

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

W.B., Appellant)
and) Docket No. 10-1090
U.S. POSTAL SERVICE, PROCESSING &) Issued: December 17, 2010
DISTRIBUTION CENTER, Cleveland, OH,)
Employer)

)

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 March 18, 2010 appellant filed a timely appeal from a December 16, 2009 merit decision of the Office of Workers' Compensation Programs and a February 2, 2010 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of total disability on October 13, 2009; and (2) whether the Office abused its discretion in denying his request for reconsideration.

FACTUAL HISTORY

On July 26, 2007 appellant, then a 40-year-old mail handler, sustained a right shoulder sprain due to lifting mail and pulling mail carts. On July 27, 2007 he began performing light duty with restrictions of no lifting, pulling or reaching over 10 pounds in accordance with the

limitations provided by Dr. Anthony M. George, an attending Board-certified specialist in preventive medicine.

By decision dated October 3, 2007, the Office accepted the claim for right shoulder sprain.

On October 26, 2009 appellant filed a claim for a recurrence of disability beginning October 13, 2009.

In an October 19, 2009 disability certificate, Dr. George stated that appellant was totally disabled from October 13 to 17, 2009 due to muscle pain and spasms.

By letter dated October 28, 2009, the Office asked appellant to provide a detailed narrative medical report containing a history of injury, findings on physical examination, a diagnosis and a rationalized medical opinion supported by objective findings explaining why he was unable to perform even limited-duty work due to his right shoulder sprain.

On November 9, 2009 Dr. George stated that appellant apparently continued to have aggravations of a torn right rotator cuff and muscle spasms. Appellant experienced pain in his acromioclavicular (AC) joint and pectoralis spasms. Dr. George advised that appellant's total disability was caused by the accepted right shoulder condition. On December 7, 2009 he stated that appellant had pain and spasms in his left shoulder due to overuse. Dr. George opined that the left shoulder condition was caused by avoidance of using his right shoulder and was causally related to his accepted right shoulder injury.

By decision dated December 16, 2009, the Office denied appellant's claim for a recurrence of disability on October 13, 2009, finding that the medical evidence failed to establish that his disability beginning October 13, 2009 was causally related to his July 26, 2007 accepted right shoulder sprain.

Appellant requested reconsideration. He argued that his July 26, 2007 right shoulder condition was misdiagnosed as a sprain and was actually a right rotator cuff tear, tendinosis, bursitis and a consequential injury to the left shoulder. In a December 28, 2009 report, Dr. George stated that appellant had a right rotator cuff tear on July 26, 2007 that was not diagnosed initially because a magnetic resonance imaging (MRI) scan was not performed. He explained that an MRI scan was not performed until May 15, 2009 because MRI scans of shoulders are not normally done immediately after an injury until physical therapy has been attempted. This MRI scan revealed a partial tearing of the supraspinatus muscle which was consistent with the AC joint impingement sign and painful arc at the time of the 2007 right shoulder injury. Dr. George opined that appellant's light-duty lifting, pulling and pushing aggravated the right-shoulder condition.

By decision dated February 2, 2010, the Office denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant further merit review.¹

LEGAL PRECEDENT -- ISSUE 1

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.² To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.³

ANALYSIS -- ISSUE 1

Appellant has the burden to provide medical evidence establishing that he was totally disabled on October 13, 2009 due to a worsening of his accepted July 26, 2007 right shoulder sprain or a change in his job duties such that he was unable to perform his light-duty work. He alleged that a change in the nature and extent of his accepted condition caused a recurrence of total disability.

In an October 19, 2009 disability certificate, Dr. George stated that appellant was totally disabled from October 13 to 17, 2009 due to muscle pain and spasms. He did not, however, explain how this total disability was causally related to the previously accepted right shoulder strain. On November 9, 2009 Dr. George stated that appellant had a torn right rotator cuff but did not explain how this condition was causally related to the July 26, 2007 accepted right shoulder strain. He did not explain, with medical rationale, how appellant's light-duty job exacerbated his accepted right shoulder sprain such that he was disabled from even light-duty work beginning October 13, 2009. The reports from Dr. George are insufficient to establish that

¹ Subsequent to the February 2, 2010 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

² *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); 20 C.F.R. § 10.5(x) provides, "Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."

³ *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack*, 50 ECAB 498, 503 (1999).

appellant had a recurrence of total disability on October 13, 2009 causally related to his accepted July 26, 2007 right shoulder sprain.

The Office explained to appellant the medical evidence required to establish that he was totally disabled on October 13, 2009, a medical report containing a history of injury, findings on physical examination, a diagnosis and a rationalized medical opinion supported by objective findings explaining why he was unable to perform even limited-duty work due to his accepted right shoulder sprain. No such medical evidence was provided.

The Board finds that appellant failed to establish that he was totally disabled on October 13, 2009 due to a change in the nature and extent of his accepted right shoulder sprain or a change in the nature and extent of his light-duty job requirements. Therefore, the Office properly denied his claim for a recurrence of total disability.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁶ 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.⁷ 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.⁸ 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.⁹

⁴ 5 U.S.C. § 8128(a).

⁵ *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁶ Under section 8128(a) of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application.” 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

On December 28, 2009 Dr. George stated that appellant sustained a right rotator cuff tear on July 26, 2007 that was not diagnosed initially because an MRI scan was not performed. A right rotator cuff tear is not an accepted condition and it was not addressed in the December 16, 2009 decision. Therefore, this diagnosis of a torn rotator cuff does not constitute relevant and pertinent new evidence not previously considered by the Office. Dr. George opined that appellant's light-duty activities of lifting, pulling and pushing aggravated his accepted right shoulder sprain. He did not, however, provide dates of disability. Dr. George did not explain how appellant was able to perform his light-duty job from July 26, 2007 to October 13, 2009, a period of over two years. He did not explain why appellant could not perform his light-duty position on October 13, 2009 due to a worsening of his accepted right shoulder sprain. Therefore, this report does not constitute relevant and pertinent new evidence not previously considered by the Office. Because appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by the Office, it did not abuse its discretion in denying his request for reconsideration.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he had a recurrence of total disability on October 13, 2009 causally related to his July 26, 2007 accepted right shoulder sprain. The Board further finds that the Office did not abuse its discretion in denying his request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 2, 2010 and December 16, 2009 are affirmed.

Issued: December 17, 2010
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