United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 06-1368**
	)	**Issued: September 21, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Kalamuth Falls, OR, Employer	)	

Appearances:
R.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

JURISDICTION

On May 30, 2006 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated March 13, 2006, finding that he did not establish a recurrence of disability and a nonmerit decision dated March 31, 2006 denying his request for reconsideration under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and also over the March 31, 2006 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has established that he sustained a recurrence of disability on December 21, 2005 causally related to his accepted employment injury; and (2) whether the Office properly denied his request for merit review of his claim under section 8128.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board affirmed the Office's finding that appellant failed to establish that he was disabled from January 8 to 19, 2005 due to his October 28, 2003 employment injury, accepted for temporary aggravation of

osteoarthritis of the shoulder and cervical and thoracic spine.[1] The Board further found that the Office properly denied his request for merit review under section 8128.

On December 28, 2005 appellant filed a recurrence of disability claim on December 21, 2005 causally related to a July 17, 2001 employment injury.[2] At the time he filed his recurrence of disability claim, appellant worked with restrictions but experienced radiating pain from his back into his legs and arms when casing mail.

On January 4, 2006 appellant filed claims for compensation on account of disability due to his October 28, 2003 employment injury. He requested compensation from December 21, 2005 to January 13, 2006.

By letter dated January 13, 2006, the Office requested additional factual and medical information from appellant regarding his alleged recurrence of disability.

In an electronic mail message dated January 12, 2006, Dan Stearns, the postmaster, related that appellant was on leave without pay effective December 21, 2005 as the employing establishment did not have any available sedentary work.

In a report dated January 3, 2006, received by the Office on January 30, 2006, Dr. Charles D. Bury, Board-certified in family practice, noted that he had treated appellant for back problems since 1996. He diagnosed bilateral low back pain with radicular pain on the right side, degenerative disc disease at L2-3, L4-5 and L5-S1, mild to moderate degenerative osteoarthritis of the lumbar spine and spondylolithesis at L5-S1. Dr. Bury reviewed appellant's limited-duty job requirements and stated:

> "I believe [his] progressive stiffness, painful movement and decreased function at work are related to his mildly progressive degenerative osteoarthritis and degenerative disc disease of the lumbar spine. [Appellant's] current mechanical problem causes impingement and muscle spasm to the right low back resulting in right leg radicular symptoms. In reviewing his job duties I can certainly see why he has aggravating symptoms from his disease process. He has twisting, bending, stooping, kneeling and lifting in most of his eight-hour workday. [Appellant] has multilevel lumbar degenerative disc disease which changes the mechanics of normal lumbar function and increases stress on the posterior intervertebral articulating surfaces and progresses into progressive osteoarthritis. With the continued constant stressors he is currently under, degenerative disc disease and osteoarthritis will progress overtime and increase his symptoms and decrease his functional status.
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> "I am currently unable to clearly determine the cause of his original problem; however, continued exposure to his current duties will contribute to his stiffness,

[1] *Ronald E. Ballard*, Docket No. 05-1420 (issued March 8, 2006).

[2] Appellant initially filed his October 25, 2003 occupational disease claim as a notice of recurrence of disability on October 25, 2003 of a July 17, 2001 employment injury. The Office determined, however, that the claim was for an occupational disease based on his description of injury.

pain and progression of disease. Currently, [he] is not stable and his condition is mildly progressive. Due to his poor response to medication and physical therapy treatments, it would be in the best interest of [appellant] to be evaluated by vocational rehab[ilitation] or his work supervisor for a different job or job duties if he was unable to continue his current job status."

The record further contains progress reports from Roger R. Cummins, a physician's assistant, dated November 2004 to February 2006. In a duty status report dated December 20, 2005, Mr. Cummins opined that appellant could perform sedentary activities lifting up to 10 pounds.

By decision dated March 13, 2006, the Office found that appellant failed to establish a recurrence of disability on December 21, 2006 causally related to his accepted employment injury.[3]

On March 8, 2006 appellant requested reconsideration of his claim. In an accompanying statement, he related that his work restrictions changed and the employing establishment was unable to provide him with work within his limitations. Appellant resubmitted the January 3, 2006 medical report from Dr. Bury and the December 2005 progress reports from Mr. Cummins. He further submitted a progress report dated March 8, 2006 from Mr. Cummins, who diagnosed degenerative arthritis and chronic low back pain and spasm. Mr. Cummins found that appellant could perform sedentary activities for eight hours per day. The record also contains a magnetic resonance imaging (MRI) scan study of appellant's cervical and thoracic spine dated February 15 and 17, 2006 showing a syrinx at T3-4 and an unsigned office visit note dated March 27, 2006 from Dr. J. Nozipo Maraire, a neurosurgeon, who treated appellant for complaints of numbness and tingling of the hands. Dr. Maraire found that he had no "myelopathic symptoms attributable to his syrinx" and recommended against surgery.

By decision dated March 31, 2006, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the merits of his claim.

LEGAL PRECEDENT -- ISSUE 1

Where 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 substantial 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 injury-related condition or a change in the nature and extent of the light-duty job requirements.[4]

[3] The Office initially issued its decision on March 1, 2006 but rescinded that decision and reissued the decision on March 13, 2006.

