

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

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**E.E., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Boston, MA, Employer**

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**Docket No. 09-1610  
Issued: May 7, 2010**

*Appearances:*  
*Ronald S. Barnes, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On June 8, 2009 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' August 5, 2008 and January 6, 2009 merit decisions finding that he did not sustain a traumatic injury and a May 22, 2009 nonmerit decision denying his request for reconsideration. 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 back injury on June 13, 2008, as alleged; and (2) whether the Office properly denied appellant's request for merit review pursuant to 5 U.S.C. § 8128(a).

On appeal, counsel argues that the medical evidence established that appellant sustained an employment-related back injury.

## **FACTUAL HISTORY**

On June 13, 2008 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim alleging that he sustained a low back injury on that date when his motor vehicle was struck from behind by a trash truck. On the reverse of the claim form, Robert Muzarol, a supervisor, noted that appellant was injured while in the performance of duty, based on his statement. In a June 13, 2008 medical report, Patricia McAlary-Losee, a nurse practitioner, obtained a history that appellant was driving his own van as he left work when he was rear-ended that day. She advised that appellant sustained a lumbar strain and was totally disabled for work through June 16, 2008. Ms. McAlary-Losee opined that the diagnosed condition was caused by the June 13, 2008 incident.

By letter dated June 19, 2008, the Office advised appellant that the evidence submitted was insufficient to establish his claim. It requested additional factual and medical evidence, including a rationalized medical report from an attending physician which described the history of his claimed injury, provided a firm diagnosis and an opinion on whether the June 13, 2008 incident caused or aggravated his claimed condition.

In reports dated June 1 to July 15, 2008, Ms. McAlary-Losee reiterated that appellant sustained a lumbar strain. In reports dated June 27 and July 8, 2008, she advised that appellant also sustained a thoracic strain.

A June 16, 2008 report from Scott Taylor, a physical therapist, listed his findings on physical examination and diagnosed lumbar strain.

By decision dated August 5, 2008, the Office denied appellant's claim. It found the evidence sufficient to establish that the June 13, 2008 incident occurred at the time, place and in the manner alleged. The medical evidence was found insufficient to establish an injury causally related to the accepted employment incident.

In a July 1, 2008 report, Mr. Taylor addressed the treatment of appellant's low back pain.

In reports dated August 20 and September 3 and 17, 2008, Dr. Walter Panis, an attending Board-certified physiatrist and neurologist, reviewed a history of the June 13, 2008 employment incident and noted appellant's complaint of back pain, primarily in the right lumbosacral area. He listed his findings on physical examination which were consistent with radiculopathy. In the August 20, 2008 report, Dr. Panis advised that appellant could return to full-time work on that date with restrictions.

On October 8, 2008 appellant requested reconsideration of the August 5, 2008 decision.

In a September 24, 2008 report, Mr. Taylor addressed the treatment of appellant's low back pain.

In reports dated October 8 and 9, 2008, Dr. Panis found that appellant experienced more difficulty with performing toe raises on the right than the left but, mostly complained about pain. He was tender to palpation over the right lumbosacral area. Dr. Panis changed his prior restrictions to reflect that appellant could only work four hours per day with restrictions. In an

October 29, 2008 report, he noted appellant's continuing back symptoms and requested a magnetic resonance imaging (MRI) scan to determine the nature of his condition. In a November 5, 2008 report, Dr. Panis reviewed a November 2, 2008 MRI scan performed by Dr. James R. Hill, a Board-certified radiologist, finding that it was abnormal. He stated: "There are facet effusions at L1-2. There is a dis[c] herniation at L2-3. It effaced the fat medial to the left L2 nerve root, possibly irritating it. There are facet effusions at [L]3-4. There is a far right lateral disc herniation at L4-5. It likely irritates the root. At L5-S1 there is a small central disc herniation without impingement. S1 and S2 nerve roots are cojoined." Dr. Panis advised that appellant's symptoms remained low back pain, more on the right, but also on the left radiating down the right leg. He listed his findings on physical examination and stated that he could not correlate them to the MRI scan findings. Dr. Panis ordered an electromyogram (EMG) study. Also on November 5, 2008, he advised that appellant could return to work on that date with restrictions.

