United States Department of Labor
Employees' Compensation Appeals Board

B.G., Appellant	)	
and	)	**Docket No. 07-2012**
	)	**Issued: January 29, 2008**
U.S. POSTAL SERVICE, POST OFFICE, New Iberia, LA, Employer	)	

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, 2007 appellant filed a timely appeal from a May 25, 2007 nonmerit decision of the Office of Workers' Compensation Programs that denied his request for reconsideration without a merit review and an August 1, 2006 decision that denied his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues.

ISSUES

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

FACTUAL HISTORY

This case has previously been before the Board. On February 10, 2005 the Board affirmed an Office decision that denied appellant's claim for a back injury on the grounds that the medical evidence was insufficient to establish that the accepted August 27, 2002 employment

incident caused an injury.[1] The facts and history of the cases are hereby incorporated by reference.

On June 9, 2005 appellant requested reconsideration before the Office. He submitted a November 12, 2004 report from Dr. Cobb, who noted that he had treated appellant since the 1980s, when "essentially he was treated for an L4-5 disc[-]related condition." Dr. Cobb indicated that appellant underwent surgery for his low back condition. He explained that appellant sustained a new injury in 2002, when he "actually injured the thoracic portion of his back that resulted in fairly significant pain in his back with radiation down his hips and his legs." Dr. Cobb noted that an October 14, 2002 MRI scan revealed stenosis at the T11-12 level of appellant's thoracic spine, "secondary to posterior column or facet hypertrophy as well as a disc herniation." He concluded that appellant had "significant clinic and laboratory and MRI [scan] findings to support the severe pain that he is having in his thoracic and his lumbar spine," and that "he has significant abnormalities in the thoracic and lumbar spine which are sufficient enough to disable him."

By decision dated July 14, 2005, the Office denied modification of its August 20, 2004 decision.

Appellant requested reconsideration on June 28, 2006. In a February 27, 2005 report, Dr. Milton J. Jovilette, Jr.[2] reported that appellant was "requesting disability retirement, effective immediately." Dr. Jovilette explained that appellant had previously performed work activities including answering telephones, returning undeliverable mail, preparing second notices and written notices and sitting at a desk. He noted that appellant had been working with restrictions which prohibited him from lifting more than five pounds. However, Dr. Jovilette stated: "I would like to go on record to claim, as [appellant] would claim, that he is not able to do any work activities. To do so would probably jeopardize him further, and I would support him entirely in seeking disability retirement."

By decision dated August 1, 2006, the Office denied modification of its July 14, 2005 decision.

Appellant requested reconsideration on November 24, 2006. He noted that he had other workers' compensation claims and asserted that, had the present claim been accepted, he would not have been injured again. Appellant indicated that he was submitting an e-mail from the postmaster and a June 8, 2006 medical report from Dr. Cobb and Dr. Hodges; however, neither

[1] Docket No. 04-2193 (issued February 10, 2005). On August 27, 2002 appellant, filed a claim alleging that he sustained back pain when he reached for his telephone. In an August 27, 2002 report, Dr. Lara Longo, an internist, diagnosed low back pain but noted that appellant refused physical examination. An October 14, 2002 magnetic resonance imaging (MRI) scan diagnosed mild to moderate central canal stenosis at T11-12. On September 25, 2002 Dr. John E. Cobb, a Board-certified orthopedic surgeon, noted appellant's claimed work injury as well as a motor vehicle accident on April 29, 2002, and diagnosed post-traumatic cervical and thoracic pain syndrome and possible aggravation of thoracic spondylosis. On May 5, 2003 Dr. Daniel L. Hodges, a Board-certified physiatrist, diagnosed post-traumatic cervical and thoracic spine pain and history of low back surgery in 1986.

[2] The Board was unable to ascertain Dr. Jovilette's specialty based on the record.

of these items appears in the record. He also submitted a duplicate copy of Dr. Longo's August 27, 2002 report.[3]

By decision dated May 25, 2007, the Office denied appellant's request for reconsideration without conducting a merit review.[4]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[5] 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.[6] 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.[7]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[8] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[9]

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.[10] The opinion of the physician must be based on a complete factual and medical background of the

[3] *See supra* note 1.

[4] The Board notes that the Office initially denied appellant's request for reconsideration without conducting a merit review on February 14, 2007. After appellant informed the Office that he did not receive its February 14, 2007 decision, the Office reissued its decision on May 25, 2007.

[5] 5 U.S.C. §§ 8101-8193.

[6] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[8] *John J. Carlone*, 41 ECAB 354 (1989).

