United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 06-2017**
	)	**Issued: May 15, 2007**
U.S. POSTAL SERVICE, POST OFFICE, St Paul, MN, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 30, 2006 appellant filed a timely appeal from the June 26, 2006 merit decision of the Office of Workers' Compensation Programs which terminated his compensation benefits effective July 8, 2006 and an August 23, 2006 decision denying appellant's 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 on appeal are: (1) whether the Office properly terminated appellant's medical and wage-loss compensation effective July 8, 2006; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 26, 1992 appellant, then a 49-year-old rural route carrier, filed an occupational disease claim for a right arm condition due to casing his route and delivering mail.[1] The claim was accepted for right shoulder chronic tendinitis, partial right rotator cuff tear, a bilateral shoulder impingement syndrome, left rotator cuff tendinitis and left rotator cuff tear. The Office subsequently accepted right shoulder bicep tendon rupture and bilateral carpal tunnel syndrome.[2] Appellant received appropriate compensation benefits.

Appellant began treatment with Dr. Jeffrey T. Garske, a Board-certified orthopedic surgeon. In a report dated October 20, 2003, Dr. Garske provided work restrictions which included no overhead work, medium restrictions for the left side and light for the right side. He also advised that, for the hands, appellant could do no fine hand manipulation or gross manipulation or firm grasping. He requested authorization for carpal tunnel surgery.

On April 9, 2004 Dr. Garske performed a decompression of the right median nerve for appellant carpal tunnel syndrome. On May 5, 2004 he provided medium-duty restrictions for appellant, including standing and walking and stretching or resting every two to three hours, bending and lifting of 15 pounds with the back straight and no twisting frequently. Appellant was limited to carrying and lifting up to 35 pounds and 15 pounds frequently, pushing and pulling of 35 pounds without bending or 50 pounds on wheels.

On May 6, 2004 the employing establishment offered appellant a modified position as a mail processing clerk which complied with Dr. Garske's restrictions. On May 10, 2004 appellant rejected the modified job offer as it did not address his nonwork-related conditions.

In a June 14, 2004 report, Dr. Garske noted that appellant had full range of motion on examination. He reviewed the May 6, 2004 job offer and opined that, from the standpoint of his carpal tunnel surgery, as well as his underlying degenerative foot disease and spinal stenosis, appellant was capable of performing the job duties. Dr. Garske also opined that appellant did not have any restrictions for work commencing June 15, 2004. However, he noted that, for the hands, appellant had light-duty restrictions that included primarily standing and walking and stretching or resting every hour, bending and lifting of 10 pounds with the back straight and no twisting frequently. Appellant could carry and lift up to 20 pounds occasionally, push and pull 20 pounds without bending or 35 pounds on wheels.

By letter dated July 9, 2004, the Office requested that appellant's physician, Dr. Mark W. Mahowald, a Board-certified neurologist, provide restrictions related to appellant's narcolepsy and a rationalized opinion to support his restrictions.

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[1] The record reflects that appellant had preexisting conditions of diabetes, heart disease, lupus, ulcer, prostate cancer and narcolepsy. Appellant also filed a traumatic injury to his right shoulder on July 25, 2001 after performing repetitive tasks under claim File No. 102002380. This claim was doubled into the file presently before the Board.

[2] On December 20, 2002 the Office granted appellant a schedule award for a 16 percent permanent impairment of the left upper extremity and a 16 percent permanent impairment of the right upper extremity. The Office also accepted a January 29, 2002 and October 20, 2003 claim for recurrence.

In a July 19, 2004 report, Dr. Mahowald noted that appellant had restrictions which included his systemic lupus erythematosus, bilateral shoulder tendinitis, right partial rotator cuff tear and repair, bilateral carpal tunnel syndrome, right shoulder biceps tendon repair and significant narcolepsy. He indicated that the work restrictions placed on appellant "confined him to a very sedentary unstimulating job." Dr. Mahowald noted that "[i]ndividuals with narcolepsy even when treated medically can be expected to be unable to maintain adequate alertness under those circumstances." He recommended that appellant either be offered a less sedentary and more productive job or that the employing establishment refuse to hire him. Dr. Mahowald noted that being assigned meaningless sedentary activities raised the issue of disability or medical retirement.

