

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

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**K.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Riverdale, GA, Employer**

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**Docket No. 08-2417  
Issued: July 8, 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  
DAVID S. GERSON, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 3, 2008 appellant filed a timely appeal of the September 6, 2007 and March 26, 2008 merit decisions of the Office of Workers' Compensation Programs, which terminated his wage-loss compensation benefits and the June 17, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation effective September 14, 2007; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).<sup>1</sup>

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<sup>1</sup> On December 27, 2007 the Office found that appellant received an overpayment of compensation in the amount of \$3,678.25 because he received compensation for lost wages at an incorrect pay rate. Appellant did not seek review of this overpayment decision. Therefore, the Board will not address the December 27, 2007 decision in this appeal.

## **FACTUAL HISTORY**

On June 23, 2006 appellant, then a 50-year-old mail carrier, filed an occupational disease claim alleging that he sustained injuries to his back due to repetitive employment activities. He stopped working on July 5, 2006. The Office accepted the claim for aggravation of degenerative disc disease of the lumbar spine and appellant was placed on the periodic rolls.

Appellant was treated by Dr. Kelvin D. White, a family physician. On August 1, 2006 Dr. White released appellant to work with restrictions. He was prohibited from driving, which involved repetitive twisting; lifting, bending, pushing, pulling or carrying more than 20 pounds, and excessive bending, stooping, kneeling or excessive casing of flats. Dr. White recommended that he sort mail for no more than one to two hours, after which he should take a 5- to 10-minute seated break. On September 13, 2006 he opined that appellant was capable of light duty only, due to his accepted condition and could lift no more than 15 pounds. Examination of the lumbar spine revealed facet tenderness at L3-S1, sciatica notch tenderness on deep palpation, and paraspinal muscle spasm in the L3-S1 area. On October 11, 2006 Dr. White stated that appellant's back pain, which was accompanied by numbness and tingling down both legs, was caused or exacerbated by work activities.

Appellant was also treated by Dr. Antaures D. Jackson, a chiropractor. On September 25, 2006 Dr. Jackson diagnosed cervical torticollis, lumbar plexus disorder and myositis/myalgia. He noted that appellant had been diagnosed with degenerative disc disease following a July 2006 work-related injury. Dr. Jackson recommended that appellant be restricted from repetitive bending, twisting and lifting in order to prevent future injury.

The Office referred appellant to Dr. Harold Alexander, a Board-certified orthopedic surgeon, for an examination and an opinion as to whether appellant had any residuals related to his accepted condition and, if so, whether he was disabled as a result of those residuals. On April 25, 2007 Dr. Alexander diagnosed degenerative disc disease. A physical examination of the back revealed satisfactory range of motion, flexion, extension and side bending, moderate lower back pain on compression in his lumbosacral spine; no sensory loss in the lower extremities, but occasional momentary tingling. Dr. Alexander stated that appellant had no objective residuals from his accepted injury, except for slight pain on compression in his lumbosacral spine and opined that he was physically capable of returning to work as a letter carrier.

Appellant submitted a June 2, 2007 work capacity evaluation from Dr. White, who reiterated his previous restrictions and stated that appellant, was unable to work an eight-hour day.

The Office found a conflict in the medical opinion evidence between Drs. White and Alexander as to whether appellant had any continuing employment-related residuals or disability. On June 6, 2007 it referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Alexander Doman, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a July 17, 2007 report, based upon an examination of appellant and review of the entire medical file and statement of accepted facts, Dr. Doman found no objective evidence of residuals directly attributable to appellant's accepted employment injury. Examination revealed a normal gait. Dr. Doman found voluntary restriction of range of motion of the lumbar spine with forward flexion to 50 degrees and extension of 10 degrees. Appellant described pain with mild lateral rotation of 40 degrees at the level of the pelvis and had subjective complaints of back pain with simple attempts to flex his knees while in the prone position to 70 degrees. He had cog wheeling giving way weakness on a subjective basis when strength testing his dorsiflexors of his left foot and complaints of back pain with mild tenderness over the subcutaneous tissue of the lumbar spine. Dr. Doman noted radiological evidence of degenerative disc disease in conjunction with lumbar spondylosis, which he stated was not work related, but rather "represented the natural history of degenerative disc disease seen in patients with severe obesity." He opined that appellant's occupational injury was a temporary aggravation of his underlying condition, which would have resolved by October 1, 2006. Dr. Doman agreed with Dr. Alexander's assessment that appellant was capable of returning to work as a letter carrier.

