

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

A.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Seattle, WA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 06-1823
Issued: July 24, 2007**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 26, 2006 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated November 14, 2005 which denied his claim that he was totally disabled for the period December 1 to 15, 2004, a September 28, 2005 decision, which denied his request for reconsideration, and a May 12, 2006 decision which denied his request for reconsideration of an August 17, 2004 decision on the grounds that he failed to establish clear evidence of error. 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 the Office properly refused to reopen appellant's claim for compensation for further review of the merits pursuant to 5 U.S.C. § 8128(a); (2) whether appellant met his burden of proof to establish that he was totally disabled for the period December 1 to 15, 2004 causally related to his accepted right wrist injury; and (3) whether the Office properly denied appellant's April 19, 2006 request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On April 9, 1996 the Office accepted that appellant, then a 30-year-old letter carrier, sustained a severe right wrist sprain and an exacerbation of right wrist ligament tears and right wrist extensor and de Quervain's tenovitis. In 1998 appellant began working modified duty and received compensation for intermittent disability thereafter. He filed Form CA-7 claim for compensation for the period August 27 to September 24, 2003 and October 9 to 17, 2003. On October 14, 2003 appellant accepted a full-time modified mail processor position described as work with his left hand and a lifting and carrying restriction of 20 pounds continuously and 35 pounds intermittently. His right hand was restricted to no casing mail, no repetitive thumb/wrist motion and no simple grasping. By decision dated November 3, 2003, the Office denied these disability claims. Appellant requested a hearing that was held on May 5, 2004. In an August 17, 2004 decision, an Office hearing representative affirmed the November 3, 2003 decision.

A grievance settlement dated December 9, 2004 provided that appellant would receive back pay for pay period 1 and pay periods 6 through 26 for the year 2004. On February 19, 2005 he filed a claim for compensation for the period December 1 to 15, 2004 and submitted medical reports from Dr. Stephen E. Fuhs, a Board-certified orthopedic surgeon, dated November 17, 2004 to January 5, 2005. The employing establishment provided leave analysis for the period December 1 to 15, 2004.

On August 16, 2005 appellant requested reconsideration of the August 17, 2004 decision and submitted duplicates of evidence previously of record, including correspondence and previous job offers. In a September 28, 2005 decision, the Office denied appellant's August 16, 2005 reconsideration request. In a merit decision dated November 14, 2005, it denied his claim for compensation for the period December 1 to 15, 2004.¹

On December 26, 2005 appellant filed an appeal with the Board of the September 28 and November 14, 2005 decisions. By order dated April 7, 2006, the Board dismissed appellant's appeal at his request.² On April 19, 2006 appellant requested reconsideration of the September 28, 2005 decision and submitted additional correspondence, previous decisions, leave requests, job offers and employing establishment policies. By decision dated May 12, 2006, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and failed to demonstrate clear evidence of error of the August 17, 2004 merit decision.³

¹ Appellant subsequently submitted a number of claims for compensation for periods not at issue in this appeal.

² Docket No. 06-501 (issued April 7, 2006).

³ Subsequent to appellant's appeal to the Board on July 26, 2006, by decision dated October 20, 2006, the Office denied his claim for compensation for periods beginning November 17, 2005. On November 11, 2006 he requested a hearing with the Office.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of the Federal Employees' Compensation Act⁴ vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁵ Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.⁶ Section 10.608(b) provides that, when an application for reconsideration 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.⁷ Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁸ Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁹

ANALYSIS -- ISSUE 1

In his August 16, 2005 letter requesting reconsideration, appellant did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁰

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no relevant evidence. With his reconsideration request, he merely submitted duplicates of correspondence, job offers, *etc.*, evidence which was previously of record. 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.¹¹ Appellant, therefore, did not submit relevant and pertinent new evidence not previously considered by the Office and by its decision dated September 28, 2005, the Office properly denied his reconsideration request.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.608(b).

⁸ *Helen E. Paglinawan*, 51 ECAB 591 (2000).

⁹ *Kevin M. Fatzer*, 51 ECAB 407 (2000).

¹⁰ 20 C.F.R. § 10.606(b)(2).

¹¹ *James W. Scott*, 55 ECAB 606 (2004).

LEGAL PRECEDENT -- ISSUE 2

Under the Act the term “disability” is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.¹² Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act¹³ and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.¹⁴ Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.¹⁵

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.¹⁶ Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.¹⁷

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹⁸ Rationalized medical evidence is medical evidence which includes a physician’s rationalized medical opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁹ Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.²⁰

¹² See *Prince E. Wallace*, 52 ECAB 357 (2001).

¹³ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

¹⁴ *Donald E. Ewals*, 51 ECAB 428 (2000).

¹⁵ *Tammy L. Medley*, 55 ECAB 182 (2003); see *Donald E. Ewals*, *supra* note 14.

