United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 18-0726**
	)	**Issued: November 5, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Buffalo, NY, Employer	)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 20, 2018 appellant filed a timely appeal from an October 5, 2017 merit decision and a January 16, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 has met his burden of proof to establish a lumbar condition causally related to the accepted factors of his federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 26, 2017 appellant, then a 59-year-old letter carrier, filed a recurrence claim (Form CA-2a) alleging that he sustained a recurrence of disability beginning June 16, 2017 under OWCP File No. xxxxxx601.[2] He reported that following his original injury, he returned to work in October 2011 and required no further treatment. Appellant indicated that his accepted condition gradually returned following his return to work due to his work duties of sitting, twisting, standing, walking, and lifting all day.

On July 7, 2017 OWCP advised appellant that since he described a new injury, his claim would be processed as an occupational disease claim under OWCP File No. xxxxxx710.

In a June 26, 2017 medical note, Dr. Andrew Cappuccino, a Board-certified orthopedic surgeon, reported that appellant was unable to work due to a spine condition.

By development letter dated August 15, 2017, OWCP informed appellant that on June 26, 2017 he had filed a notice of recurrence which was administratively amended into a new occupational disease claim based on his statement indicating that his medical condition gradually occurred due to sitting, twisting, and lifting all day. It informed him that the evidence of record was insufficient to establish his claim. OWCP advised appellant of the medical and factual evidence necessary and provided a questionnaire for completion. In another letter of that same date, it requested the employing establishment provide additional information pertaining to his occupational disease claim. OWCP afforded 30 days for submission of additional evidence.

On August 22, 2017 appellant responded to OWCP's questionnaire. He described the employment-related activities he believed contributed to his condition which included bending, lifting, and twisting when casing mail for two hours per day, and twisting 180 degrees when delivering mail for six hours per day. Appellant reported that he performed these repetitive activities for eight hours per day, five days per week.

Appellant also submitted a June 26, 2017 medical report from Dr. Cappuccino in support of his claim. Dr. Cappuccino reported that appellant was evaluated for injuries sustained while working for the employing establishment in 2010. Appellant was doing well and had returned to work when, on June 14, 2017, he began to experience increasing mechanical pain in the back, buttock, and legs. Dr. Cappuccino described the findings of appellant's 2010 lumbar spine magnetic resonance imaging (MRI) scan and noted that appellant underwent lumbar spine surgery in 2010. He provided findings on physical examination pertaining to the cervical and lumbar spine. Dr. Cappuccino reported that appellant was to remain out of work and requested authorization for a new lumbar spine MRI scan. He further requested authorization for a brace because of radiographs showing collapse of L4-5 and L3-4 with trace anterior instability on flexion/extension at L4-5 and loss of lordosis.

[2] On May 19, 2010 appellant filed an occupational disease claim (Form CA-2) alleging a work-related lumbar injury as a result of his repetitive federal employment duties. OWCP accepted the claim for displacement of lumbar intervertebral disc without myelopathy, left, in OWCP File No. xxxxxx601. Appellant stopped work on June 19, 2010 and returned to work on October 13, 2010 in a part-time modified-duty capacity working four hours per day. He was released to full-duty work on October 5, 2011.

By decision dated October 5, 2017, OWCP denied appellant's claim finding that the medical evidence of record failed to provide a firm medical diagnosis which could be reasonably attributed to the accepted federal employment duties.[3]

By letter dated October 18, 2017, appellant requested reconsideration of OWCP's decision. He noted that OWCP's decision incorrectly found that his Form CA-2a was alleging a right knee injury. Rather, appellant had noted a prior right knee medial collateral ligament tear when asked about any other injuries. He reiterated that he was claiming injury to his lumbar spine and requested OWCP review his original CA-2a form which was for a recurrence of a lower back injury.

In support of his reconsideration request, appellant resubmitted Dr. Cappuccino's June 26, 2017 report with an accompanying October 16, 2017 addendum. In the addendum, Dr. Cappuccino opined that appellant's injuries were due to the repetitive motions of lifting and constant twisting at his job as a letter carrier for the employing establishment.

By decision dated January 16, 2018, OWCP denied appellant's request for reconsideration, finding that he neither raised substantive legal questions nor submitted relevant and pertinent new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[4] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[6] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

[3] The decision noted that, in addition to his lumbar injury, appellant also alleged a right knee injury. It further noted that there was no medical evidence submitted supporting an injury to the right knee.

[4] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[5] *Michael E. Smith*, 50 ECAB 313 (1999).

[6] *Elaine Pendleton*, *supra* note 4.

