United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 08-734**
	)	**Issued: September 5, 2008**
NATIONAL TRANSPORTATION SAFETY BOARD, ACCOUNTING OPERATIONS DIVISION, Washington, DC, Employer	)	

Appearances:
Robert A. Taylor, Esq., for the appellant
No appearance, for the Director

Oral Argument July 10, 2008

DECISION AND ORDER

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

JURISDICTION

On January 14, 2008 appellant through his representative filed a timely appeal from the Office of Workers' Compensation Programs' December 6, 2007 nonmerit decision denying his request for merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of the Office was its June 12, 2006 decision denying appellant's traumatic injury claim. Because more than one year has elapsed between the Office's last merit decision and the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

The issue is whether 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).

Appellant's representative argues that the medical evidence of record establishes a causal relationship between the accepted July 28, 2004 work incident and appellant's back condition.

The representative contends that the Office erred in finding that the deposition of appellant's treating physician, under oath, is not competent medical evidence.

FACTUAL HISTORY

On August 3, 2004 appellant, a 55-year-old financial management specialist, filed a traumatic injury claim alleging that he sustained injuries to his right leg and back on July 28, 2004, while moving his computer monitor. The Office initially denied the claim, by decision dated October 4, 2004, on the grounds that the claimed injury did not occur in the performance of duty, as it occurred almost three hours after his normal tour of duty ended.

On October 3, 2005 appellant, through his representative, requested reconsideration. By decision dated June 12, 2006, the Office modified the October 4, 2004 decision to reflect that the claimed incident occurred in the performance of duty. As appellant was authorized to be on the employer's premises when the work incident occurred, and it occurred at a reasonable time after his regular tour of duty hours, the Office found that the activity of moving his office to a new location was reasonably incidental to his employment. However, the Office affirmed its denial of appellant's claim on the grounds that the medical evidence submitted failed to demonstrate a causal relationship between the claimed medical condition and the established employment incident.

Medical evidence of record submitted prior to the Office's June 12, 2006 decision included: a July 29, 2004 urgent care report, bearing an illegible signature, indicating that he fell "last night at work" and had pain in his right leg; the first page of an unsigned August 3, 2004 report, reflecting appellant's complaints of bilateral hip and thigh pain; a July 29, 2004 attending physician's report, bearing an illegible signature, indicating that appellant tripped and fell on July 28, 2004 while moving a computer during an office move, and reflecting diagnoses of muscle strain (back and thigh) and right knee sprain; a letter dated June 22, 2004 from Dr. Dominick Mirando, a chiropractor; and a May 13, 2005 report from Dr. Guy W. Gargour, who opined that appellant had sustained an injury at work while moving some files, which exacerbated a previously diagnosed lumbosacral problem.

On June 12, 2007 appellant, through his representative, requested reconsideration, contending that newly-submitted medical evidence was sufficient to establish his claim. In support of the request, appellant submitted the June 22, 2006 deposition of Dr. Gargour, who opined, to a reasonable degree of medical certainty, that appellant's fall on July 28, 2004 exacerbated a preexisting back condition (L4-5 herniated disc).[1] Appellant also submitted copies of documents previously received by the Office, including the above-referenced July 29, 2004 urgent care report, an August 3, 2004 unsigned report, a July 29, 2004 attending physician's report and Dr. Mirando's June 22, 2004 letter; a position description for financial management specialist; documents relating to a March 24, 2004 injury, including a June 25, 2004 letter from Dr. Gargour and a May 11, 2006 letter from Dr. Joseph J. Lamb; unsigned medical notes from Mirando Chiropractor Center dated December 10, 2003 through June 15, 2006; an undated

[1] The representative noted that appellant has another claim before the Office for an earlier aggravation of his herniated disc which allegedly occurred at work on May 24, 2004 (File No. 252043468). Dr. Gargour's deposition addressed both claims.

physical therapy report; and June 2, 2004 reports of magnetic resonance imaging scans of the brain and lumbar spine.

By decision dated December 6, 2007, the Office denied appellant's request for reconsideration, finding the evidence submitted insufficient to warrant merit review. The Office found that Dr. Gargour's deposition could not be considered valid medical evidence, in that it was not signed. The remaining evidence submitted was found to be irrelevant or duplicative.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[3] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[4] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[5] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[6] 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.[7]

A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a "physician" as defined in 5 U.S.C. § 8102(2).[8] The Board has found that reports lacking proper identification, such as unsigned treatment notes, do not constitute probative medical evidence.[9]

[2] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b)(2).

