United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 07-268**
	)	**Issued: April 12, 2007**
U.S. POSTAL SERVICE, MARKET SQUARE POST OFFICE, Philadelphia, PA, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 2, 2006 appellant filed a timely appeal from a May 19, 2006 decision of the Office of Workers' Compensation Programs that denied his request for reconsideration without conducting a merit review. He also appealed a November 4, 2005 merit decision of an Office hearing representative that affirmed the denial of his claim for recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUE

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a recurrence of disability on May 20, 1999 that was causally related to his accepted occupational disease; and (2) whether the Office properly denied his request for reconsideration without conducting a merit review.

FACTUAL HISTORY

On August 21, 2000 appellant, then a 36-year-old letter carrier, filed an occupational disease claim stating that he developed nerve damage, pain and discomfort and spasms in his neck, arm and shoulder. He stated that he first became aware of the disease or illness on October 16, 1998 and first related it to his employment on May 19, 1999. Appellant indicated that he stopped work following a nonoccupational motor vehicle accident on October 16, 1998 and returned to work under medical restrictions in March 1999, but was required to perform full duty. He stopped work on May 20, 1999. The Office accepted appellant's claim for brachial neuritis on November 22, 2000 and advised him how to file a claim for compensation if he experienced wage loss.

On August 5, 2003 the Office received a November 6, 1999 claim for recurrence of disability for which appellant advised that he stopped work on May 20, 1999. Appellant listed his original injury as October 16, 1998 and noted that he was involved in an accident on October 16, 1998 and returned to work in March 1999. He stated that his recurrence of disability was precipitated by the employing establishment's refusal to assign him light-duty work in accordance with his medical restrictions. Appellant also asserted that the requirements of his job, including casing, carrying and lifting mail, caused him to experience constant neck, back and shoulder pain, which ultimately caused nerve damage. On February 28, 2003 the Office also received a November 6, 1999 claim for compensation (Form CA-7), beginning October 16, 1998.

In support of his claim for recurrence of disability, appellant submitted numerous reports from Dr. John Szostek, a chiropractor, who diagnosed cervical radiculitis with associated paresthesias, as well as chronic moderate cervical strain/sprain with associated cervical somatic dysfunction, cervical ligament instability and cervicalgia.

On June 3, 2004 the Office requested additional information concerning appellant's claim. In response, appellant forwarded a June 22, 1999 report of diagnostic testing from Dr. Eusebio Nunez, a Board-certified physiatrist, diagnosing chronic neck pain syndrome with radicular symptoms in the left upper extremity and left brachial plexus lesion. Dr. Nunez indicated that appellant was involved in a motor vehicle accident on October 16, 1998. In a June 22, 1999 narrative report, he also noted the history of the motor vehicle accident on October 16, 1998 and recorded the same diagnoses. Dr. Nunez recommended a home exercise regimen and chiropractic care. In a June 14, 1999 Form report, he indicated that appellant had full range of motion in both the cervical and lumbar spine and normal strength in his upper extremities. In a July 27, 2000 report, Dr. Nunez indicated that appellant complained of persistent neck and shoulder pain and had been on leave from employment since May 20, 1999 as he was unable to lift the heavy bags of mail required of him and there was no available light-duty work. On July 1, 2004 Dr. Nunez stated that appellant received a consultation and electromyography (EMG) study in connection with a "work[-]related injury" and that he was unable to work from May 20, 1999 through November 7, 2000, enclosed the results from a June 14, 1999 EMG study that indicated prolonged left ulnar F-wave and referenced appellant's October 16, 1998 accident.

Also provided was a December 11, 1998 report from Dr. William Mangino II, an anesthesiologist, indicating that appellant had been in good health and able to work without difficulty before his October 16, 1998 motor vehicle accident. He found that appellant had "diminished range of motion of the cervical spine with paracervical spasm and tenderness and pain on palpation of the cervical spinous processes from C4 to C7." Dr. Mangino diagnosed bilateral cervical radiculopathy, bilateral lumbar radiculopathy, bilateral scalene, trapezius and lumbar myofascial pain syndrome, cervical, thoracic and lumbar sprain/strain and contusion and possible left brachial plexus traction injury or thoracic outlet syndrome. He concluded: "Within a reasonable degree of medical certainty, I do feel that the above-mentioned diagnoses are as a direct result of the injuries that [appellant] sustained on impact, in a motor vehicle accident on October 16, 1998." Dr. Mangino also recommended that, since appellant was "a [l]etter [c]arrier whose job requires physical type of work, I would suggest keeping him out of work for several weeks until he begins to improve with therapy." The December 29, 1999 computerized tomography (CT) scan reports from Dr. R. Scott Scheer, a radiologist, noted appellant's history of trauma sustained in a motor vehicle accident and stated that testing revealed normal results for his cervical and lumbosacral spine.

