United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
and	)	**Docket No. 07-1769**
	)	**Issued: April 28, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, 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 June 20, 2007 appellant filed a timely appeal from a May 18, 2007 nonmerit decision of the Office of Workers' Compensation Programs which denied his request for reconsideration. He also appealed from the June 28 and November 29, 2006 merit decisions denying his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues are: (1) whether appellant established entitlement to compensation commencing February 24, 2003; and (2) whether the Office properly denied his reconsideration request without further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case was previously before the Board. By decision dated September 19, 2005, the Board found that the Office properly terminated appellant's wage-loss compensation as of

February 23, 2003 based on his refusal of an offer of suitable work.[1] The Board noted that the work restrictions set forth by Dr. Carlton J. Wong, an attending Board-certified family practitioner, had been approved by Dr. Satish K. Sharma, an attending internist. It also found that appellant did not establish that he had a preexisting psychological condition which prevented him from performing the duties of the offered position. The facts and history of the case are set forth in the Board's prior decision and incorporated herein by reference.

On September 29, 2005 appellant requested reconsideration before the Office, contending that working the mail weight scale would cause a recurrence of a psychological condition which came to light when he was initially offered the position. He addressed medical reports previously of record and reiterated arguments concerning the legitimacy of the offered position. Appellant contended that the Office violated its implementing federal regulations at section 10.515(c) and (d), which pertain to the employee's responsibility in advising a treating physician of alternative available positions or accommodations at the employing establishment. He did not submit any new medical evidence.

By decision dated November 29, 2005, the Office denied appellant's reconsideration request, finding that his contentions were insufficient to require further merit review.

On December 12, 2005 appellant requested reconsideration, stating that he was restricted from repetitive motions at shoulder level and that the job offer involved repetitive movements he could not perform. He submitted a copy of a September 27, 2002 duty status report, previously of record. In a December 6, 2005 note, Dr. Eric Wang, a Board-certified internist, stated that appellant had been a patient since April 2003 and had a long history of shoulder problems. He advised that appellant could not do any repetitive motions involving either shoulder. Dr. Wang stated that he had reviewed appellant's chart, noting that his shoulder problems had existed for at least five years and were present on November 11, 2002.[2]

In a March 8, 2006 decision, the Office denied modification of its prior decisions. It was noted that Dr. Wang provided insufficient rationale to overcome the report of Dr. Sharma, who found that appellant was capable of performing the work duties subject to weight restrictions on lifting and no overhead work.

Appellant again requested reconsideration on April 20, 2006. In an April 14, 2006 report, Dr. Sharma advised that appellant reached a permanent and stationary status as of December 28, 2001 with restrictions of lifting no more than two pounds with the right arm and no overhead lifting. He addressed his previous review of the modified job offer, noting that appellant was now seen by Dr. Wang. Dr. Sharma reviewed the note of Dr. Wang, stating: "I initially sent you a letter on January 15, 2003 that [appellant] can do the modified job as you described in your

[1] Docket No. 05-892 (issued September 19, 2005). The Office accepted that appellant sustained a left rib contusion and right shoulder sprain on September 6, 2000 after he was struck by a mail container. The employing establishment offered appellant a position as a limited duty monitor working at postal scales.

[2] On November 20, 2002 the Office advised appellant that it found the offered position to be medically suitable based on his work capacity and currently available.

letter, but now when I review the notes by Dr. Wang and also my previous notes, I do not think that he could do that job as it required repetitive motion of his arms."

On June 28, 2006 the Office denied modification of the March 8, 2006 decision. It found that Dr. Sharma did not sufficiently explain why he was changing his opinion as provided on January 15, 2003, noting that the job required appellant to insert one ounce tags approximately 20 times a day in an eight-hour day.

On September 8, 2006 appellant requested reconsideration. In a September 1, 2006 report, Dr. Sharma reiterated his April 14, 2006 report, noting that appellant was followed by Dr. Wang at a different Kaiser Permanente facility. He stated:

> "I do not think [appellant] could do that job because his job involves inserting a piece of paper of less than one ounce into a date-stamper several times a day and waiting for printouts to be generated. This job involves repeated motion of his shoulder and he has problems with both his shoulders. As I was reviewing his records, his shoulders [sic] pain was persistent and he did not improve to the extent that he could do any range of motion of the shoulder…."