[4] 20 C.F.R. § 10.607(a).

[5] 20 C.F.R. § 10.608(b).

[6] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[7] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[8] *See Bradford L. Sutherland*, 33 ECAB 1568 (1982).

[9] *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

It is a well-established principle that the Board is best qualified by its expertise to judge the probative value of certain types of testimony, such as hearsay. The Board has stated that "technical objections regarding the nature of the evidence are seldom of great moment."[10]

ANALYSIS

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits, as the evidence submitted by appellant in support of his June 12, 2007 reconsideration request is relevant and pertinent new evidence not previously considered.[11] Appellant submitted several documents, including a June 22, 2006 deposition from Dr. Gargour, who opined that appellant's fall on July 28, 2004 exacerbated a preexisting L4-5 herniated disc.[12] In its December 6, 2007 decision, the Office found that Dr. Gargour's deposition could not be considered "valid medical evidence" because it was unsigned. The Board disagrees.

A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a "physician" as defined in the Act.[13] The Board has found that reports lacking proper identification, such as unsigned treatment notes, do not constitute probative medical evidence.[14] However, the fact that a document is not signed does not, in and of itself, negate its authenticity or reliability. Although Office regulations provide that a medical report "should" bear the physician's signature or signature stamp,[15] the signature is not required. It is a well-established principle that the Board is best qualified by its expertise to judge the probative value of certain types of testimony, such as hearsay. In the instant case, Dr. Gargour offered his testimony under oath before a licensed court reporter. The record reflects that Dr. Gargour waived his right to sign the deposition. The Board finds that the absence of Dr. Gargour's signature was cured by the signature of the court reporter, who attested under oath to the accuracy of his testimony.[16] The Board notes that Dr. Gargour is not a stranger

[10] A. Larson, *The Law of Workers' Compensation* § 127 (2000). *See Frederick Nightingale*, 6 ECAB 268 (1953) (noting the informal processes employed in the administration and development of compensation cases, the techniques of investigation which sometimes lead to records replete with hearsay evidence, and the Office's responsibility to evaluate such evidence in light of all of the surrounding facts and circumstances of a particular case). *Id.* at 271.

[11] 20 C.F.R. § 10.606(b)(2).

[12] The Board notes that the remaining documents submitted by appellant in support of his request for reconsideration were either duplicative, cumulative or irrelevant.

[13] *See Bradford L. Sutherland*, *supra* note 8.

[14] *See Merton J. Sills*, *supra* note 9.

[15] *See* 20 C.F.R. § 10.331.

[16] The Board has previously accepted depositions as probative medical evidence. *See, e.g., M.G.*, Docket No. 06-1092 (issued August 24, 2006) (where the Board found a conflict in medical opinion based, in part, on the deposition testimony of claimant's attending physician); *Toni J. Stephens*, Docket No. 05-559 (issued February 14, 2006) (where the Board found an unresolved conflict in medical opinion evidence based on the deposition of the impartial medical examiner); *Jeanne Bragg*, Docket No. 05-424 (issued February 9, 2006) (where the Board found that the deposition testimony of claimant's treating physician constituted sufficient evidence to warrant further development of her claim).

to this case. The fact that the record contains earlier medical reports, signed by Dr. Gargour and submitted on his letterhead, further supports the authenticity of the deposition testimony.

The Board finds that Dr. Gargour's deposition constitutes pertinent new evidence relevant to the underlying issue in this case, namely, whether the medical evidence submitted establishes a causal relationship between the claimed medical condition and the established employment incident. This new evidence was not previously considered by the Office; therefore, it is sufficient to require further review of the case on its merits.[17] The case will therefore be remanded for consideration of Dr. Gargour's June 22, 2006 deposition, together with the previously submitted evidence of record, and a decision on the merits as to whether appellant sustained a traumatic injury on July 28, 2004.

CONCLUSION

The Office improperly denied appellant's request for a merit review pursuant to section 8128(a) of the Act in its December 6, 2007 decision.

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for action consistent with the terms of this decision.

Issued: September 5, 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

[17] 20 C.F.R. § 10.606(b)(2). *See Donald T. Pippin*, 54 ECAB 631 (2003).