In a November 19, 2008 report, Dr. Panis released appellant to return to work with restrictions on that date. In a December 3, 2008 report, he advised that appellant sustained mild chronic L5-S1 radiculopathy on the right based on a November 22, 2008 EMG study performed by Dr. Peter Siao, a Board-certified neurologist. In another December 3, 2008 report and a report with an illegible date, Dr. Panis advised that appellant could return to work with restrictions on December 3 and 22, 2008, respectively.

A November 2, 2008 hospital record stated that appellant sustained lumbago, lumbosacral neuritis not otherwise specified, lumbar disc displacement and thoracic disc degeneration.

By decision dated January 6, 2009, the Office denied modification of the August 5, 2008 decision. The evidence was sufficient to establish that the June 13, 2008 incident occurred as alleged.<sup>1</sup> The medical evidence, though, was insufficient to establish that appellant sustained an injury causally related to the accepted employment incident.

In a May 7, 2009 letter, appellant, through his attorney, requested reconsideration accompanied by medical evidence. In a December 17, 2008 report, Dr. Panis advised that appellant's condition was improving. It still remained in his lower back without radiation. Dr. Panis listed his findings on physical examination and opined that appellant could perform limited-duty work with restrictions. In a December 31, 2008 report, he stated that appellant could return to work on January 5, 2009 without restrictions. A December 8, 2008 report from Tara Kernan, a physical therapist, stated that appellant was treated on December 10 and 17, 2008. Appellant resubmitted Ms. McAlary-Losee's June 13, 2008 reports, Dr. Panis' August 20, 2008 report and Dr. Siao's November 22, 2008 report.

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<sup>1</sup> By letters dated November 25, 2008, the Office requested that appellant and the employing establishment provide information regarding the June 13, 2008 employment incident. On November 28, 2008 appellant stated that he was stopped at a red light in front of the employing establishment when he was hit by a truck. At the time of the accident, he was beginning his work shift and not leaving work for home. Appellant stated that the employing establishment had knowledge of and provided consent to use his personal vehicle at work.

In a May 22, 2009 decision, the Office denied appellant's request for reconsideration. It found that he failed to submit any relevant and pertinent new evidence or argument or establish that the Office erred in applying or interpreting a point of law. Appellant's claim was not entitled to further merit review.

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

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his claim, including the fact that the individual is an "employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation period of the Act, that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>4</sup>

To establish that a traumatic injury was sustained in the performance of duty the Office must first determine whether fact of injury is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.<sup>5</sup> Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>6</sup> Neither the fact that appellant's condition became apparent during a period of employment nor his belief that the condition was caused by his employment, is sufficient to establish a causal relationship.<sup>7</sup>

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

The Board notes that appellant was involved in a motor vehicle accident on June 13, 2008 while driving his vehicle in the performance of duty as a carrier at the employing establishment. The Board finds, however, that the medical evidence is insufficient to establish that his

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>5</sup> *Id.*

<sup>6</sup> *Solomon Polen*, 51 ECAB 341 (2000).

<sup>7</sup> *See Dennis M. Mascarenas*, 49 ECAB 215 (1997).

diagnosed back conditions were caused or aggravated by the June 13, 2008 employment incident.

The reports from Ms. McAlary-Lossee, a nurse practitioner, and Mr. Taylor, a physical therapist, have no probative medical value in establishing appellant's claim. Neither a nurse practitioner<sup>8</sup> nor a physical therapist<sup>9</sup> is a "physician" as defined under the Act.