On December 7, 2004 the Office referred appellant, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Robert J. Tierney, a Board-certified internist, to determine whether appellant's work-related conditions had resolved and his work capacity. The Office requested a determination as to whether the current restrictions were for work-related conditions and nonwork-related conditions. On December 20, 2004 the Office referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Gilbert Westreich, a Board-certified neurologist.

In a December 22, 2004 report, Dr. Tierney noted appellant's history of injury and treatment. He also noted that appellant had lupus since the early 1980's and narcolepsy. Dr. Tierney advised that appellant had other health problems which included spinal stenosis, stress, anxiety, depression and hypertension. He noted that appellant refused a job offer on May 6, 2004 because the employing establishment was not able to accommodate his sleep requirement. Dr. Tierney stated that appellant related that he had bilateral shoulder pain. He conducted a physical examination and advised that appellant had a full range of motion of all joints, normal spine motion, a normal finger to floor measurement, a normal Schober's and normal reflexes, motor and sensory examinations. Dr. Tierney diagnosed bilateral rotator cuff pathology, systemic lupus, narcolepsy and multiple health problems. He opined that appellant's shoulder injuries "certainly could be the result of his work as a mail route carrier. It obviously gave him trouble for four years prior to his initial surgery on the shoulder." Dr. Tierney noted that appellant's problems were "likely related to the work that he was doing or aggravated by them." He found that appellant's shoulder problems were unrelated to the underlying lupus. Dr. Tierney stated that appellant could be released to full-time work with regard to his carpal tunnel syndrome and noted that he would have work restrictions related to his narcolepsy. He opinion appellant's underlying lupus was not disabling and advised that his rotator cuff pathology was secondary to his previous job as a rural carrier or related to his narcolepsy which was unrelated to his employment. Dr. Tierney opined that appellant reached maximum medical improvement with respect to his shoulders, carpal tunnel and lupus. He indicated that, other than light clerical activities and answering the telephone, he did not believe that appellant could continue to work at the employing establishment. Dr. Tierney stated that appellant "certainly is not totally and permanently disabled from any gainful employment on the basis of the rotator cuff tenosynovitis." He noted that appellant's narcolepsy was a limiting disease and he would defer to Dr. Mahowald.

In a January 7, 2005 report, Dr. Westreich noted appellant's history and set forth findings on examination. Appellant related that his problems were basically in his shoulders because of

pain and not decreased mobility. Dr. Westreich indicated that appellant was obese, had wrist scars related to carpal tunnel surgery and had a ruptured right biceps tendon. He otherwise reported normal muscle strength, advised that appellant could stand on his toes and heels without difficulty and noted that there was no atrophy in the arms and legs. Dr. Westreich advised that appellant had a normal sensory examination in the arms and legs and that detailed testing of the shoulders revealed no limitation of motion. He also conducted extensive testing of the upper back, neck and shoulders. Although appellant complained of some shoulder pain, there was no limitation of motion. Dr. Westreich stated that appellant had a heart attack 15 years prior due to a change in enzymes and opined that appellant's problems were related to his "polymalgia or as stated in the chart, to his lupus." He stated that, as a neurologist, it was "probably not appropriate for me to spend much time commenting on [appellant's] shoulder difficulties as far as any orthopedic problems are concerned, but I again would suggest that the shoulder problems are due to the polymyalgia rather than any kind of orthopedic problem." Dr. Westreich opined that appellant did not have any orthopedic shoulder problem that would prevent him from working. This was based on the absence of any limitation of motion of his shoulders or any muscle spasm. Dr. Westreich did not believe that appellant's employment had anything to do with his shoulder difficulties and explained that polymyalgia, was not a result of activity or any work-related enterprise. He listed no objective findings to support appellant's subjective complaints. Dr. Westreich noted that appellant did not exhibit definite weakness or limitation of motion which made it clear that his problems were polymyalgia. Regarding appellant's hands, he found no Tinel's signs at the wrists and an absent Phalen's sign. Dr. Westreich opined that appellant's carpal tunnel syndrome had resolved with surgery. He advised that appellant had two problems that would require restrictions, polymalgia in the shoulders and narcolepsy. Dr. Westreich explained that the polymalgia would prevent repetitive action in the arms, especially reaching and lifting for any prolonged period of time and the narcolepsy would require him to take frequent naps. He opined that appellant had reached maximum medical improvement. Dr. Westreich noted that the ruptured biceps tendon was not limiting ordinary activities but noted that he might have problems if he was lifting 75-pound boxes. He further recommended that appellant continue treatment with his rheumatology specialist in sleep medicine. Dr. Westreich opined that appellant would be able to work within certain limitations. He advised that appellant not work for more than two hours at a time without taking a one-hour break for a nap. Dr. Westreich clarified his restrictions and opined that appellant could sit, walk, stand for a ½ to 1 hour and then require at 45-minute break, with the ability to sleep during this time. He added that movements of reaching and reaching above the shoulder would be limited, that appellant could operate a motor vehicle, without difficulty going to and from work and he could operate a motor vehicle at work but for no more than an hour at a time. Dr. Westreich had no limits on movements of the wrists or elbows. He noted that appellant could push, pull and lift again with difficulty. Dr. Westreich also advised that appellant could kneel, climb or squat. He added that appellant needed to take breaks of one hour after two hours of work. Additionally, Dr. Westreich explained that these restrictions were consistent with appellant's polymalgia and narcolepsy.

