

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

V.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Middle Village, NY, Employer**

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**Docket No. 14-1251
Issued: April 28, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2014 appellant filed a timely appeal from an April 3, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). The Board also has jurisdiction over OWCP's nonmerit May 6, 2014 decision. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 met his burden of proof to establish a recurrence of disability beginning October 15, 2011 causally related to his accepted employment condition; and (2) whether OWCP properly denied his request for reconsideration.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 25, 2011 appellant, then a 50-year-old city carrier, filed a traumatic injury claim alleging that on that date he sprained his left elbow. He stopped work on August 26, 2011.

In an August 25, 2011 authorization for examination or treatment (Form CA-16), Dr. Vikas Vishnoi, Board-certified in internal medicine, diagnosed left elbow strain. He marked the box "yes" when asked if appellant's injury was caused or aggravated by an employment activity. In an August 25, 2011 duty status report, Dr. Vishnoi indicated that appellant was unable to return to work.

In a September 7, 2011 report, Dr. Joel Bonamo, an orthopedic surgeon, noted that appellant was on the job pulling mail weighting approximately 70 to 90 pounds when he had a sudden onset of pain. Left elbow x-rays performed on September 7, 2011 were negative for bone pathology. Dr. Bonamo noted that appellant previously sustained another work-related injury on February 11, 2011 when he fell and slipped on ice resulting in a chip fracture of the left elbow.

In a September 12, 2011 report, Dr. Steve Sharon, a Board-certified radiologist, advised that a magnetic resonance imaging (MRI) scan revealed a four to five millimeter partial tear in the common extensor tendon insertion where there is moderate grade lateral epicondylitis without full thickness or restriction.

In a September 28, 2011 duty status report (Form CA-17), Dr. Bonamo advised that appellant was able to return to work on October 9, 2011.

In an October 17, 2011 report, Dr. Bonamo advised that appellant presented with persistent left elbow pain due to an August 25, 2011 work injury. He noted that appellant attempted to return to work, but he could not secondary to pain. Dr. Bonamo advised that left elbow examination revealed no swelling, loss of motion, or clicking although there was tenderness over the medial and lateral epicondyles. He diagnosed sprained left elbow and medial epicondylitis. Dr. Bonamo noted that appellant was experiencing pain in the medial posterior and lateral aspects of the left elbow. He further explained that appellant expressed to him that it was impossible to carry mail in his left arm while he distributed it with his dominate right arm. In an October 17, 2011 disability report, Dr. Bonamo stated that appellant had a recurrence of left elbow sprain and that he was unable to work for three weeks.

In an October 18, 2011 report of termination of disability and/or payment (Form CA-3), the employing establishment noted that appellant returned to full duty on October 9, 2011.

By decision dated November 9, 2011, OWCP accepted appellant's claim for sprained left elbow. It advised that if his injury resulted in time lost from work, he could submit a claim for compensation.

On November 21, 2013 appellant filed a recurrence of disability claim. He claimed that, after he returned to work full duty on October 9, 2011, there was a recurrence that caused him to stop work from October 15 to November 7, 2011. When asked to describe how the condition was related to the accepted work injury, appellant stated that the same left arm was injured. The employing establishment confirmed that appellant returned to full duty on October 9, 2011.

Appellant submitted a November 4, 2011 disability status report from Dr. Bonamo stating that he could not return to work until November 7, 2011.

In a February 14, 2014 letter, OWCP advised appellant that the evidence was insufficient to establish that he sustained increased disability due to his accepted work-related condition. Appellant was advised that he had 30 days to submit medical evidence to show how the condition was causally related to the accepted work-related injury, a left elbow sprain. He was also advised to complete a questionnaire about the incident to establish the factual basis of his claim.

By decision dated April 3, 2014, OWCP denied appellant's recurrence claim. It found that the medical evidence was insufficient to establish the claimed recurrent disability.

In response, appellant submitted new evidence and requested reconsideration on April 6, 2014. He submitted a September 12, 2011 duty status report (Form CA-17) from Dr. Bonamo who advised that appellant was unable to return to work. Appellant also submitted a September 12, 2011 attending physician's report (Form CA-16) signed by Dr. Bonamo, who specified that appellant injured himself while pulling a heavy mail sack. In a September 28, 2011 continuing disability form, Dr. Bonamo stated that appellant was able to return to work on October 9, 2011. Appellant also resubmitted Dr. Bonamo's November 4, 2011 disability status report.

Appellant responded to OWCP's questionnaire on March 13, 2014. When asked how and when the recurrence occurred, he referred to the August 25, 2011 injury. He did not address how his symptoms may have changed.

