

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

G.B., Appellant)
and) Docket No. 07-1525
U.S. POSTAL SERVICE, POST OFFICE,) Issued: November 13, 2007
Mt. Clemens, MI, Employer)

)

Appearances:
Diana Hohenthaler, for the appellant
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 May 14, 2007 appellant filed a timely appeal from the July 14 and November 8, 2006 decisions of the Office of Workers' Compensation Programs denying his claim for compensation benefits on the grounds that he had not established disability for work during the claimed period. On March 8, 2007 the Office issued a nonmerit decision denying 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 established that his current claim for leave buyback for the period January 17 to March 3, 2006, is due to the accepted employment condition; and (2) whether the Office properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 15, 2006 appellant, then 54-year-old letter carrier, filed an occupational disease claim, Form CA-2, alleging that he sustained bursitis, tendinitis, arthritis and a tear of tendons and ligaments in his right shoulder as a result of his work over the prior 20 years. He used his arms and shoulders regularly, lifted up to 20 pounds and noted that he carried a mailbag weighing up to 35 pounds on his right shoulder for 14 years. Appellant's mail casing and sorting duties required twisting, turning, reaching over his shoulder and lifting mail trays weighing up to 35 pounds.

In a January 19, 2006 report, Dr. Donald Garver, an orthopedic surgeon, stated that he began treating appellant in November 2005 for gradual onset of pain with overhead motion and activity. He stated that physical examination revealed that appellant had right shoulder pain in external rotation and abduction and left shoulder tenderness at the vertebral border of the scapula, which indicated bursitis. Dr. Garver noted that x-rays revealed acromioclavicular (AC) arthritis and that a magnetic resonance imaging (MRI) scan showed a possible subscapularis tear in the right shoulder. He diagnosed AC arthritis and tendinitis of the right shoulder. On November 16, 2005 Dr. Garver reported that an injection conducted two weeks earlier had not resolved appellant's pain. He recommended that appellant take time off from throwing letters, which aggravated and accelerated his symptoms. On January 16, 2006 Dr. Garver removed appellant from work until February 13, 2006 because his right shoulder "was giving him difficulties with anything, overhead, lifting or even sorting mail." He stated that appellant was 10 percent better and was having dull aching pain of 5 to 6 out of 10.

On March 1, 2006 Dr. Garver stated that appellant's duties delivering mail from a truck with a right-handed drive required him to constantly lift and elevate his right arm in and out of the truck, which aggravated and accelerated his symptoms. He opined that appellant's job as a letter carrier and the repetitive motions it entailed had a direct causal relationship with his shoulder pain and shoulder condition. Dr. Garver stated that appellant's condition had been worsened at least temporarily, by his work. He released him to work without restrictions on March 2, 2006 saying that he was 70 percent better.

By decision dated March 20, 2006, the Office accepted appellant's claim for aggravation of adhesive capsulitis (tendinitis) in the right shoulder. However, it did not accept left shoulder bursitis, right shoulder AC arthritis or possible subscapular tear because the medical evidence did not establish their relationship to his federal employment. The Office asked for evidence establishing either appellant's total disability for work or the employing establishment's inability to provide work within his restrictions during the period he was off of work.

On March 28, 2006 Dr. Garver stated that appellant was removed from work on January 16, 2006 to give his shoulder a chance to rest and recover with no active use. He stated that, though appellant's shoulder had begun to improve by February 9, 2006, he recommended minimal use of the arm and continued disability from work to avoid recurrence of symptoms. Dr. Garver provided appellant's progress notes that supplemented the content of his reports. On November 16, 2006 he noted that appellant needed time off from throwing letters, because this involved a scapulothoracic motion which was irritating the scapulothoracic joint and the underlying bursa on the right shoulder. Dr. Garver stated that in the future he was most likely

going to have to take appellant out of work or restrict his letter throwing duties. On January 16, 2006 Dr. Garver noted that appellant was having problems with lifting and sorting mail in addition to his original problem with overhead actions. He stated that he needed at least a month off from work to give his shoulder a chance to rest and recover from active use. Dr. Garver hoped one month would be enough time for the shoulder to recover. On February 9, 2006 he reported that both he and appellant were unsure about a return to work. Dr. Garver stated that he was afraid that appellant would not be able to work for very long because it would take a toll on him. He wanted appellant to be able to return to work but did not know how he would tolerate the position without a recurrence of symptoms. Appellant was returned to work on March 2, 2006 because his shoulder was feeling 70 percent better.

