

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

C.L., Appellant)

and)

U.S. POSTAL SERVICE, SOUTHERN)
MARYLAND PROCESSING & DISTRIBUTION)
CENTER, Capitol Heights, MD, Employer)

**Docket No. 07-2301
Issued: April 16, 2008**

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument March 5, 2008

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 10, 2007 appellant filed a timely appeal from an August 28, 2007 nonmerit decision of the Office of Workers' Compensation Programs which denied his request for reconsideration, and of a July 23, 2007 decision which denied his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he developed an occupational disease in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration without conducting a merit review.

FACTUAL HISTORY

On May 1, 2007 appellant, then a 40-year-old mail handler, filed an occupational disease claim alleging that he developed a bulging disc at the L3 level of his spine as well as nerve

impingement, scar tissue and arthritis in the performance of duty. He first noticed problems with his low back in February 2007 and first related his condition to his employment on April 18, 2007. Appellant noted that he had back surgery on April 4, 2007 and attributed his back condition to standing on a hard concrete floor at work. He stopped work on April 18, 2007.

In a July 2, 2007 statement, appellant attributed his condition to walking and standing on a concrete surface at work and commuting more than one hour each way by automobile, as well as to his need for medications which caused drowsiness. He stated that he worked for four hours per day, five days per week.

In an April 5, 2007 report, Dr. Alan Kronthal, a Board-certified diagnostic radiologist, detailed the results of a lumbar magnetic resonance imaging (MRI) scan. He noted appellant's history, which included sciatica, back pain with radiation into the right hip and leg, and a previous lumbar surgery. Dr. Kronthal diagnosed status post surgery on the right side at L4-5 and likely L5-S1 with slight enhancing epidural fibrosis, mild to moderate foraminal narrowing at the right L5-S1 level due to facet arthritis, likely arthritic endplate edema at L5-S1 and probable right hemangioma at the L3 level.

In an April 18, 2007 report, Dr. Bruce Ammerman, a treating Board-certified neurosurgeon, noted appellant's complaints of back pain with radiation into the right leg as well as numbness and tingling in the sole of his right foot. He reviewed the diagnostic testing reports and believed that it was inappropriate for appellant to drive a long distance to work or to stand on a hard concrete surface. On June 25, 2007 Dr. Ammerman reported that appellant needed certain accommodations to return to work. He was restricted from driving more than 30 minutes or working on hard surfaces. Dr. Ammerman stated that the employing establishment had not yet provided the required accommodations and advised that appellant was to remain off work until his restrictions were met. He opined that appellant would eventually be able to return to a sedentary job.

By decision dated July 23, 2007, the Office denied appellant's occupational disease claim on the grounds that the medical evidence was insufficient to establish a causal relationship between his diagnosed condition and the accepted employment factors.

By correspondence dated August 14, 2007, appellant informed the Office that Dr. Ammerman had passed away and he was searching for a new treating physician. He also requested reconsideration on August 14, 2007. Appellant noted that Dr. Ammerman had intended to write a medical report addressing causal relationship and that he was attempting to find a new physician.

By decision dated August 28, 2007, the Office denied appellant's request for reconsideration without conducting a merit review, finding that appellant had not identified the grounds on which reconsideration was sought and had not presented new evidence or argument warranting a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged, and that any disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

An occupational disease or injury is one caused by specified employment factors occurring over a longer period than a single shift or workday.⁴ The test for determining whether appellant sustained a compensable occupational disease or injury is three-pronged. To establish the factual elements of the claim, appellant must submit: "(1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the factors identified by the claimant."⁵

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁶ The opinion of the physician must be based on a complete factual and medical background of the claimant⁷ and must be one of reasonable medical certainty⁸ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁹

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *D.D.*, 57 ECAB ___ (Docket No. 06-1315, issued September 14, 2006).

⁵ *Michael R. Shaffer*, 55 ECAB 386, 389 (2004); citing *Lourdes Harris*, 45 ECAB 545 (1994); *Victor J. Woodhams*, *supra* note 3.

⁶ *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

⁷ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

⁸ *John W. Montoya*, 54 ECAB 306 (2003).

⁹ *Judy C. Rogers*, 54 ECAB 693 (2003).