[4] *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

Office regulations provide that 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.[5] 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.[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an employment-related temporary aggravation of osteoarthritis of his shoulder and cervical and thoracic spine. Subsequent to his employment injury, he performed limited-duty employment. On December 28, 2005 appellant filed a notice of recurrence of disability alleging that he continued to experience pain radiating from his spine into his arms and legs when casing mail for his route.

Appellant has not alleged a change in the nature and extent of his limited-duty job requirements. Instead, he attributed his recurrence of disability to a change in the nature and extent of his employment-related condition. The employing establishment indicated that it was unable to provide him work within his increased restrictions effective December 21, 2005. Appellant would consequently be entitled to wage-loss compensation if rationalized medical evidence established that his increased disability beginning December 21, 2005 resulted from a worsening of his accepted work-related conditions, a temporary aggravation of osteoarthritis of his shoulder and cervical and thoracic spine.[7]

In support of his claim, appellant submitted a report dated January 3, 2006 from Dr. Bury, who diagnosed bilateral low back pain with radicular pain on the right side, degenerative disc disease at L2-3, L4-5 and L5-S1, mild to moderate degenerative osteoarthritis of the lumbar spine and spondylolithesis at L5-S1. Dr. Bury attributed appellant's decreased ability to perform his job duties to degenerative osteoarthritis and degenerative disc disease of the lumbar spine. He opined that appellant's employment duties, which included twisting, bending, lifting and stooping, aggravated his degenerative disc disease and osteoarthritis. Dr. Bury indicated that he could not determine the original cause of appellant's condition but asserted that the performance of his current work duties "will contribute to his stiffness, pain and progression of disease." He recommended vocational rehabilitation or different job duties "if he was unable to continue his current job status." Dr. Bury's finding that appellant's work duties may cause his condition to deteriorate, however, constitutes the possibility of a future injury and does not form a basis for the payment of compensation under the Federal Employees'

[5] 20 C.F.R. § 10.5(x).

[6] *Id*.

[7] *See Jackie D. West, supra* note 4.

Compensation Act.[8] As Dr. Bury did not find appellant currently unable to perform his limited-duty employment, beginning December 21, 2005, his opinion is of little probative value.

Appellant further submitted progress reports from Mr. Cummins; however, the reports of a physician's assistant are entitled to no weight as a physician's assistant is not a "physician" as defined by section 8202(2) of the Act.[9]

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between his claimed condition and his employment.[10] To establish causal relationship, appellant must submit a physician's report in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination, state whether the employment injury caused or aggravated the diagnosed conditions and present medical rationale in support of his or her opinion.[11] Appellant failed to submit such evidence in this case and, therefore, has failed to discharge his burden of proof to establish that he sustained an employment-related recurrence of disability.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[12] 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) submit relevant and pertinent new evidence not previously considered by the Office.[13] 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.[14] 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.[15]

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.[16] The Board also has

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[8] *Manual Gill*, 52 ECAB 282 (2001).

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

[10] *Robert A. Boyle*, 54 ECAB 381 (2003); *Patricia J. Glenn*, 53 ECAB 159 (2001).

[11] *Calvin E. King*, 51 ECAB 394 (2000).

[12] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[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."

[13] 20 C.F.R. § 10.606(b)(2).

[14] 20 C.F.R. § 10.607(a).

[15] 20 C.F.R. § 10.608(b).

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

held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[17] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[18]

ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant argued that his work restrictions changed such that he could no longer perform his limited-duty position. The relevant issue, however, is whether the medical evidence establishes that he was unable to perform his limited-duty employment beginning December 21, 2005. Appellant's lay opinion is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.[19]

Appellant further resubmitted Dr. Bury's January 3, 2006 report and Mr. Cummins' December 2005 reports. The Board has held, however, that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[20]

In an unsigned report dated March 27, 2006, Dr. Maraire discussed appellant's complaints of numbness and tingling of the hands and opined that he had no myelopathy due to his syrinx. It is well established, however, that to constitute competent medical opinion evidence the medical evidence submitted must be signed by a qualified physician. The Board has held that unsigned reports are of no probative value.[21]

Appellant additionally submitted a progress report from Mr. Cummins dated March 8, 2006. As discussed, however, this report is of no probative value as a physician's assistant is not considered a "physician" under the Act.[22]

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 pertinent new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.[23]

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

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

[19] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[20] *John Polito*, 50 ECAB 347 (1999).

[21] *Vickey C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572 (1988).

[22] 20 C.F.R. § 8101(2); *see also Allen C. Hundley*, *supra* note 9.

[23] Appellant submitted additional medical evidence with his appeal. The Board, however, cannot consider this evidence as its review is limited to the evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *see also Linda D. Guerrero*, 54 ECAB 556 (2003).

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability on December 21, 2005 causally related to his accepted employment injury. The Board further finds that the Office properly denied appellant's request for merit review of his claim under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 31 and 13, 2006 are affirmed.

Issued: September 21, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board