On June 6, 2006 appellant submitted a claim for buyback of leave taken from January 17 to March 3, 2006.¹ On June 8, 2006 the Office informed appellant that the medical evidence received to date was vague as to the reasons that he was totally unable to work. It requested additional information about the cause and nature of appellant's claimed period of disability. On June 12, 2006 the employing establishment stated that appellant was not offered a light-duty position because he was on sick leave when he filed his occupational disease claim. It also stated that light-duty positions were available but had not been requested.

By decision dated July 14, 2006, the Office denied appellant's claim on the grounds that the medical evidence did not establish that his accepted tendinitis condition had disabled him for work from January 17 to March 3, 2006. It noted that Dr. Garver had diagnosed other conditions that had not yet been accepted as employment related.

On September 21, 2006 appellant requested reconsideration. He stated that he was never offered a limited-duty position. Appellant also argued that his physician told him that he was not to work at all in order to improve his condition, which had been good advice as he was currently able to work without restriction. He stated that his physician told him that all necessary medical evidence had been submitted.

By decision dated November 8, 2006, the Office denied modification of its July 14, 2006 decision. It found that appellant had not submitted any new medical evidence to establish his claim. The Office also found that his argument that he did not know that he should request light duty was not sufficient to entitle him to compensation for the claimed period.

On January 25, 2007 appellant requested reconsideration. He submitted a note from Dr. Garver stating that he was totally disabled from January 16 to March 1, 2006 and unable to do any work.

By nonmerit decision dated March 8, 2007, the Office denied reconsideration of appellant's claim.

¹ The Board notes that appellant claimed total disability through March 3, 2006, though his treating physician released him to work on March 2, 2006.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of proving the essential elements of his claim by the weight of the evidence presented.³ Compensation for wage loss is available only for periods during which an employee's accepted condition prevents him from earning his wages.⁴ Even if the Office has accepted that appellant sustained an injury in the performance of duty, appellant still has the burden of establishing that his accepted condition resulted in disability during the specific periods for which he is claiming compensation.⁵ The duration of a disability is a medical issue that must be proved by a preponderance of the reliable, probative and substantial evidence.⁶

When an employee claims compensation for leave used because of an alleged injury or disability, the Office has the responsibility of determining whether the employee was disabled during those periods.⁷ The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the particular periods of disability for which compensation is claimed. To do so would have the effect of allowing employees to self-certify their disability and entitlement to compensation.⁸ When dealing with an accepted employment injury, a narrative medical opinion directly addressing the dates of claimed disability is generally sufficient to demonstrate disability for those periods.⁹

ANALYSIS -- ISSUE 1

Appellant, having proved that he had an accepted employment injury, now must demonstrate that his employment injury caused him to be completely disabled from work for the claimed period January 16 to March 3, 2006.

Dr. Garver, a Board-certified orthopedic surgeon, removed appellant from work from January 17 to March 1, 2006. On November 2, 2005 he began treating appellant for increasing right shoulder pain. After examination, the Office diagnosed tendinitis of the right shoulder, as well as arthritis of the AC joint and a possible subscapular tear. On November 16, 2005 Dr. Garver explained that appellant's duties of throwing letters involved a scapulothoracic motion which was irritating the scapulothoracic joint and underlying bursa of the right shoulder. He stated that he would likely need to give appellant some time off from work or letter throwing

² 5 U.S.C. §§ 8101-8193.

³ *William A. Archer*, 55 ECAB 674 (2004); *Nathaniel Milton*, 37 ECAB 712 (1986).

