹ He stopped work on April 11, 2005. By letter dated April 13, 2005, the Office accepted appellant's claim for inguinal hernia and lumbar sprain/strain.

On April 13, 2005 appellant filed a claim (Form CA-7) for wage-loss compensation for the period April 11 through 13, 2005. He submitted a March 23, 2005 disability certificate from a physician whose signature is illegible, which excused him from work during the period March 16 through 18, 2005. In a May 17, 2005 disability certificate, the same physician excused appellant from work on that day. An April 19, 2005 disability certificate of Dr. Mark A. Lucianna, a Board-certified family practitioner, excused appellant from work on that date until April 21, 2005. In an April 28, 2005 disability certificate, Dr. Monroe C. Whitman, III, a Board-certified surgeon, indicated that appellant displayed symptoms of bilateral inguinal hernias and that his return to light-duty work was pending.

On April 20, 2005 appellant filed a Form CA-7 claim for total disability during the period April 19 through 29, 2005. He filed another Form CA-7 claim on April 26, 2005 for total disability during the period May 2 through 13, 2005.

Appellant submitted an April 21, 2005 magnetic resonance imaging (MRI) scan performed by Dr. John R. Maxwell, a Board-certified radiologist, which found no evidence of metallic foreign body relating to the orbits. On April 21, 2005 Dr. Ross P. Hartling, a Board-certified radiologist, performed an MRI scan of the lumbar spine, which found moderate multilevel degenerative changes with a mildly to moderately bulging disc and moderate facet disease and small left far lateral disc herniation at L2-3 with mild narrowing of the lateral aspect of the left neural foramen. While there was little evidence of significant canal compromise, left L2 radiculopathy was considered. Dr. Hartling diagnosed small broad-based left posterolateral and far lateral disc herniation at L3-4. While there was little evidence of significant canal compromise, left L3 or L4 radiculopathy was considered. Dr. Hartling also diagnosed mild central and lateral stenosis at L4-5 secondary to a mildly to moderately bulging disc and facet disease. While there was little evidence of significant canal compromise, bilateral L5 radiculopathy, the left greater than the right was considered.

In a March 31, 2005 disability certificate, Dr. Whitman stated that appellant could return to light-duty work on April 22, 2005 or pending recovery from surgery which was scheduled on April 14, 2005. A May 3, 2005 report indicated that he performed surgery for bilateral inguinal hernias on April 28, 2005.

¹ The record does not indicate what type of work appellant performed when he returned to work following his January 27, 2005 employment-related injuries.

Dr. Lucianna's May 9, 2005 disability certificate revealed that appellant was unable to work through May 23, 2005.

By letter dated May 24, 2005, the Office advised appellant that his claim for compensation for the period April 11 through 27, 2005 could not be paid at that time as the evidence submitted did not adequately explain why he could not work.² The Office requested that he submit medical evidence supportive of his claim.

In a June 3, 2005 report, Dr. Lucianna stated that appellant had been unable to work from April 11 through May 13, 2005 due to severe bilateral inguinal hernias and a severely herniated disc in his back. His June 6, 2005 report provided appellant's temporary physical limitations for the period June 3 through July 1, 2005.

Appellant submitted Dr. Whitman's June 15, 2005 report, which stated that appellant was originally scheduled for surgery on March 7, 2005 for a hernia appellant sustained at work. Due to discomfort, he was instructed to avoid any type of heavy lifting, straining or vigorous activity for fear of incarceration of the hernia. Dr. Whitman noted that surgery was not authorized until April 28, 2005. Because of this situation, Dr. Whitman stated that appellant remained off work during the original time period plus the period April 11 through 27, 2005. His April 20, 2005 progress note provided a diagnosis of bilateral inguinal hernias and recommended surgery to repair this condition.

Appellant submitted hospital records regarding his April 28, 2005 hernia surgery and discharge instructions. In a chart note dated April 11, 2005, Dr. Whitman indicated that appellant's sciatica condition was improving and that he continued to be off work. He scheduled an MRI scan and stated that appellant should remain off work until then. A March 31, 2005 treatment note of Dr. R. Bowlin³ revealed that appellant complained of low back pain on the left side. Dr. Lucianna's treatment note of the same date, found positive straight leg raising on the left and a negative neurological examination. A March 17, 2005 chart note of Robert McNemey, a nurse practitioner, diagnosed low back pain and a right inguinal hernia. Dr. Lucianna reviewed a March 17, 2005 radiology report, which found degenerative changes in the lumbar spine.