By decision dated May 6, 2014, OWCP denied appellant's request for reconsideration, without a merit review, finding that the evidence was not sufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee 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 he or she claims compensation is causally related to the accepted injury.² OWCP's procedure manual discusses the evidence necessary if recurrent disability for work is alleged within 90 days of return to duty. It is noted that the focus is on disability rather than causal relationship of the accepted condition to the work injury.³

The Board has held that if recurrent disability for work is claimed within 90 days or less from the first return to duty, the attending physician should describe the duties which the employee cannot perform and the demonstrated objective medical findings that form the basis

² *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013).

for the renewed disability for work.⁴ When a physician's statements regarding an employee's ability to work consists only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁵

ANALYSIS -- ISSUE 1

In the present case, appellant returned to regular duty on October 9, 2011 and claimed a recurrence of disability on October 15, 2011. As noted above, when the claim for recurrence is within 90 days of a return to work, the focus is on disability, rather than whether appellant continues to have an employment-related condition. But as to disability, the medical evidence must provide a description of the job duties appellant cannot perform and the objective findings that support disability. In addition, the disability must be related to an accepted employment-related condition.

In an October 17, 2011 disability report, Dr. Bonamo stated that appellant had a recurrence of left elbow sprain and that he could not work for three weeks. In another October 17, 2011 report, Dr. Bonamo advised that appellant presented with persistent left elbow pain due to an August 25, 2011 work injury. On physical examination he found that the left elbow revealed no swelling, loss of motion, or clicking; although, there was tenderness over the medial and lateral epicondyles. He stated that appellant returned to work, but was unable to continue secondary to pain. Dr. Bonamo also stated that appellant related that he was unable to carry mail in his left arm as he distributed mail with his right arm. Dr. Bonamo's comments about appellant's work limitations are premised on appellant's own representations rather than on objective medical findings.⁶ Furthermore, a complaint of too much pain to work without more support does not establish a recurrence of disability.⁷ Dr. Bonamo did not provide a discussion of how any objective medical finding prevented appellant from performing his job duties.

In his November 4, 2011 disability status report, Dr. Bonamo advised that appellant could not return to work until November 7, 2011. However, this report is insufficient to establish the claim because Dr. Bonamo did not address how appellant's disability was related to the work injury. Appellant submitted other reports from Dr. Bonamo including September 7 and 12, 2011 reports. These reports failed to discharge appellant's burden of proof because they predate his claimed recurrence of disability and do not otherwise address how his claimed recurrent disability was due to the original work injury.

⁴ See *G.P.*, Docket No. 14-1150 (issued September 15, 2014); *R.C.*, Docket No. 14-201 (issued May 8, 2014).

⁵ See *S.E.*, Docket No. 14-1125 (issued October 1, 2014).

⁶ *C.M.*, Docket No. 14-88 (issued April 18, 2014) (finding that a physician's opinion regarding causal relationship that appears to be primarily based on appellant's own representations rather than on objective medical findings is of limited probative value).

⁷ See *S.B.*, Docket No. 14-1511 (issued March 2, 2015).

The Board finds the medical evidence in this case insufficient to meet appellant's burden of proof to establish a recurrence of disability. Focusing on the issue of disability, the evidence does not contain an opinion supported by objective findings and discussing specific job duties, establishing a recurrence of disability commencing October 15, 2011.

Appellant may submit new evidence or argument as part of a formal written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by a claimant must either: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁸ Where the request from reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without opening the case for a review of the merits.⁹

ANALYSIS -- ISSUE 2

Appellant requested reconsideration, disagreeing with OWCP's denial of his claim for a recurrence of disability. He did not advance any specific arguments on reconsideration regarding the denial of his claimed recurrence of disability. Appellant submitted a March 13, 2014 statement, responding to an OWCP questionnaire, but this statement refers only to the original August 25, 2011 injury, not the claimed recurrence of disability. Thus, this statement does not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP.

Appellant also submitted other evidence with his reconsideration request. However, this evidence is either not new or relevant. In a September 12, 2011 duty status report, Dr. Bonamo advised that appellant was unable to return to work. Appellant also submitted a September 12, 2011 attending physician's report. Both of these forms predate the recurrence of disability; therefore, they are not relevant to underlying period of claimed disability.¹⁰ Likewise, the September 28, 2011 continuing disability form from Dr. Bonamo is not relevant as it predates the claimed period of disability and does not otherwise address how any disability beginning October 15, 2011 would be due to the accepted condition. Furthermore, the November 4, 2011 disability status report was previously submitted and considered by OWCP.¹¹

⁸ *E.K.*, Docket No. 09-1827 (issued April 27, 2010). See 20 C.F.R. § 10.606(b)(2).

⁹ *L.D.*, 59 ECAB 648 (2008). See 20 C.F.R. § 10.606(b).

¹⁰ See *Betty A. Butler*, 56 ECAB 545 (2005) (evidence that does not address the particular issue involved does not constitute a basis for reopening a claim).

¹¹ See *James W. Scott*, 55 ECAB 606 (2004) (submitting evidence that is repetitious or duplicative of evidence already in the case record does not constitute a basis for reopening the claim).

Because appellant failed to meet one of the three regulatory criteria for reopening a claim, he was not entitled to further merit review of his claim.

CONCLUSION

The Board finds that appellant did not establish that he sustained a recurrence of disability on October 15, 2011. The Board also finds that OWCP properly refused to reopen appellant's case for further review of the merits.

ORDER

IT IS HEREBY ORDERED THAT the May 6 and April 3, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 28, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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