ANALYSIS -- ISSUE 1

The Board finds that appellant established that he stood on a concrete surface at work for four hours per day, five days per week. However, he has not established a causal relationship between his job duties and his diagnosed back condition.¹⁰

In support of his claim, appellant submitted April 18 and June 25, 2007 reports from Dr. Ammerman, noting appellant's complaints of back pain and stating that it was inappropriate for appellant to stand on a hard concrete surface or drive more than 30 minutes. On April 18, 2007 Dr. Ammerman stated that appellant could return to work when his recommended accommodations were met. However, on June 25, 2007 he reported that the employing establishment still had not met the recommended accommodations and consequently appellant was unable to work. The Board finds that Dr. Ammerman's April 18 and June 25, 2007 reports are insufficient to establish causal relationship. As noted, causal relationship is a medical issue which must be proven by the provision of a physician's rationalized medical opinion.¹¹ Although Dr. Ammerman noted appellant's diagnosed condition and stated that he was unable to stand on a concrete surface or drive more than 30 minutes, he did not provide sufficient explanation or rationale to establish how standing at work caused or contributed to appellant's low back condition. He did not describe appellant's medical history or support causal relationship with reasoning or a detailed explanation of how standing at work caused or aggravated appellant's diagnosed condition.¹² Accordingly, the Board finds that Dr. Ammerman's April 18 and June 25, 2007 notes are insufficient to establish a causal relationship between appellant's diagnosed condition and factors of his employment. Similarly, Dr. Kronthal's diagnostic report is insufficient to establish the claim as he did not specifically relate a diagnosed condition to specific factors of appellant's employment.

At oral argument, appellant explained that he had previously undergone two back surgeries: an L4-5 discectomy, which was performed by mistake; and an L5-S1 discectomy. He

¹⁰ The Board notes that the Office received new evidence after issuing its most recent merit decision. The Board cannot consider this evidence for the first time on appeal because the Office did not consider this evidence in reaching its final decision. The Board's review is limited to the evidence in the case record at the time the Office made its final decision. 20 C.F.R. § 501.2(c). Appellant may resubmit the evidence with a request for reconsideration by the Office.

¹¹ See *supra* note 6.

¹² See *supra* notes 7, 9. Although Dr. Ammerman also attributed appellant's condition to the act of driving to work, there is no evidence that this was a requirement of appellant's employment. See *William W. Knispel*, 56 ECAB 639, 642 (2005) (an injury sustained by an employee having fixed hours and place of work while going to or coming from work is generally not compensable because it does not occur in the performance of duty).

also noted that he had a previous claim accepted for a low back condition.¹³ However, the record before the Board does not contain evidence pertaining to appellant's prior surgeries and accepted back condition. As the Board's review is limited to the evidence in the instant record, the Board is unable to consider appellant's prior back surgeries and accepted condition or what effect, if any, they may have had on his present condition.¹⁴

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.¹⁵ 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].”¹⁶

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.¹⁷ 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

¹³ At oral argument, appellant seemed to indicate that his claim was predicated on an aggravation involving his separate claim before the Office. The Board notes that appellant's back surgeries and prior accepted condition appear to involve the same body part, namely, his lumbar spine. The Office's procedures provide that claims should be doubled in instances when “correct adjudication of the issues depends on frequent cross-reference between files.” Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.0400.8(c) (February 2000). The procedure manual provides, as an example of a case requiring doubling: “A new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body. For instance, a claimant with an existing case for a back strain submits a new claim for a herniated lumbar disc.” *Id.* at (c)(1). Because it appears that appellant's present claim involves the same body part or condition as his previous accepted claim, on return of the case record the Office should combine the files.

¹⁴ See 20 C.F.R. § 501.2(c).

¹⁵ 20 C.F.R. § 10.606(b)(2) (1999).

¹⁶ *Id.*

¹⁷ 20 C.F.R. § 10.608(b) (1999).

10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for reconsideration because appellant did not meet the above-listed three criteria warranting a merit review. In his August 14, 2007 reconsideration request, appellant asserted that his injury was work related and noted that his physician had passed away before he was able to prepare a report addressing causal relationship in detail.¹⁹ However, he did not advance a new legal theory or assert that the Office misapplied or misinterpreted a point of fact or law. Appellant did indicate that once he found a new treating physician, he would submit a report discussing causal relationship in detail. However, he was not able to find a new physician and consequently he did not submit a detailed report addressing causal relationship, or any other new and relevant evidence, in connection with his reconsideration request. Accordingly, the Board finds that appellant's request for reconsideration did not meet any of the above-listed criteria and consequently that the Office properly denied his request without conducting a merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof in establishing that he developed an occupational disease in the performance of duty and the Office properly denied his request for reconsideration without conducting a merit review.

¹⁸ *Annette Louise*, 54 ECAB 783 (2003).

¹⁹ At oral argument, appellant noted that, after his treating physician passed away, he was never granted authorization to obtain a new treating physician. The Board notes that section 8103 of the Act provides that the employee may initially select a treating physician. 5 U.S.C. § 8103; *Billy Ware Forbess*, 45 ECAB 157, 162 (1993). The regulation implementing the Act provides that an employee who wishes to change physicians or see a new treating physician must submit a written request to the Office explaining why he needs a new physician and the Office may approve the request at its discretion. 20 C.F.R. § 10.401(b); *Billy Ware Forbess*, *supra* note 19 at 162. Here, it appears that the Office has not exercised its discretion, as appellant advised the Office of his attending physician's death and his need for a new physician. The Office has not yet addressed the request.

ORDER

IT IS HEREBY ORDERED THAT the August 28 and July 23, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 16, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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