The August 20 to December 3, 2008 reports of Dr. Panis stated that appellant sustained radiculopathy at L5-S1 on the right, facet effusions at L1-2, a disc herniation at L2-3 which effaced the fat medial to the left L2 nerve root with possible irritation, facet effusions at L3-4, a far right lateral disc herniation at L4-5 that likely irritated the root, a small central disc herniation without impingement at L5-S1 and conjoined S1 and S2 nerve roots. Dr. Panis opined that appellant could work with restrictions from August 20 to December 22, 2008. He did not address how these diagnosed conditions were caused or contributed to by the accepted June 13, 2008 employment incident. The Board finds that Dr. Panis' reports are of diminished probative value as the physician did not adequately address the issue of causal relation.

Similarly, the November 2, 2008 hospital record which stated that appellant sustained lumbago, lumbosacral neuritis lumbar disc displacement and thoracic disc degeneration does not address how he sustained a back condition that was caused or contributed to by the accepted employment incident. This evidence lacks probative value.

The Board finds that there is insufficient rationalized medical evidence of record to establish that appellant sustained a back injury causally related to the accepted June 13, 2008 employment incident. Appellant did not meet his burden of proof.

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

To require the Office to reopen a case for merit review under section 8128 of the Act,<sup>10</sup> the Office's regulations provide that 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>11</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>12</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 of the merits.

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<sup>8</sup> 5 U.S.C. § 8102(2). See also *Paul Foster*, 56 ECAB 208 (2004).

<sup>9</sup> *David P. Sawchuk*, 57 ECAB 316 (2006).

<sup>10</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>11</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>12</sup> *Id.* at § 10.607(a).

## ANALYSIS -- ISSUE 2

In a May 7, 2009 letter, appellant disagreed with the January 6, 2009 decision which found that the medical evidence of record was insufficient to establish that he sustained a back condition causally related to the June 13, 2008 employment incident. The relevant issue is whether his back condition was causally related to the accepted employment incident. The Board notes that this issue is medical in nature.

Appellant submitted a December 17, 2008 report, from Dr. Panis, who noted that his condition was improving although it still remained in his lower back without radiation. Dr. Panis listed findings on physical examination and opined that appellant could perform limited-duty work with restrictions. On December 31, 2008 he advised that appellant could return to work on January 5, 2009 without restrictions. These reports are similar to the prior reports regarding appellant's back condition and ability to work his which the Office previously reviewed. The Board has held that evidence that repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>13</sup> Moreover, Dr. Panis merely reiterated that appellant could work with restrictions despite continuing to experience back symptoms. He did not further address the relevant issue of causal relation. As Dr. Panis' reports are essentially repetitious of his earlier reports, the Board finds that they are insufficient to reopen appellant's claim for further merit review.

Appellant resubmitted Ms. McAlary-Losee's June 13, 2008 reports, Dr. Panis' August 20, 2008 report and Dr. Siao's November 22, 2008 report. This evidence was previously of record and reviewed by the Office. Duplicative evidence does not warrant reopening a case for further merit review.<sup>14</sup>

Ms. Kernan's December 8, 2008 report stated that appellant was treated on December 10 and 17, 2008. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.<sup>15</sup> Ms. Kernan did not provide a medical opinion addressing the relevant issue of whether appellant sustained a back injury due to the June 13, 2008 employment incident. The Board finds that this evidence is insufficient to reopen appellant's claim for further merit review.

The evidence submitted by appellant did not 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. Appellant did not meet any of the regulatory requirements for further merit review.<sup>16</sup>

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<sup>13</sup> See *L.H.*, 59 ECAB \_\_ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

<sup>14</sup> *Id.*

<sup>15</sup> *D'Wayne Avila*, 57 ECAB 642 (2006).

<sup>16</sup> See 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB 207 (2005).

**CONCLUSION**

The Board finds that appellant failed to establish that he sustained a back injury on June 13, 2008, as alleged. The Board further finds that the Office properly denied his request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 22 and January 6, 2009 and August 5, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 7, 2010  
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