United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	**Docket No. 07-1821**
	)	**Issued: February 15, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Detroit, MI, Employer	)	

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

Oral Argument January 10, 2008

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 28, 2007 appellant timely appealed the April 4, 2007 nonmerit decision of the Office of Workers' Compensation Programs which denied merit review and a December 21, 2006 decision denying his claim for recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.[1]

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability on March 29, 2006 causally related to his December 14, 2001 employment injury; and (2) whether the Office properly declined to reopen his case for merit review under 5 U.S.C. § 8128(a).

[1] The record on appeal includes additional medical evidence received after the Office issued its April 4, 2007 decision. The Board cannot consider evidence for the first time on appeal. The review of a case shall be limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 10.501.2(c) (2007).

FACTUAL HISTORY

Appellant, a 33-year-old mail processor, injured his lower back on December 14, 2001 when he tripped and fell at work. The Office accepted the claim for back contusion and lumbar radiculopathy.[2] Appellant was off work for approximately four and a half months following his injury. On April 29, 2002 he returned to work in a limited-duty capacity and worked through mid July 2002. Appellant stopped work entirely on July 31, 2002 and filed a claim for recurrence of disability.[3] The Office accepted his claim and paid appropriate wage-loss compensation.

On December 27, 2004 appellant returned to work in a part-time, limited-duty capacity, working four hours a day as an outbound dispatch announcer.[4] The duties entailed announcing via intercom upcoming dispatches and then verifying that the mail was dispatched as scheduled. The work was primarily sedentary, but involved some limited walking in order to visually confirm the outbound dispatches. The limited-duty assignment was consistent with the November 16, 2004 physical limitations imposed by his treating physician, Dr. Myron M. LaBan, a Board-certified physiatrist.[5] On November 14, 2005 Dr. LaBan advised that appellant could work up to seven hours a day, while maintaining the previous restrictions.

On March 28, 2006 appellant filed a claim for recurrence of disability. Dr. LaBan excused appellant from work for three weeks beginning March 29, 2006 because of recurrent low back and leg pain. On April 18, 2006 he extended the nowork restriction to three months. Dr. LaBan reported that appellant had a low grade spinal stenosis associated with moderate multilevel degenerative disease. He told appellant that he did not believe he would ever be able to return to labor. Dr. LaBan explained that because of appellant's markedly degenerative back, performing work that involved repetitive stooping, bending and lifting would only serve to aggravate what was now a significant symptomatic problem.

On May 11, 2006 the Office asked Dr. LaBan to submit a report explaining how appellant's employment-related condition changed such that he was no longer capable of performing his limited-duty job as an outbound dispatch announcer.

In a report dated May 19, 2006, Dr. LaBan stated that appellant had a severely degenerative back and he remained severely compromised with both moderate to severe

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[2] A February 4, 2002 lumbar magnetic resonance imaging (MRI) scan showed disc abnormalities at L4-5 and L5-S1, with disc herniations. There was also evidence of "degeneraton" at the L5-S1 level. Appellant was 27-years-old at the time. To date, the Office has not accepted appellant's multilevel lumbar degenerative disc disease, disc protrusions and lumbar spinal stenosis as being employment related.

[3] Appellant's work stoppage was precipitated by the employing establishment's July 16, 2002 decision to effectively withdraw light-duty work by ordering him to return to his regular, full-time duties.

[4] The Office removed appellant from the periodic compensation rolls effective December 28, 2004.

[5] Appellant's restrictions included 20 minutes of intermittent sitting and standing, unlimited walking, no reaching or reaching above shoulder, no twisting, limited repetitive wrist and elbow movements, limited pushing and pulling, no lifting or squatting, occasional kneeling and no climbing.

multilevel degenerative disease and a low grade lumbar spinal stenosis. He noted that the restrictions he imposed on April 18, 2006 remained in force.

By decision dated June 20, 2006, the Office denied appellant's recurrence claim.

Appellant subsequently requested an oral hearing which was held on October 6, 2006. In a July 18, 2006 report, Dr. LaBan noted that appellant continued to complain of low back and leg pain, associated with the degenerative disease and spinal stenosis. Dr. LaBan stated that appellant's normal routine at work involved lifting heavy tubs of mail which appellant felt he could not do. Appellant reportedly made an effort to return to work to do his regular job or lighter jobs and found that he was unable to do it without pain. Dr. Laban noted that appellant believed he could not handle the job at the present time and, therefore, he asked that appellant remain off work for another three to four weeks. On August 29, 2006 Dr. LaBan excused appellant from work for the next three months. In an October 9, 2006 treatment note, Dr. LaBan indicated that appellant had significant lumbar degenerative disc disease, with associated early spinal stenosis. He reported continuing discomfort on the left side as well as the right side. Dr. LaBan indicated that surgery was not an option and that appellant would be scheduled for epidurals.