By letter dated February 24, 2005, the Office requested that Dr. Mahowald review Dr. Westreich's findings. In a March 2, 2005 response, Dr. Mahowald indicated that he concurred with the January 7, 2005 report of Dr. Westreich.

On April 27, 2006 the Office issued a notice of proposed termination of compensation finding that the medical evidence established that appellant could work 8 hours per day at 40 hours a week with no restrictions. The Office found that the medical evidence established that appellant no longer had any residuals or disability that was due to his accepted work injury.

By letter dated May 4, 2006, appellant disagreed with the notice of proposed termination. He contended that he had injury-related residuals.

By decision dated June 26, 2006, the Office terminated appellant's medical benefits and compensation for wage-loss compensation effective July 8, 2006.[3] The Office determined that appellant had failed to submit relevant evidence to support continuation of residuals due to the injury-related condition and/or disability. The Office found that the weight of the medical evidence rested with his treating physician, Dr. Garske, and the second opinion physicians, Drs. Westreich and Tierney, which supported that, from an orthopedic standpoint, appellant could work 8 hours per day at 40 hours a week with no restrictions.

On June 29, 2006 appellant request reconsideration. He contended that Dr. Garske provided no restrictions specifically for his "hands" and enclosed a copy of his report. Appellant also referenced Dr. Westreich's January 7, 2005 report and reiterated that it was not entitled to greater weight as the physician was "outside of his medical expertise." He alleged that Dr. Garske's report supported that he continued to have residual and permanent effects from the biceps tendon rupture. Appellant argued that Dr. Tierney's report supported that he continued to have shoulder problems. He reiterated that his work-related injuries were permanent and that he continued to have residuals.

By decision dated August 23, 2006, the Office denied appellant's request for reconsideration without further review of the merits. The Office found that appellant did not raise any substantive legal questions nor did he include any new and relevant evidence and thus his request was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[4] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[5]

[3] This decision was an amendment of an original decision dated June 23, 2006.

[4] *Curtis Hall,* 45 ECAB 316 (1994).

[5] *Jason C. Armstrong,* 40 ECAB 907 (1989).

ANALYSIS -- ISSUE 1

The Board finds that the weight of the medical evidence was represented by the second opinion physicians, Drs. Tierney and Westreich, as well as appellant's treating physicians, Drs. Garske and Mahowald.

In a December 22, 2004 report, Dr. Tierney noted appellant's history of injury and treatment and conducted a physical examination, which was essentially normal. He opined that appellant was released full time for his carpal tunnel syndrome and that he did not believe that appellant's underlying lupus was disabling. Dr. Tierney opined that appellant reached maximum medical improvement with respect to his shoulders, carpal tunnel and lupus. He indicated that other than "light clerical" activities and answering the telephone, he did not believe that appellant could continue to work at the employing establishment. However, Dr. Tierney opined that appellant "certainly is not totally and permanently disabled from any gainful employment on the basis of the rotator cuff tenosynovitis." He noted that appellant's narcolepsy was a limiting disease and he would defer his decision to Dr. Mahowald.