⁴ *Judith A Cariddo*, 55 ECAB 348 (2004); see also 20 C.F.R. § 10.500(a).

⁵ *Dorothy J. Bell*, 47 ECAB 624 (1996).

⁶ *Edward H. Horton*, 41 ECAB 301 (1989).

⁷ *Glen M. Lusco*, 55 ECAB 148 (2003); *Laurie S. Swanson*, 53 ECAB 517 (2002).

⁸ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ See *William Archer*, *supra* note 3.

duties in the future to give his shoulder a rest. On January 16, 2006 Dr. Garver noted that appellant continued to struggle to perform overhead work and that lifting and sorting were also causing him difficulty. He stated that his right shoulder was experiencing a dull aching pain of 5 to 6 out of 10. Dr. Garver placed appellant on disability from work until February 13, 2006 to give his shoulder a chance to rest fully and recover. The Board finds that he provided adequate rationale for removing appellant from work and set out a specific period of disability. The Board, therefore, finds that this medical evidence is sufficient to establish appellant's disability from work from January 17 to February 9, 2006, when he next saw Dr. Garver for evaluation.

On February 9, 2006 Dr. Garver stated that appellant continued to have some pain in his right shoulder. He noted that his truck delivery duties required him to constantly lift and elevate his right arm as he moved it in and out of the vehicle. Dr. Garver noted that he was unsure whether appellant could tolerate a return to work without having a recurrence of symptoms. He extended his disability from work until March 1, 2006. The Board finds that this evidence is not sufficient to establish appellant's disability from work from February 10 to March 1, 2006. It has held that the fear of future injury is not compensable under the Act.¹⁰ Dr. Garver's February 9, 2006 opinion relates appellant's disability from February 9 to March 1, 2006 to the danger of future periods of disability rather than appellant's current condition or disability. He also did not explain why working with restrictions would not be possible given appellant's improved condition. Therefore, the Board finds that appellant has not established that he was disabled for the period February 10 to March 3, 2006.

The Board finds that appellant has met the burden of proving that he was disabled from January 17 to February 9, 2006, but has not established disability the claimed period of February 10 to March 3, 2006.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.¹¹ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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 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.¹³

¹⁰ *Manuel Gill*, 52 ECAB 282 (2001); *Mary A. Geary*, 43 ECAB 300 (1991).

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b)(2).

¹³ 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 2

Because the Office's July 14 and November 8, 2006 decisions have been affirmed in part, the Board must now resolve whether the medical evidence submitted by appellant was sufficient to reopen the case for a review of the merits.

On January 25, 2007 appellant submitted a disability slip from Dr. Garver who stated merely that he was unable to do any work from January 16 to March 1, 2006. This evidence was repetitious or cumulative of that already reviewed by the Office. The Board finds that it is insufficient to reopen the case on the merits.¹⁴ Therefore, appellant was not entitled to further review on the merits of his case under the third criteria of section 10.606(b)(2).¹⁵ He also did not raise new arguments or present new evidence that the Office erroneously applied or interpreted a specific point of law or advance any relevant legal arguments not previously considered by the Office. Appellant is thus, not entitled to further review of the merits of her case under the first two criteria of section 10.606(b)(2).¹⁶

Appellant did not meet any of the regulatory requirements for review of the merits of his claim. The Office properly denied his January 25, 2007 request for reconsideration.

CONCLUSION

The Board finds that appellant established that his claim for leave buyback for disability January 17 to February 9, 2006 was due to the accepted employment condition. However, he has not submitted sufficient medical evidence to establish the claimed period for disability February 10 to March 3, 2006. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ See *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁵ 20 C.F.R. § 10.606(b)(2)(iii).

¹⁶ 20 C.F.R. § 10.606(b)(2)(i) and (ii).

ORDER

IT IS HEREBY ORDERED THAT the November 8 and July 14, 2006 decisions of the Office of Workers' Compensation Programs are set aside in part and affirmed in part and the February 26, 2007 decision is affirmed.

Issued: November 13, 2007
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