¹⁶ *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁷ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

¹⁸ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁹ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

²⁰ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

Section 8102(a) of the Act provides that the United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.²¹ A claimant, however, is not entitled to receive temporary total disability and actual earnings for the same period.²²

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that his claimed disability for the period December 1 to 15, 2004 was caused by the accepted right wrist condition. Appellant's attending orthopedic surgeon, Dr. Fuhs, submitted reports dated November 17, 2004 to January 5, 2005. Dr. Fuhs provided restrictions to appellant's activity of no casing mail, no repetitive motion of the right thumb and wrist and no simple grasping with the right hand, with lifting limited to 20 pounds continuously and 35 pounds intermittently. All restrictions with the left hand were removed. However, Dr. Fuhs did not advise that appellant was totally disabled. On January 5, 2005 he advised that appellant's right upper extremity had "dramatically improved" and he could continuously lift 35 to 40 pounds and intermittently lift 70 pounds, with no other restrictions. The description of appellant's modified mail processor position indicated that he was to work with his left hand with a lifting and carrying limited to 20 pounds continuously and 35 pounds intermittently and right hand restrictions of no casing mail, no thumb or wrist repetitive motion and no simple grasping.

The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete, accurate, factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.²³ In this case, the physical requirements of appellant's limited-duty job conformed with the restrictions provided by Dr. Fuhs. The medical evidence of record, therefore, does not establish that appellant was totally disabled for the period December 1 to 15, 2004. Furthermore, an employee is not entitled to receive temporary total disability and actual earnings for the same period.²⁴ The record in this case indicates that appellant received a back pay settlement covering pay period 1 and pay periods 6 through 26, 2004 and he would, therefore, not be entitled to compensation during for these periods.²⁵ Thus, he did not meet his burden of proof to establish that he was totally disabled for the period December 1 to 15, 2004 causally related to his accepted right wrist condition.

²¹ 5 U.S.C. § 8102(a).

²² *Danny E. Haley*, 56 ECAB ____ (Docket No. 04-853, issued March 18, 2005).

²³ *Sandra D. Pruitt*, 57 ECAB ____ (Docket No. 05-739, issued October 12, 2005).

²⁴ *Danny E. Haley*, *supra* note 22.

²⁵ The record does not indicate what dates were covered by these pay periods.

LEGAL PRECEDENT -- ISSUE 3

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.²⁶ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.²⁷ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth section 10.607 of Office regulations,²⁸ if the claimant's application for review shows "clear evidence of error" on the part of the Office. In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.²⁹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision. The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.³⁰

ANALYSIS -- ISSUE 3

The Board finds that, as more than one year had elapsed from the date of issuance of the last merit decision on whether appellant established that he was totally disabled for periods August 27 to October 17, 2003, the Office decision dated August 17, 2004 appellant's request for reconsideration on April 19, 2006 was untimely filed. Consequently, appellant must demonstrate clear evidence of error by the Office in denying her claim for compensation.³¹

The Board also finds that appellant failed to establish clear evidence of error on the part of the Office with his reconsideration request. On reconsideration, appellant raised arguments

²⁶ 20 C.F.R. § 10.607(b); see *Gladys Mercado*, 52 ECAB 255 (2001).

²⁷ *Cresenciano Martinez*, 51 ECAB 322 (2000).

²⁸ 20 C.F.R. § 10.607.

²⁹ *Alberta Dukes*, 56 ECAB ____ (Docket No. 04-2028, issued January 11, 2005).

³⁰ *Nancy Marcano*, 50 ECAB 110 (1998).

³¹ 20 C.F.R. § 10.607(b); see *Debra McDavid*, 57 ECAB ____ (Docket No. 05-1637, issued October 18, 2005).

previously considered by the Office, these arguments are, therefore, insufficient to establish clear evidence of error.³² He also submitted evidence previously of record or not relevant to the August to October 2003 period.³³ Reports that are duplicative or irrelevant are insufficient to establish clear evidence of error.³⁴ The evidence submitted by appellant did not raise a substantial question concerning the correctness of the Office's decision. He, therefore, did not submit the type of positive, precise and explicit evidence which manifests on its face that the Office committed an error.³⁵

In accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the evidence and argument submitted by appellant with his April 19, 2006 reconsideration request to ascertain whether it demonstrated clear evidence of error. The Office correctly determined that it did not and thus properly denied appellant's untimely request for reconsideration of the merits of his claim.³⁶

CONCLUSION

The Board finds that, by its September 28, 2005 decision, the Office properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). The Board also finds that appellant failed to meet his burden of proof to establish that he was totally disabled for the period December 1 to 15, 2004 and that the Office properly denied his April 19, 2006 reconsideration request.

³² *Nancy Marcano, supra* note 30.

³³ This consisted of duplicates of correspondence, previous decisions, leave requests, job offers and employing establishment policies.

³⁴ *Id.*

³⁵ *D.D.*, 58 ECAB ____ (Docket No. 06-1148, issued November 30, 2006).

³⁶ *Nancy Marcano, supra* note 30.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 12, 2006 and November 14 and September 28, 2005 be affirmed.

Issued: July 24, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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