By letter dated July 25, 2007, the Office proposed to terminate appellant's compensation and medical benefits based on Dr. Doman's July 17, 2007 report. Appellant was provided 30 days to submit additional evidence or argument in response to the notice.

In a letter dated August 24, 2007, appellant's representative contended that the Office erroneously relied on Dr. Doman's report in terminating appellant's benefits. Counsel argued that Dr. Doman exceeded the scope of his review by providing a diagnosis of temporary aggravation of degenerative disc disease. He also contended that Dr. Doman was inconsistent in stating on the one hand that x-rays showed evidence of degenerative disc disease, but on the other hand indicating that his accepted condition had resolved.

By decision dated September 6, 2007, the Office finalized the termination of appellant's wage-loss compensation benefits effective September 14, 2007.<sup>2</sup>

Appellant submitted an August 27, 2007 report from Dr. White indicating that appellant was experiencing severe back pain resulting from a June 9, 2008 injury, which occurred on the job. Dr. White stated that appellant was being treated for lumbar degenerative disc disease, which was aggravated by his employment activities, including weight-bearing activity, walking and running. He opined that appellant should be restricted from prolonged standing, working on the truck or lifting more than 10 pounds.

In a letter dated September 12, 2007, appellant, through his representative, requested an oral hearing, which was held on January 9, 2008. Appellant testified that he continued to experience residuals from his accepted condition. Counsel argued that it was incomprehensible that appellant's work duties did not contribute to his current degenerative spine condition.

A March 10, 2008 report of an employing establishment investigation concluded that appellant was capable of performing his duties as a letter carrier. He was observed from

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<sup>2</sup> The Board notes that, although the notice of proposed termination related to compensation and medical benefits, the final decision dated September 6, 2007 terminated only appellant's compensation benefits.

January 15 to March 8, 2008 performing functions common to a letter carrier, such as bending, testing, lifting boxes and driving. Appellant appeared to experience no apparent discomfort while performing these functions.

In a March 26, 2008 decision, the Office hearing representative affirmed the Office's September 6, 2007 decision. He found that the well-rationalized opinion of Dr. Doman was entitled to special weight and established that appellant no longer had residuals related to his accepted condition. Dr. Doman found that appellant's current condition was due to his underlying degenerative disease, rather than to conditions of his employment.

On April 25, 2008 appellant requested reconsideration of the September 6, 2007 decision. He also asked for a review of the Office's determinations about his debt. Appellant stated that he had attempted unsuccessfully to return to work and that he was unable to repay the debt. He submitted unsigned treatment notes dated April 14 and 17, 2008, which reflected treatment for neck and back pain.

By decision dated June 17, 2008, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant merit review.<sup>3</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>4</sup> After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination.<sup>7</sup> Where a case is referred to an impartial medical specialist for the

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<sup>3</sup> Appellant submitted additional evidence after the Office's June 17, 2008 decision; however, the Board cannot consider such evidence for the first time on appeal. The Board's review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 10.501.2(c) (2007).

<sup>4</sup> *S.F.*, 59 ECAB \_\_\_ (Docket No. 08-426, issued July 16, 2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> *I.J.*, 59 ECAB \_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>6</sup> *See J.M.*, 58 ECAB \_\_\_ (Docket No. 06-661, issued April 25, 2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>7</sup> 5 U.S.C. § 8123(a); *see also R.H.*, 59 ECAB \_\_\_ (Docket No. 07-2124, issued March 7, 2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office properly terminated appellant's wage-loss compensation effective September 14, 2007.

