United States Department of Labor
Employees' Compensation Appeals Board

G.G., Appellant	)	
and	)	**Docket No. 09-1084**
	)	**Issued: January 4, 2010**
U.S. POSTAL SERVICE, SEATTLE BULK MAIL CENTER, Seattle, WA, Employer	)	

Appearances:
Rainer Brown, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 16, 2009 appellant filed a timely appeal from a February 18, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration of a November 25, 2008 merit decision denying his wage-loss claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issue are: (1) whether appellant met his burden of proof to establish he was disabled from work July 17 through September 24, 1999; and (2) whether the Office properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 26, 2006 appellant, a 49-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging he sustained carpal tunnel syndrome which he attributed to his sack

keying duties since July 15, 1999.[1] The Office accepted appellant's claim for left-hand cubital tunnel syndrome that resolved no later than October 23, 1999.

In an August 3, 1999 report, Dr. Arthur DePalma, Board-certified in family medicine, diagnosed appellant with ulnar entrapment.

In reports dated August 13, September 20 and October 18, 1999, Dr. Curtiss B. Chin, Board-certified in family medicine, diagnosed appellant with left ulnar neuropathy and carpal tunnel syndrome. He reported in his August 13, 1999 progress note that appellant was "given off work August 13 to August 15, 1999." In his September 20, 1999 note, Dr. Chin reported that appellant felt he was too tired to work because he could not sleep at night secondary to left elbow pain.

In a report dated August 16, 1999, Dr. Robert W. Leyen, a Board-certified orthopedic surgeon, reported findings on examination, reviewed appellant's medical history and diagnosed appellant with left elbow cubital tunnel syndrome.

Appellant submitted an October 23, 1999 report in which Dr. Bruce Wheeler, a Board-certified orthopedic surgeon, reported findings on examination, reviewed appellant's medical history and diagnosed him with left shoulder impingement, left small finger flexor muscle tendinitis as well as a history of cubital tunnel. Dr. Wheeler noted that he made no objective findings concerning appellant's cubital tunnel syndrome.

Appellant filed a claim for compensation (Form CA-7) for wages lost July 17 through September 24, 1999. Time analysis revealed that he claimed 210.75 hours leave without pay that he attributed to an "injury on the job."

By decision dated November 25, 2008, the Office denied appellant's wage-loss claim because the evidence of record failed to demonstrate that he was disabled from work on the dates claimed.

Appellant disagreed and on December 4, 2008 requested reconsideration.

Appellant submitted physical capacity evaluation reports in which different physicians diagnosed him with cubital tunnel syndrome. He also resubmitted progress notes from Dr. Chin.

By decision dated February 18, 2009, the Office denied appellant's reconsideration request.

[1] This is the second time this case has been before the Board. *See G.G.* (Docket No. 07-501, issued August 4, 2007). In that decision, the Board found appellant had not established that he sustained an injury in the performance of duty causally related to his federal employment. However, the Board remanded the case for further development, finding that the Office failed to review all the relevant evidence prior to denying his reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,[2] the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in loss of wage-earning capacity.[3] For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.[4] Whether a particular injury causes an employee to become disabled for work and the duration of that disability are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[5] The fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[6]

The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his disability and entitlement to compensation.[7]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for left cubital tunnel syndrome. Appellant alleged that he was disabled from work July 17 through September 24, 1999. His burden is to demonstrate, through the production of rationalized medical evidence, that his disability during the period claimed was causally related to his accepted employment injury. The Board finds the evidence of record insufficient to satisfy appellant's burden of proof.[8]

The evidence of record consists of reports signed by Drs. Chin, DePalma, Leyen, Wagner and Wheeler. But these reports lack a rationalized medical opinion explaining if and how appellant's alleged disability during the period claimed was causally related to appellant's accepted employment injury. Dr. Chin noted that appellant was "given off work" August 13 to 15, 1999 and that he felt too tired to work in September 1999; however, he did not explain why appellant's accepted condition would have disabled him from work during this time period. Dr. Wheeler diagnosed appellant with a history of cubital tunnel syndrome but offered no

[2] 5 U.S.C. §§ 8101-8193.

[3] *See S.F.*, 59 ECAB ___ (Docket No. 08-426, issued July 16, 2008); *Prince E. Wallace*, 52 ECAB 357 (2001).

[4] *Sandra D. Pruitt*, 57 ECAB 126 (2005); *Dennis J. Balogh*, 52 ECAB 232 (2001).

[5] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Gary J. Watling*, 52 ECAB 278 (2001).

[6] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Manuel Garcia*, 37 ECAB 767 (1986).

[7] *Amelia S. Jefferson*, 57 ECAB 183 (2005); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[8] Appellant submitted a report signed by a physician assistant. Because health care providers such as nurses, acupuncturists, physician's assistants and physical therapists are not considered physicians under the Act, their reports and opinions do not constitute competent medical evidence. (5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983). Thus this report is of no probative or evidentiary value.

medical explanation as to why this diagnosis would have disabled him during the time period in question. Therefore, these reports are of diminished probative value and are insufficient to satisfy appellant's burden of proof.[9]

An award of compensation may not be based on surmise, conjecture or speculation.[10] Because the evidence of record lacks a rationalized medical opinion explaining appellant's disability during the dates in question, appellant has not satisfied his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[11] 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.[12] 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.[13] 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.[14]

ANALYSIS -- ISSUE 2

Appellant's reconsideration request did not demonstrate that the Office erroneously applied or interpreted a specific point of law. His reconsideration request did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant was not entitled to reconsideration under the first two enumerated statutory grounds.

Concerning the third enumerated ground, appellant has not submitted relevant and pertinent new evidence not previously considered by the Office. The relevant issue is whether his disability during the period alleged was caused by his accepted employment injury. While appellant submitted duplicate reports from Dr. Chin, the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[15] and the submission of evidence or argument which does not address the particular issue

[9] *See Sandra D. Pruitt*, 57 ECAB 126 (2005).

[10] *See also Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's subjective symptoms and self-serving declarations do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).

[11] 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).

[12] 20 C.F.R. § 10.606(b)(2).

[13] *Id*. at § 10.607(a).

[14] *Id*. at § 10.608(b).

[15] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

involved does not constitute a basis for reopening a case.[16] Appellant submitted additional reports, all of which lack a rationalized medical opinion explaining if and how appellant's disability was causally related to his accepted employment injury.

Because appellant has not satisfied any of the above-mentioned criteria, the Board finds that the Office properly refused to reopen his case for further review of the merits of his claim.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he was disabled from work July 19 through September 24, 1999. The Board also finds that the Office properly refused to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2009 and November 25, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 4, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[16] *D.K., supra* note 6; *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).