

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

J.V., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Wichita, KS, Employer**

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**Docket No. 08-1758
Issued: February 17, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 11, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 18, April 1 and 25, 2008 merit decisions denying his recurrence of disability claim and the Office's May 30, 2008 nonmerit decision denying his request for further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability on or after March 30, 2002 due to his March 20, 2000 employment injury; and (2) whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted that on March 20, 2000 appellant, then a 50-year-old letter carrier, sustained a lumbar strain when he stepped on a sparkplug and fell to the ground. An attending

physician determined that appellant could return to his regular-duty work at the employing establishment by April 6, 2000. Appellant was separated from the employing establishment for cause in April 2002.¹

On September 17, 2007 appellant filed a claim alleging that he sustained a recurrence of total disability on March 30, 2002 due to his March 20, 2000 employment injury.

Appellant submitted an initial physical therapy evaluation dated July 13, 2006 in which his physical therapist indicated that he complained of chronic low back pain. His physical therapist continued to produce reports describing appellant's back condition. The record also contains chiropractic reports dated between 2004 and 2006 regarding the treatment of his back. The findings of April 28, 2004 and October 17, 2005 x-rays showed multiple levels of lumbar disc degeneration.

In a January 18, 2008 decision, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on March 30, 2002 due to his March 20, 2000 employment injury. It indicated that appellant did not submit probative medical evidence supporting his disability claim.

In a February 1, 2008 report, Dr. Matt Byrd, a Board-certified attending family practitioner, stated that appellant reported that he injured his back at work in 2000 when he slipped on some debris and fell to the ground. He noted regarding disability that appellant "already has a determination and is disabled from back pain and it is my opinion it is medically probable that his symptoms are related to injuries that occurred in 2000." Appellant also submitted nurses' notes dated beginning in 2004 which indicated that he reported having back pain. The record also contains additional diagnostic testing results from after March 2002 showing degenerative lumbar disease.

In an April 1, 2008 decision, the Office affirmed its January 18, 2008 decision. It indicated that the evidence appellant submitted, including the February 1, 2008 report of Dr. Byrd, did not establish his recurrence of disability claim.

Appellant submitted numerous reports, dated after March 2002, describing his treatment for various conditions. Most of these reports were produced by nurses who described his back pain complaints. Some of the reports were produced by physicians, but none of them contained an opinion that appellant's back complaints were employment related.² Appellant continued to argue that the evidence showed that he sustained a recurrence of disability on March 30, 2002 due to his March 20, 2000 employment injury.

In an April 25, 2008 decision, the Office affirmed its prior decisions denying appellant's claim that he sustained an employment-related recurrence of disability. In a May 12, 2008 letter, appellant requested reconsideration of his claim. He submitted another copy of Dr. Byrd's February 1, 2008 report and argued that it supported his claim. Appellant submitted a letter he

¹ Appellant later received disability retirement payments.

² Most of these medical reports discussed appellant's emotional condition.

sent to his congressional representative in which he argued that his back condition was employment related rather than related to two accidents he had when handling horses. In a May 30, 2008 decision, the Office denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.³ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.⁴ Where no such rationale is present, medical evidence is of diminished probative value.⁵

Nurses and physical therapists are not physicians under the Federal Employees' Compensation Act and cannot render a medical opinion on the causal relationship between a given physical condition and implicated employment factors or conditions.⁶ Under section 8101(2) of the Act, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.⁷

ANALYSIS -- ISSUE 1

The Office accepted that on March 20, 2000 appellant sustained a lumbar strain due to a fall and an attending physician determined that appellant could return to his regular-duty work at the employing establishment by April 6, 2000. Appellant was separated from the employing establishment for cause in April 2002 and on September 17, 2007 he filed a claim alleging that he sustained a recurrence of total disability on March 30, 2002 due to his March 20, 2000 employment injury.

The Board finds that appellant has not submitted sufficient medical evidence to establish that he sustained a recurrence of disability on or after March 30, 2002 due to his March 20, 2000 employment injury.

Appellant submitted a February 1, 2008 report in which Dr. Byrd, a Board-certified attending family practitioner, stated that he reported he injured his back at work in 2000 when he

³ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

⁴ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

⁵ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁶ 5 U.S.C. § 8101(2); *Bertha L. Arnold*, 38 ECAB 282, 285 (1986); *Jane A. White*, 34 ECAB 515, 518-19 (1983).

⁷ 5 U.S.C. § 8101(2). See *Jack B. Wood*, 40 ECAB 95, 109 (1988).

slipped on some debris and fell to the ground. Dr. Byrd noted that regarding disability appellant “already has a determination and is disabled from back pain and it is my opinion it is medically probable that his symptoms are related to injuries that occurred in 2000.” This report, however, is of limited probative value on the relevant issue of the present case in that Dr. Byrd did not provide adequate medical rationale in support of his apparent conclusion on causal relationship.⁸ Dr. Byrd did not describe appellant’s March 20, 2000 employment injury in any detail or provide a complete factual and medical history of his treatment for back problems. He did not explain the medical mechanics of how appellant could have sustained a recurrence of his employment-related lumbar strain or indicate why his continuing problems were not due to some nonwork-related condition such as underlying degenerative disease.

Appellant submitted other medical reports but none of them contained an opinion that he sustained a recurrence of disability on or after March 30, 2002 due to his March 20, 2000 employment injury. He submitted reports of nurses and physical therapists which discussed his back problems, but these reports from nonphysicians would not constitute medical evidence.⁹ Appellant submitted reports of chiropractors but none of these chiropractors’ report would constitute medical evidence because there is no indication that subluxations were demonstrated by x-rays to exist.¹⁰

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant’s claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.¹¹ Appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability was causally related to the accepted employment injury and, therefore, the Office properly denied his claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹² the Office’s 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.¹³ To be entitled to

⁸ See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

⁹ See *supra* note 6 and accompanying text.

¹⁰ See *supra* note 7 and accompanying text.

¹¹ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

¹² Under section 8128 of the Act, “[t]he 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).

¹³ 20 C.F.R. § 10.606(b)(2).

a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.¹⁴ 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.¹⁵ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.¹⁶

ANALYSIS -- ISSUE 2

In support of his May 12, 2008 reconsideration request, appellant submitted another copy of Dr. Byrd's February 1, 2008 report. This report was already considered by the Office. In his reconsideration letter and a letter he sent to his congressional representative, appellant continued to argue that his back condition since March 30, 2002 was employment related. The resubmission of this evidence and argument would not require the Office to conduct further merit review of appellant's claim as the Board has determined that repetitious evidence and argument does not require such a reopening of a claim.

Appellant has not established that the Office improperly denied his request for further review of the merits of its decisions denying his recurrence of disability claim under section 8128(a) of the Act, because the evidence and argument he submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after March 30, 2002 due to his March 20, 2000 employment injury. The Board further finds that the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ 20 C.F.R. § 10.608(b).

¹⁶ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 30, April 25, April 1 and January 18, 2008 decisions are affirmed.

Issued: February 17, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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