Appellant also submitted November 20, 1998 and July 9, 1999 reports from Dr. Joseph J. Davidson, a chiropractor, who diagnosed post-traumatic acute cervicobrachial syndrome, cervicalgia, cervical kinesalgia, cervical segmental dysfunction, cervical sprain/strain, pain in the thoracic spine, thoracic segmental dysfunction and thoracic sprain/strain. Dr. Davidson indicated that appellant's conditions were the result of a motor vehicle accident on October 16, 1998. In a report with an illegible date, Dr. Davidson indicated that it appeared that appellant "has symptoms that stem from job." Appellant also provided additional reports from Dr. Szostek that reiterated his previous diagnoses and noted his status. Also provided was a November 29, 1998 unsigned "accident examination" indicating that, following his motor vehicle accident, appellant had muscle spasms in the cervical and thoracic spine as well as swelling and edema and decreased range of motion in the cervical spine.

By decision dated August 13, 2004, the Office denied appellant's claim for recurrence of disability on the grounds that the medical evidence was insufficient to establish that his claimed May 20, 1999 recurrence of disability was causally related to appellant's accepted brachial neuritis.

Appellant requested an oral hearing and provided a November 9, 2004 report from Dr. Byrne L. Solberg, a Board-certified, physiatrist who advised that an EMG and nerve conduction study indicated left C6 and C8 acute cervical radiculopathy.

An oral hearing was conducted on August 16, 2005. The hearing representative noted that appellant's claim had been accepted for medical care only and the Office had not authorized a period of disability. At the hearing, appellant confirmed that his current claim was for a recurrence of disability.

Following the hearing, appellant submitted an August 18, 2005 report from Dr. Despina Tsirakoglou, his treating physician, who indicated that appellant had severe neck pain and cervical spondylosis, as well as "some narrowing of central spinal canal and left neural foramina encroachment." In a handwritten addendum, Dr. Tsirakoglou noted that appellant sustained an

injury at work on May 17, 1999 and was disabled since May 20, 1999. Appellant also submitted the results of a magnetic resonance imaging (MRI) scan conducted on August 17, 2005 by Dr. John J. Manning[1] who revealed disc bulging at several levels in appellant's cervical spine.

By decision dated November 4, 2005, the hearing representative affirmed the denial of appellant's recurrence of disability claim. The hearing representative found that his conditions were due to his October 16, 1998 nonoccupational motor vehicle accident and that the medical evidence did not establish that he sustained a recurrence of disability causally related to his employment.

Appellant requested reconsideration on March 13, 2006. With his request, additional copies of the August 17, 2005 MRI scan and Dr. Tsirakoglou's August 18, 2005 report were provided. In an undated statement, appellant asserted that the employing establishment caused an "aggravation to a preexisting injury" when, upon returning from leave in connection with his nonoccupational motor vehicle accident, he was required to perform full-duty work. Appellant also stated that "there was never a reoccurrence because I have never returned back to work since the CA-2a was filed for May 17, 1999, the only reason that a CA-2a form was filed" was because he was told by the Office that it had to be filed "in order for my file to be opened."

By decision dated May 19, 2006, the Office denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 10.5(x) of the Office's regulations provides, in pertinent part:

> "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."[2]

The Board has held that in order to establish a claim for a recurrence of disability, appellant must establish that he suffered a spontaneous material change in the employment-related condition without an intervening injury.[3] Appellant has the burden of establishing that he sustained a recurrence of a medical condition[4] that is causally related to his accepted employment injury. To meet his burden, appellant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes

[1] Dr. Manning's specialty could not be ascertained from the record.

[2] 20 C.F.R. § 10.5(x) (2002).

[3] *Carlos A. Marrero*, 50 ECAB 117 (1998).

[4] Recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a "need for further medical treatment after release from treatment," nor is an examination without treatment. 20 C.F.R. § 10.5(y) (2002).

that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[5] Where no such rationale is present, the medical evidence is of diminished probative value.[6]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for brachial neuritis and authorized medical treatment. Appellant then submitted a claim for recurrence of disability stating that he was initially injured on October 16, 1998 the date of his nonoccupational motor vehicle accident and sustained a recurrence of disability on approximately May 20, 1999, after he returned to full-duty employment. The Board finds that he did not meet his burden of proof in establishing that he sustained a recurrence of disability that was causally related to his accepted condition.