Dr. Whitman's February 10, 2005 progress note included diagnoses of bilateral reducible inguinal hernias, gastroesophageal reflux disease and a change in bowel habits. The doctor's May 3, 2005 disability certificate included a diagnosis of bilateral inguinal hernias and indicated that appellant could return to work on May 9, 2005. An April 11, 2005 disability certificate indicated that appellant was unable to work from April 11 through 13, 2005. A February 10, 2005 chest x-ray by Dr. Hartling revealed a stable chest and no acute findings.

In a September 27, 2005 medical report, Dr. Sanford J. Wright, Jr., a Board-certified neurosurgeon, noted appellant's January 27, 2005 employment injuries. He provided findings on neurological examination and reviewed the April 21, 2005 MRI scan. Dr. Wright diagnosed

² The Board notes that following appellant's April 28, 2005 hernia surgery, the Office paid him appropriate wage-loss compensation.

³ Dr. Bowlin's professional qualifications are not contained in the case record.

mild central disc bulge at L4-5 and mild foraminal disc bulges at L3-4 and L2-3 on the left side. He also diagnosed back, hip and leg pain predominating on the left side that was brought about by the accepted employment injuries with causation or aggravation of the diagnosed lumbar conditions.

By decision dated October 11, 2005, the Office denied appellant's claim for wage-loss compensation. The Office found that he failed to submit sufficient medical evidence to establish total disability from April 11 through 27, 2005.

Subsequently, appellant submitted Dr. Lucianna's August 29, 2005 report, which indicated his temporary physical restrictions for the period August 29 through September 29, 2005.

On October 27, 2005 appellant requested reconsideration of the Office's October 11, 2005 decision. He submitted duplicate copies of Dr. Lucianna's June 3, 2005 report, the April 21, 2005 MRI scan of his lumbar spine, hospital records regarding his April 28, 2005 hernia surgery and discharge instructions, Dr. Wright's September 27, 2005 report, Dr. Whitman's May 3, 2005 operative report and the Office's October 11, 2005 decision. In addition, appellant submitted Dr. Lucianna's October 27, 2005 progress note. He reviewed appellant's insurance papers disputing his time loss from work in April and May 2005. Dr. Lucianna stated that this was unfortunate since appellant was in miserable pain during that time from hernias and a ruptured disc which was improving.

In a November 7, 2005 decision, the Office denied appellant's request for reconsideration because the evidence he submitted was either of a repetitious or irrelevant nature and, thus, it was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

As used in the Federal Employees' Compensation Act,⁴ 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

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he was disabled for work as the result of an employment injury.⁶ To meet this burden appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor(s). The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be

⁴ 5 U.S.C. §§ 8101-8193.

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 *Thomas M. Petroski*, 53 ECAB 484 (2002).

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 appellant's claim for an inguinal hernia and a lumbar sprain/strain. The Board finds that he failed to establish that his accepted conditions resulted in intermittent disability for work during the period April 11 through 27, 2005. Appellant submitted disability certificates dated March 23 and May 17, 2005 bearing an illegible signature, which excused him from work during the period March 16 through 18, 2005 and on May 17, 2005, respectively. As these disability certificates lack proper identification, the Board finds that they have no probative value sufficient to establish appellant's burden of proof.⁸

Dr. Lucianna's April 11 and 19, 2005 disability certificates indicated that appellant was disabled for work from April 11 through 13, 2005 and April 19 through 21, 2005, respectively. In an April 28, 2005 disability certificate, Dr. Whitman found that appellant had symptoms of bilateral inguinal hernias and that his return to work was pending. Dr. Lucianna failed to provide a diagnosis. He did not address whether appellant's disability for work was causally related to the January 27, 2005 employment injuries.⁹ The Board finds that the disability certificates of Dr. Lucianna are insufficient to establish appellant's claim.

In an April 11, 2005 chart note, Dr. Whitman opined that appellant's sciatica condition was improving, but stated that he should remain off work until an MRI scan was performed. Dr. Lucianna's June 3, 2005 medical report listed that appellant was unable to work from April 11 through May 13, 2005 due to severe bilateral inguinal hernias and a severely herniated disc in his back. Dr. Whitman did not provide medical rationale explaining how appellant's disability during the claimed period was causally related to the January 27, 2005 employment injuries. The Office has not accepted appellant's claim for a herniated disc of the back. The Board finds that Dr. Whitman's chart notes are insufficient to establish appellant's claim.

Dr. Whitman's April 20, 2005 progress notes, which diagnosed bilateral inguinal hernias and recommended surgery and hospital records pertaining to his April 28, 2005 hernia surgery are insufficient to establish his claim. They failed to address whether he was totally disabled for work during the period April 11 through 27, 2005 due to the accepted injury.