By decision dated November 29, 2006, the Office denied modification of the June 28, 2006 decision. It found that the September 1, 2006 letter of Dr. Sharma was largely repetitive of his April 16, 2006 letter. The Office stated that, as to the medical evidence, Dr. Sharma did not provide a sufficient explanation for changing his medical opinion, noting that his description of appellant's duties was inadequate or why inserting a one ounce tag into a machine 20 times during an eight-hour day was considered repetitive motion.

On February 16, 2007 appellant requested reconsideration, submitting an undated report from Dr. Sharma. Appellant noted that he filed a grievance against Dr. Sharma and was seeking a recovery "equal to my benefit compensation that I should have received from February 24, 2003 to present." The report from Dr. Sharma reiterated his prior statement that inserting a one ounce tag into a date stamp machine approximately 20 times in an eight-hour day required repetitive motion of the shoulder. He stated that he was "wrong" in giving the decision that appellant could do the job.

By decision dated May 18, 2007, the Office denied appellant's reconsideration request, finding the evidence submitted to be duplicative and repetitious.

LEGAL PRECEDENT -- ISSUE 1

Once the Office meets its burden of proof to terminate an employee's compensation benefits, the burden of proof shifts to the employee to establish that he or she has disability causally related to the accepted injury.[3] Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion from a physician, based on a complete and accurate factual and medical background, supported by an

[3] *See Kathryn E. Demarsh*, 56 ECAB 677 (2005).

explanation of the relationship between the diagnosed condition and the factors of employment.[4] A medical opinion is of limited probative value if it contains a conclusion regarding causal relationship that is unsupported by medical rationale.[5]

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for a left rib contusion and right shoulder sprain/strain. In the prior appeal, the Board found that the employing establishment offered suitable work based on the physical restrictions set forth by Dr. Wong, an attending physician. Dr. Sharma also reviewed the job description and approved the work restrictions set forth by Dr. Wong. It was determined that appellant refused an offer of suitable work and his wage-loss benefits were terminated as of February 23, 2003.

Appellant sought reconsideration of the termination decision, contending that the requirements of the position exceed the physical limitations imposed by his physicians. He provided a December 6, 2005 note from Dr. Wang, who advised that appellant had a long history of shoulder problems and could not do repetitive motions involving either shoulder. Dr. Wang stated that he reviewed appellant's chart and that his shoulder problems had existed as of November 11, 2002, prior to the Office decision terminating compensation. The Board finds that the note of Dr. Wang is insufficient to establish that appellant was incapable of performing the duties of the offered position when offered in November 2002. The note consists of a brief recitation of appellant's shoulder problems. Dr. Wang does not indicate any knowledge of appellant's accepted conditions or otherwise discuss appellant's medical treatment contemporaneous with the job offer. He did not address the reports of Dr. Wong or Dr. Sharma or the physical limitations imposed prior to the job offer being made. The note does not provide any description of the requirements of the job offer or explain how the work activities proposed in the modified position would require repetitive motion of the shoulder. The job description provided that appellant would have to push a button on a data processing machine that was not higher than his shoulder level. The note of Dr. Wang does not provide any medical rationale in support of the physician's stated conclusion that appellant was unable to perform any repetitive motion involving the shoulders. In fact, as written, the note does not go so far as to say that appellant was unable to perform the duties of the position when offered; only that appellant's shoulder problems existed in November 2002 at the time the job offer was being made. As noted, Dr. Wong provided physical limitations pertaining to appellant's use of his shoulder in the modified-duty position. The opinion of Dr. Wang is of diminished probative value and does not establish that the suitable work offered by the employing establishment violated appellant's physical limitations.

Appellant also submitted additional medical evidence from Dr. Sharma. On April 14, 2006 Dr. Sharma reiterated that appellant had reached permanent and stationary status as of December 28, 2001 with restrictions of lifting no more than two pounds with the right arm and

[4] *See John W. Montoya*, 54 ECAB 306 (2003).