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[7]

To establish causal relationship between the condition, as well as any attendant disability claimed, and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such causal relationship.[8] 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. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a lumbar condition causally related to the accepted factors of his federal employment.[10]

OWCP accepted that appellant engaged in repetitive activities of twisting, lifting, reaching, and bending in his employment duties as a letter carrier after his return to work in October 2011. The issue, therefore, is whether appellant submitted sufficient medical evidence to establish that the employment exposure caused a lumbar condition.[11]

In support of his claim, appellant submitted Dr. Cappuccino's June 26, 2017 note and a narrative report of the same date indicating that he was to remain off work due to a spine injury. The Board finds that Dr. Cappuccino's note fails to provide a firm medical diagnosis as the

[7] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

[8] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[9] *James Mack*, 43 ECAB 321 (1991).

[10] *See Robert Broome*, 55 ECAB 339 (2004).

[11] The Board notes that although appellant filed a notice of recurrence claiming disability, the evidence of record indicates an intervening incident negating causal relationship between his current lumbar spine injury and his prior May 19, 2010 work-related injury. As such, OWCP properly converted his June 26, 2017 notice of recurrence to a new occupational disease injury. A 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 resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment. 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition). OWCP procedures provide that a recurrence of disability does not include a work stoppage caused by a new injury, even if it involves the same part of the body previously injured, or by renewed exposure to the causative agent of a previously suffered occupational disease. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (June 2013).

physician only related a "spine injury." Dr. Cappuccino's note did not diagnose a medical condition.[12] He also related in his narrative report dated June 26, 2017 that x-ray examination revealed the collapse of L4-5 and L3-4 with trace anterior instability on flexion/extension at L4-5 and loss of lordosis. Dr. Cappuccino did not, however, relate the date of appellant's x-ray examination or whether in fact the x-ray findings constituted his diagnosis of appellant's current lumbar condition. As such, the Board finds that Dr. Cappuccino did not diagnose a medical condition in corroboration with the x-ray findings.[13] Dr. Cappuccino's reports are, therefore, of limited probative value.

For these reasons, the Board finds that there is no medical evidence of record establishing a lumbar condition causally related to appellant's accepted factors of his federal employment.[14]

Appellant may submit new evidence or argument with a 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,[15] OWCP regulations provide that the evidence or argument submitted by a claimant must: (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.[16] To be entitled to a merit review of an OWCP 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.[17] Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[18]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[12] *J.P.*, Docket No. 14-87 (issued March 14, 2014).

[13] *See D.B.*, Docket No. 15-1507 (issued October 26, 2015).

[14] *T.O.*, Docket No. 18-0139 (issued May 24, 2018).

[15] 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

[16] 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141 (2007).

[17] *Id.* at § 10.607(a).

[18] *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495 (2008).

In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and he did not advance a new and relevant legal argument not previously considered. He argued that he sustained a work-related lumbar injury and that OWCP incorrectly suggested that he filed a claim for a right knee injury. The Board notes that, while the October 5, 2017 decision incorrectly noted a right knee injury, OWCP reviewed the evidence of record to determine whether appellant established a work-related lumbar injury as alleged. As such, discussion of the right knee was harmless error and insufficient to reopen the case for review of the merits of the claim.[19] Consequently, appellant is not entitled to review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board notes that the underlying issue in this case was whether appellant sustained a lumbar condition causally related to the accepted factors of his federal employment as a letter carrier. That is a medical issue which must be addressed by relevant medical evidence not previously considered.[20] The only medical evidence received was the resubmission of Dr. Cappuccino's June 26, 2017 report with the accompanying October 16, 2017 addendum. The Board notes that his June 26, 2017 report was previously addressed and evaluated by OWCP in its October 5, 2017 merit decision. As the report repeats evidence already in the case record, it is duplicative and does not constitute pertinent new and relevant medical evidence.[21]

While the October 16, 2017 addendum constituted new medical evidence, Dr. Cappuccino did not address the relevant issue in this claim. He opined that appellant's "injuries" were due to repetitive motions of lifting and constant twisting at his job as a letter carrier for the employing establishment. However, Dr. Cappuccino again failed to provide a firm medical diagnosis. 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.[22] In this case, appellant failed to submit any relevant and pertinent new evidence regarding a firm diagnosis of his current lumbar condition.[23]

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

[19] *Sherry A. Hunt*, 49 ECAB 467 (1998).

[20] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[21] *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989) (material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case).

[22] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[23] *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a lumbar condition causally related to the accepted factors of his federal employment. The Board also finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated January 16, 2018 and October 5, 2017 are affirmed.

Issued: November 5, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board