[9] *Id.*

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

claimant[11] and must be one of reasonable medical certainty[12] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[13]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof in establishing that he sustained a traumatic injury in the performance of duty.[14]

Following the Board's February 10, 2005 decision, appellant submitted a November 12, 2004 report from Dr. Cobb who noted that appellant was a long-standing patient treated for a low back condition since the 1980s. Dr. Cobb indicated that appellant sustained a new injury in 2002. He stated that appellant's new injury was to his thoracic spine but that it resulted in radicular pain in appellant's hips and legs. However, Dr. Cobb did not provide a detailed description of the new injury to which he referred. He did not relate it to appellant's employment incident or explain how the August 27, 2002 incident caused appellant's diagnosed condition. Although Dr. Cobb concluded that appellant had "significant abnormalities in the thoracic and lumbar spine which are sufficient enough to disable him," he did not explain how reaching for a telephone would cause injury to the thoracic spine with radiculopathy to the hips and legs. The Board finds that his November 12, 2004 report is not sufficient to meet appellant's burden of proof because it does not contain a well-reasoned medical opinion on the issue of causal relationship.

Appellant also provided a February 27, 2005 report from Dr. Jovilette who noted appellant's prior restrictions and stated that appellant was now completely disabled. Dr. Jovilette did not address the August 27, 2002 employment incident or explain how the incident caused or aggravated any particular diagnosed condition. Because Dr. Jovilette did not discuss the employment incident or provide a specific diagnosis, the Board finds that his report is insufficient to establish appellant's claim. Neither Dr. Cobb's November 12, 2004 report nor Dr. Jovilette's February 27, 2005 report supported causal relationship with a detailed explanation and a well-rationalized medical opinion. The Board finds that appellant has not met his burden of proof in establishing that he sustained a traumatic injury on August 27, 2002 in the performance of duty.

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

[12] *John W. Montoya*, 54 ECAB 306 (2003).

[13] *Judy C. Rogers*, 54 ECAB 693 (2003).

[14] On the present appeal, appellant submitted additional medical evidence. The Board, however, notes that it 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).

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 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 November 24, 2006 request for reconsideration because appellant did not meet any of the above listed criteria. In his reconsideration request, appellant noted that he had been injured on the job subsequent to the filing of the present claim and that he had additional workers' compensation claims. He asserted that had the present claim been approved, he would not have been injured again. Appellant also stated that he was submitting new evidence, including an August 27, 2002 report from Dr. Longo, an e-mail from the postmaster, and a June 8, 2006 medical report from Dr. Cobb and Dr. Hodges.

The Board finds that appellant neither raised new and relevant legal arguments nor asserted that the Office misapplied or misinterpreted a point of fact or law. The Office denied appellant's claim on the grounds that the medical evidence did not establish a causal relationship between appellant's diagnosed condition and the accepted August 27, 2002 employment

[15] 20 C.F.R. § 10.606(b)(2) (1999).

[16] *Id.*

[17] 20 C.F.R. § 10.608(b) (1999).

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

incident. Appellant did not make a legal argument concerning the relevant issue of causal relationship. Rather, he simply noted that he had other workers' compensation claims and asserted that he would not have been injured subsequent to the injury at issue presently, had the Office approved his claim. The Board finds that appellant has not made a legal argument on the relevant issue of whether his diagnosed condition is causally related to the August 27, 2002 employment incident. Appellant also did not make any assertions or arguments regarding the Office's application or interpretation of a point of fact or law. Accordingly, the Board finds that appellant did not meet the first two criteria warranting a merit review.

Appellant indicated that he was submitting new evidence to the Office, an August 27, 2002 report from Dr. Longo, a June 8, 2006 report from Drs. Cobb and Hodges, and an e-mail from his postmaster. However, the June 8, 2006 report from Drs. Cobb and Hodges and the postmaster's e-mail are not of record. Appellant did submit the August 27, 2002 report from Dr. Longo, but the Board notes that the report was duplicative of a report previously considered. It is well established that evidence which repeats or duplicates that already of record does not constitute a basis for reopening a call for merit review.[19] The Board finds that the report is insufficient to require further merit review.[20] Accordingly, the Board finds that appellant did not meet any of the above-listed three criteria warranting a merit review and that the Office properly denied his November 24, 2006 request for reconsideration without conducting a merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof in establishing that he sustained a traumatic injury in the performance of duty and that the Office properly denied his November 24, 2006 reconsideration request without conducting a merit review.

[19] *See Arlesa Gibbs*, 53 ECAB 204 (2001).

[20] *See Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board held that material which is repetitious or duplicative of that already in the case record is of no evidentiary value in establishing a claim and does not constitute a basis for reopening a case).

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2007 and August 1, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 29, 2008
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