[5] *See Conrad Hightower*, 54 ECAB 796 (2003) (noting that contemporaneous evidence may be entitled to greater probative evidence than that submitted later.) *Accord Eileen R. Kates*, 46 ECAB 573 (1995); *Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

no overhead lifting. He noted that he had not recently treated appellant, who was now seen by Dr. Wang. After reviewing Dr. Wang's note, Dr. Sharma stated: "I do not think that he could do that job as it required repetitive motion of his arms." The Board notes that he did not offer any medical rationale for this stated conclusion other than noting that he relied on the note of Dr. Wang. As noted, however, there are serious deficiencies in the rationale provided by Dr. Wang. Dr. Sharma gave no other reason for stating that he did not feel that appellant could do the job. There is no evidence of record that he examined appellant in 2006, some four years after the job offer. Dr. Sharma did not provide any description of the job duties under the suitable work offer, to assure an accurate recollection of the lifting involved. Moreover, he does not reconcile his comment that appellant had been permanent and stationary since December, 2001 with a right arm lifting restriction of two pounds with any discussion as to when or how appellant's condition changed such that he was precluded from performing the job when offered in November 2002. In the prior appeal, the Board noted that the restrictions were set by Dr. Wong. Dr. Sharma did not address the reports of Dr. Wong to explain why he was changing his mind four years after the fact.

In a September 8, 2006 report, Dr. Sharma referenced his April 14, 2006 comments, again noting that appellant was followed at a different Kaiser Permanente facility. He described the job as involving insertion of a piece of paper of less than one ounce into a date stamp machine several times a day. Dr. Sharma stated that this involved repetitive motion and that "[appellant] did not improve to the extent that he could do any range of motion of the shoulder." This explanation by him is not well rationalized. Dr. Sharma does not report on any physical examination of appellant or otherwise explain what findings he was relying on in 2006 to conclude that appellant was not capable of any range of motion of the shoulder in 2002. He did not attempt to explain the inherent inconsistency between his previous statements that appellant was permanent and stationary as of December 2001 with a two-pound lifting restriction, with the job requirement that appellant insert a one ounce piece of paper into a machine located at a height that did not require overhead lifting. Again, there is no indication that the opinion was based on any examination of appellant or a discussion of the medical opinion from Dr. Wong, who provided the work restriction with which Dr. Sharma previously agreed. There was no attempt to reconcile Dr. Sharma's current conclusion with the evidence contemporaneous to the time of the job offer and appellant's refusal. His reports contain, at best, contradictory opinions regarding appellant's employability. For these reasons, the Board finds that the medical evidence contemporaneous with the 2002 job offer is entitled to greater probative value.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for against compensation, either under its own authority or on the application of a claimant.[6] Section 10.608(a) of the Office's implementing federal regulations provides that timely requests for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of the standards described in section 10.606(b)(2).[7] This section provides that the application for

[6] 5 U.S.C. § 8128(a). *See Freddie Mosley*, 54 ECAB 255 (2002).

[7] 20 C.F.R. § 10.608(a).

reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (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 Office.[8] Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[9]

ANALYSIS -- ISSUE 2

In support of his February 16, 2007 reconsideration request, appellant noted that he had filed a grievance against Dr. Sharma and submitted an undated report from the physician, who reiterated his prior statements. He did not allege or demonstrate that the Office erroneously applied or interpreted a point of law or advance a relevant legal argument not previously considered by the Office. The report of Dr. Sharma noted his previous letters of April and September 2006 addressing appellant's incapacity to perform the duties of the suitable work job offer and his present treatment by Dr. Wang. The Board notes that this evidence is duplicative of the physician's April and September 2006 reports and stated conclusion. It is well established that evidence which repeats or duplicates that already of record and considered by the Office does not constitute a basis for reopening a claim for further merit review.[10] The opinion provided in Dr. Sharma's undated report addresses the same material as that previously considered by the Office. Appellant did not submit evidence sufficient to warrant further merit review of his claim.

CONCLUSION

The Board finds that appellant did not establish that he was unable to perform the duties of the 2002 suitable work job offer; therefore, he has not established entitlement to compensation after February 23, 2003. The Office properly determined that appellant was not entitled to further merit review of his claim.

[8] 20 C.F.R. § 10.606(b).

[9] 20 C.F.R. § 10.608(b).

[10] *See Edward W. Malaniak*, 51 ECAB 279 (2000).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2007 and November 29 and June 28, 2006 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: April 28, 2008
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