The medical evidence supports that appellant was unable to work during the period May 20, 1999 through November 7, 2000. However, the evidence does not establish that his disability during that time period was causally related to the accepted employment condition, brachial neuritis. Appellant submitted several reports from Dr. Nunez, indicating that he had consistently complained of neck and shoulder pain since his nonoccupational motor vehicle accident. In a July 27, 2000 report, Dr. Nunez noted that appellant had to take a leave of absence from his job, as he was unable to carry mailbags and there was no light-duty assignment available for him. Dr. Nunez did not, however, explain how appellant's inability to carry mailbags was caused by employment factors, rather than by appellant's nonoccupational motor vehicle accident. Additionally, in a July 1, 2004 report, Dr. Nunez indicated that appellant took leave from work between May 20, 1999 and November 7, 2000, due to a "work[-]related injury." However, he did not identify the injury to which he referred, nor did he discuss the relevance of appellant's nonoccupational injury of October 16, 1998. Therefore, the Board finds that Dr. Nunez's reports are based on an incomplete medical history[7] and are not fortified by sufficient explanation or rationale[8] and accordingly are of diminished probative value.

Dr. Tsirakoglou's August 18, 2005 report is also insufficient to establish appellant's claim. She noted that he had been on leave from work since May 20, 1999 due to an "injury at work" on May 17, 1999. Dr. Tsirakoglou did not identify the injury to which she referred and did not further address the question of causal relationship between appellant's claimed recurrence of disability and employment factors. To the extent that her report supports causal

[5] *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[6] *Albert C. Brown*, 52 ECAB 152 (2000).

[7] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value).

[8] In order to be considered rationalized medical evidence, a physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the claimant's specific employment factors. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989); *Steven S. Saleh*, 55 ECAB 169, 172 (2003). The Board has held that a medical opinion not fortified by medical rationale is of little probative value. *Caroline Thomas*, 51 ECAB 451, 456 n.10 (2000); *Brenda L. Dubuque*, 55 ECAB 212, 217 (2004).

relationship, Dr. Tsirakoglou did not provide any medical rationale to explain the basis of her opinion.[9] Accordingly, the Board finds that Dr. Tsirakoglou's report is of little probative value on the question of whether appellant's claimed recurrence of disability was causally related to his accepted medical condition. The Board notes that appellant also submitted reports from Dr. Scheer and Dr. Solberg. However, these reports do not address causal relationship, but merely state the physicians' findings upon performing diagnostic tests. Furthermore, Dr. Mangino's December 11, 1998 report, opining that appellant's injuries were the direct result of his nonoccupational motor vehicle accident is insufficient as it was prepared before the date of the claimed recurrence of disability.

The record also contains numerous reports from Dr. Szostek and Dr. Davidson. However, the Board notes that as Dr. Szostek and Dr. Davidson are chiropractors and did not diagnose a subluxation of the spine based on x-rays, their reports do not constitute competent medical evidence.[10] Therefore, Dr. Szostek's and Dr. Davidson's reports are not probative on the question of whether appellant sustained a recurrence of disability that was causally related to his accepted condition.

Accordingly, the Board finds that appellant did not meet his burden of proof in establishing that his claimed May 20, 1999 recurrence of disability was causally related to his initially accepted condition of brachial neuritis.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128 of the Federal Employees' Compensation Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulations provides guidance for the Office in using this discretion.[11] The regulations provide that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[12]

[9] *See id.*

[10] Under the Act, "the term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist." 5 U.S.C. § 8101(2) (1993); *Isabelle Mitchell*, 55 ECAB 623 (2001).

[11] 20 C.F.R. § 10.606(b)(2) (1999).

[12] *Id.*

Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[13] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[14]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review. Appellant did not submit new and relevant medical evidence in connection with his reconsideration request. Rather, he submitted an additional copy of Dr. Tsirakoglou's August 18, 2005 report which had been submitted and received into the record prior to the Office's final decision. Appellant also submitted an incomplete version of Dr. Manning's previously submitted August 17, 2005 report. The Board has held that submission of duplicative or repetitious evidence is insufficient to require the Office to reopen a case for merit review.[15] Accordingly, the Board finds that appellant did not submit new and relevant evidence sufficient to warrant a merit review by the Office.

Appellant also did not assert that the Office misinterpreted a point of law, nor did he advance a new legal argument. Rather, appellant submitted an undated statement and repeated his assertion that his job requirements aggravated a preexisting injury, namely, his October 16, 1998 nonoccupational motor vehicle accident. This argument is repetitious of appellant's previous arguments and consequently does not suffice to require the Office to conduct a merit review. Accordingly, the Board finds that appellant's reconsideration request did not meet the statutory conditions requiring the Office to reopen his claim for merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof in establishing that on May 20, 1999 he sustained a recurrence of disability that was causally related to his accepted condition. The Board also finds that the Office properly denied appellant's claim without conducting a merit review.

[13] 20 C.F.R. § 10.608(b) (1999).

[14] *Annette Louise*, 54 ECAB 783 (2003).

[15] *Edward W. Malaniak*, 51 ECAB 279 (2000); *Eugene F. Butler*, 36 ECAB 393 (1984); *Jerome Ginsburg*, 32 CAB 31 (1980).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2006 and November 4, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 12, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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