The Office correctly determined that a conflict in the medical opinion evidence arose between Dr. White, an attending physician and Dr. Alexander, an Office referral physician, as to whether appellant had any continuing residuals or disability causally related to his accepted condition. On the one hand, Dr. White opined that appellant had continuing employment-related residuals and was only capable of working a light-duty position which required lifting no more than 15 pounds and no repetitive activities. On the other hand, Dr. Alexander concluded that appellant had no objective residuals from his accepted injury, except for slight pain on compression in his lumbosacral spine and opined that he was physically capable of returning to work as a letter carrier.

In order to resolve the conflict, the Office referred appellant, a statement of accepted facts and the entire medical record to Dr. Doman for an impartial medical examination. Based on his review of the case record and findings on examination, Dr. Doman found no objective evidence of residuals or disability directly attributable to appellant's accepted employment injury. He noted radiological evidence of degenerative disc disease in conjunction with his lumbar spondylosis. However, Dr. Doman indicated that the degenerative condition was not work related, but rather "represented the natural history of degenerative disc disease seen in patients with severe obesity." He opined that appellant's occupational injury was a temporary aggravation of his underlying condition, which would have resolved by October 1, 2006. Dr. Doman agreed with Dr. Alexander's assessment that appellant was capable of returning to work as a letter carrier. The Board finds that Dr. Doman's July 17, 2007 opinion is well-rationalized and based on a proper factual and medical background.

Appellant's counsel argued that Dr. Doman exceeded the scope of his review by providing a diagnosis of temporary aggravation of degenerative disc disease. However, his determination that appellant's condition was temporary was essential to the finding that the accepted condition had resolved. Therefore, counsel's contention is without merit. Appellant's representative also contended that Dr. Doman's opinion that the accepted condition had resolved, was inconsistent with radiographic evidence of degenerative disc disease. The Board finds no such inconsistency. Appellant's claim was accepted only for aggravation of degenerative disc disease, which Dr. Doman opined would have resolved by October 1, 2006. He did not opine that the underlying degenerative disc disease had resolved.

Dr. Doman's well-rationalized report constitutes the special weight of the medical opinion evidence afforded an impartial medical specialist and establishes that appellant is no longer disabled due to residuals of his accepted condition. The Board, therefore, finds that the

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<sup>8</sup> *V.G.*, 59 ECAB \_\_\_ (Docket No. 07-2179, issued July 14, 2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

Office met its burden of proof to terminate appellant's compensation benefits effective September 14, 2007.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> Further, evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's April 25, 2008 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted unsigned treatment notes dated April 14 and 17, 2008 reflecting treatment for neck and back pain. The Board finds that these notes do not constitute new and relevant evidence not previously considered by the Office. Rather, appellant's report merely reiterates information contained in documents previously received and reviewed by the Office, and contains no additional rationale to support his claim that he remains disabled or continues to experience residuals of his accepted condition.

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<sup>9</sup> 5 U.S.C. §§ 8101-8193. 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).

<sup>10</sup> 20 C.F.R. § 10.606(b)(2).

<sup>11</sup> *Id.* at § 10.607(a).

<sup>12</sup> *Id.* at § 10.608(b).

<sup>13</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>14</sup> *Denis M. Dupor*, 51 ECAB 482 (2000).

The report is therefore cumulative and duplicative in nature<sup>15</sup> and does not constitute relevant new evidence.

As abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic, and probable deductions from known facts.<sup>16</sup> Appellant has made no such showing here. The Board finds that the Office properly determined that he was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his August 15, 2008 request for reconsideration .

### **CONCLUSION**

The Board finds that the Office met its burden to terminate appellant's compensation benefits effective September 14, 2008. The Board further 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).

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<sup>15</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor, supra* note 14.

<sup>16</sup> *Rebel L. Cantrell*, 44 ECAB 660 (1993).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 17 and March 26, 2008 and September 6, 2007 are affirmed.

Issued: July 8, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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