In a June 15, 2005 report, Dr. Whitman stated that appellant was unable to work beginning March 7, 2005, the date surgery was originally scheduled and again from April 11 through 27, 2005. Dr. Whitman's report is dated several months after the claimed period of disability and it does not provide any reference to contemporaneous medical examination or treatment addressing a change in appellant's employment-related conditions which rendered him disabled for work on April 11, 2005. Dr. Whitman's February 10, 2005 progress note diagnosed

⁷ *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

⁸ *Vickey C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572 (1988) (Reports not signed by a physician lack probative value).

⁹ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

bilateral reducible inguinal hernias, gastroesophageal reflux disease and a change in bowel habits. In a March 31, 2005 disability certificate, he found that appellant's return to light-duty work was pending based on his recovery from surgery. In a treatment note of the same date, Dr. Bowlin provided appellant's complaints of low back pain on the left side. This evidence is not relevant as it predates the claimed period of disability. This evidence is insufficient to establish appellant's claim.

Dr. Whitman's May 3, 2005 disability certificate stated that appellant sustained bilateral inguinal hernias and he could return to work on May 9, 2005. Dr. Lucianna's May 9, 2005 disability certificate found that appellant was disabled through May 23, 2005 and his June 6, 2005 report revealed appellant's temporary physical limitations during the period June 3 through July 1, 2005. In an August 29, 2005 report, Dr. Lucianna provided appellant's temporary physical restrictions for the period August 29 through September 29, 2005. Dr. Wright's September 27, 2005 report found that appellant sustained a mild central disc bulge at L4-5 and mild foraminal disc bulges at L3-4 and L2-3 on the left side. He also diagnosed back, hip and leg pain predominately on the left side due to the January 27, 2005 employment injuries, which caused or aggravated the diagnosed lumbar conditions. These reports failed to address whether appellant sustained any work-related disability during the period April 11 through 27, 2005.

The March 17, 2005 chart note of Mr. McNemey, a nurse practitioner, does not constitute probative medical evidence as a nurse practitioner is not defined as a "physician" under the Act.¹⁰

Appellant failed to submit rationalized medical evidence establishing that his disability during the period April 11 through 27, 2005 resulted from the effects of his employment-related inguinal hernia and lumbar sprain/strain. The Board finds that he has not met his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,¹¹ 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.¹² 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.¹³ When a claimant fails to meet one of the above

¹⁰ 5 U.S.C. § 8101(2) which defines "physician" as including surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see also Joseph N. Fassi*, 42 ECAB 231 (1991) (medical evidence signed only by a registered nurse or nurse practitioner is generally not probative evidence).

¹¹ 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).

¹² 20 C.F.R. § 10.606(b)(1)-(2).

¹³ *Id.* at § 10.607(a).

standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

In a decision dated October 11, 2005, the Office found that appellant was not totally disabled during the period April 11 through 27, 2005 due to his accepted January 27, 2005 employment injuries. Appellant disagreed with this decision and requested reconsideration on October 27, 2005. Thus, the relevant underlying issue in this case is whether appellant's disability during the period April 11 through 27, 2005 was causally related to his accepted employment injuries.

Appellant submitted duplicate copies of Dr. Lucianna's June 3, 2005 report, the April 21, 2005 MRI scan of his lumbar spine, hospital records regarding his April 28, 2005 hernia surgery and discharge instructions, Dr. Wright's September 27, 2005 report, Dr. Whitman's May 3, 2005 operative report and the Office's October 11, 2005 decision. The Board has held that evidence that repeats or duplicates evidence already in the case record and considered by the Office has no evidentiary value and does not constitute a basis for further merit review.¹⁴ As the Office previously reviewed this medical evidence, it is repetitive in nature and insufficient to warrant further merit review.¹⁵

In an October 27, 2005 progress note, Dr. Lucianna indicated that he reviewed appellant's insurance papers, which disputed his time loss from work in April and May 2005. He stated that this was unfortunate since appellant was in pain due to hernias and a ruptured disc which was improving. Dr. Lucianna's progress note is cumulative in nature as he previously expressed a similar opinion in his June 3, 2005 medical report. This was considered by the Office prior to its November 7, 2005 decision. Thus, his report is insufficient to warrant reopening appellant's case for a review of the merits.¹⁶

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.¹⁷

CONCLUSION

The Board finds that appellant has failed to establish that he was totally disabled during the period April 11 through 27, 2005 due to his accepted employment injuries of

¹⁴ *Edward W. Malaniak*, 51 ECAB 279 (2000).

¹⁵ *Freddie Mosley*, 54 ECAB 255 (2002); *James A. England*, 47 ECAB 115, 119 (1995).

¹⁶ *Id.*

¹⁷ *See James E. Norris*, 52 ECAB 93 (2000).

January 27, 2005. The Board further finds that the Office properly denied appellant's request 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 7 and October 11, 2005 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: September 6, 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