In a January 7, 2005 report, Dr. Westreich found that appellant had normal muscle strength, no atrophy and normal sensory findings in the arms and legs and no limitation of shoulder motion. He advised that appellant's shoulder problems were "due to the polymyalgia rather than any kind of orthopedic problem" and advised that appellant did "not have any orthopedic shoulder problem that would prevent him from working." Dr. Westreich explained that he arrived at this conclusion based upon the "absence of any limitation of motion of his shoulders or any spasm." He explained that polymyalgia, was "not a result of activity or any work-related enterprise." Dr. Westreich added that there were no objective findings to support appellant's subjective complaints. He explained that what appellant was referring to was "pain rather than definite weakness or limitation of motion" which made it clear that appellant's problems were polymyalgia. Regarding appellant's hands, Dr. Westreich concluded that appellant's carpal tunnel syndrome had resolved with surgery as he found no Tinel's signs at the wrists and the Phalen's sign was absent. He noted that the only conditions that required work restrictions were polymalgia in the shoulders and narcolepsy. Dr. Westreich explained that the polymalgia would prevent repetitive action in the arms, especially reaching and lifting for any prolonged period of time and the narcolepsy would also require him to take frequent naps during the day. He also added that appellant's ruptured biceps tendon did not limit ordinary activities and, while he might have some problems if he was lifting "75[-]pound boxes," he did not indicate a need for continuing treatment or restrictions due to this condition. Additionally, Dr. Westreich explained that appellant's restrictions were related to appellant's polymalgia and narcolepsy.

On March 2, 2005 appellant's physician, Dr. Mahowald, indicated that he concurred with the January 7, 2005 report of Dr. Westreich. The Board also notes that appellant's treating physician, Dr. Garske, a Board-certified orthopedic surgeon, advised that on June 14, 2004 appellant had full range of motion on examination and that appellant did not have any restrictions for work commencing June 15, 2004.

The reports of Drs. Westreich and Tierney are based on an accurate factual background and provide medical rationale for their conclusions and are consistent with the opinions of appellant's physicians, Drs. Garske and Mahowald.[6] The Office met its burden of proof to terminate appellant's benefits as the weight of the medical evidence indicates that residuals of the employment-related conditions had ceased effective July 8, 2006.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Federal Employees' Compensation Act,[7] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[8]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[9]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for review. The underlying issue on reconsideration was whether the Office properly terminated appellant's wage loss and medical compensation effective July 8, 2006.

In support of his June 29, 2006 request for reconsideration, appellant alleged that the claims examiners did not fully read nor comprehend the documents relied upon to terminate his benefits. He provided a copy of Dr. Garske's June 14, 2004 report and questioned the restrictions in that report. However, the report of Dr. Garske was previously of record and

[6] *Michael S. Mina*, 57 ECAB ___ (Docket No. 05-1763, issued February 7, 2006) (in assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality; the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.606(b).

[9] *Id*. at § 10.608(b).

Office had previously considered this report and other medical reports of record in reaching its prior decision. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.[10]

Appellant also referenced Dr. Westreich's January 7, 2005 report and stated his belief that the physician had stated opinions "outside of his medical expertise." However, his allegation does not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered. The underlying issue is medical in nature and the evidence reflects that Dr. Westreich, as a Board-certified neurologist, is competent to render a medical opinion. Appellant provided no evidence supporting his contention. Thus, this argument does not constitute a basis for reopening appellant's case for a merit review. Appellant also referred to Dr. Tierney's report and alleged that it supported that he had a shoulder problem. However, this report was already reviewed and considered by the Office.[11]

Consequently, the evidence and argument submitted by appellant on reconsideration does not satisfy one of the three regulatory criteria, noted above, for reopening a claim for merit review. Therefore, the Office properly denied his request for reconsideration

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective July 8, 2006. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

[10] *David J. McDonald*, 50 ECAB 185 (1998); *John Polito*, 50 ECAB 347 (1999); *Khambandith Vorapanya*, 50 ECAB 490 (1999).

[11] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 23 and June 26, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 15, 2007
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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