On October 27, 2006 appellant consulted with Dr. Marc I. Wittenberg, a Board-certified anesthesiologist specializing in pain medicine. Dr. Wittenberg diagnosed lumbar degenerative disc disease and administered a lumbar epidural steroid.

By decision dated December 21, 2006, the hearing representative affirmed the June 20, 2006 decision.

Appellant requested reconsideration on March 16, 2007. He submitted a January 5, 2007 report from Dr. LaBan who noted that appellant returned with continuing recurrent low back pain associated with his on-the-job injury superimposed on a back with spinal stenosis. Dr. LaBan explained that a normal healthy back would be able to tolerate the trauma of the injury and hopefully the pain would dissipate within a reasonable period of time, but with appellant's underlying spinal stenosis, the anatomical change would be a provocative and recurrent source of low back pain. Dr. LaBan stated that as a practical matter, appellant had to live within his tolerance now and for the foreseeable future and perhaps for the rest of his life. He indicated that the combination of the on-the-job injury and the structural changes that appellant was living with would create for him a potential recurrent source of pain. Dr. LaBan also provided a March 15, 2007 work release. He indicated that appellant could return to work on March 19, 2007, working four hours per day for two weeks, with limited work restrictions as before.

By decision dated April 4, 2007, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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

injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[6] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[7] Moreover, when the claimed recurrence of disability follows a return to light-duty work, the employee may satisfy his burden of proof by showing a change in the nature and extent of the injury-related condition such that he was no longer able to perform the light-duty assignment.[8]

Where an employee claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing that the recurrence of disability is causally related to the original injury.[9] This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.[10] The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[11]

ANALYSIS -- ISSUE 1

Appellant has not alleged that his claimed recurrence of disability was the result of a change in the nature and extent of his light-duty assignment. There is no evidence that the employing establishment either withdrew the light-duty assignment or otherwise altered appellant's job requirements prior to his March 29, 2006 work stoppage. Therefore, he must establish a change in the nature and extent of his employment-related condition.[12]

At the January 10, 2008 oral argument, appellant advised the Board that he returned to work on March 19, 2007 and, therefore, he was claiming wage-loss compensation due to a recurrence of disability for the period March 29, 2006 to March 18, 2007. However, the medical evidence of record does not establish that appellant was disabled as a result of either of his accepted conditions. The only conditions the Office has accepted as employment related are back contusion and lumbar radiculopathy. Dr. LaBan's various reports concerning appellant's ongoing back and leg pain clearly attribute the pain and appellant's inability to work to

[6] 20 C.F.R. § 10.5(x).

[7] *Id.*

[8] *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

[9] 20 C.F.R. § 10.104(b); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Carmen Gould*, 50 ECAB 504 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[10] *See Helen K. Holt, supra* note 9.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

[12] *Theresa L. Andrews, supra* note 8.

degenerative disc disease and lumbar spinal stenosis. As neither condition has been accepted as being causally related to the December 14, 2001 employment injury, appellant has not established that he sustained a recurrence of disability beginning March 29, 2006.

Dr. LaBan's reports are of limited probative value because they do not reflect an understanding of appellant's particular light-duty assignment as an outbound dispatch announcer. Appellant performed these duties for approximately 15 months prior to his March 29, 2006 work stoppage. While Dr. LaBan found him totally disabled, none of his reports described the specific duties appellant had been performing during the months preceding his March 29, 2006 work stoppage. Dr. LaBan did not explain why and how appellant's accepted conditions had changed to the point that he was no longer capable of performing the limited-duty assignment of outbound dispatch announcer. The reports contemporaneous to appellant's disability on March 29, 2006 attributed his symptoms to spinal stenosis and degenerative disease.

While appellant stopped work on the advice of Dr. LaBan, the record indicates that the March 29, 2006 work stoppage was the result of his preexisting lumbar degenerative disc disease and spinal stenosis and not because of his accepted conditions. As such, appellant has failed to establish an employment-related recurrence of disability. The Office, therefore, properly denied his claim.

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.[13] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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.[14] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[15]

ANALYSIS -- ISSUE 2

Appellant's March 16, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[16]

[13] 5 U.S.C. § 8128(a) (2000).

[14] 20 C.F.R. § 10.606(b)(2).

[15] 20 C.F.R. § 10.608(b).

[16] 20 C.F.R. § 10.606(b)(2)(i) and (ii).

Appellant also failed to satisfy the third requirement under section 10.606(b)(2). He did not submit any relevant and pertinent new evidence with his March 16, 2007 request for reconsideration. Although the January 5 and March 15, 2007 reports from Dr. LaBan were not previously of record, the fact that they are new is not by itself a sufficient basis to reopen the record for merit review. The evidence must also be relevant and pertinent.

The March 15, 2007 return to work certificate did not address the relevant issue of why appellant had been off work since March 29, 2006. It did not identify the specific condition that prevented him from performing his regular duties as a mail processor. Dr. LaBan merely noted that appellant could return to work on March 19, 2007, working four hours per day for two weeks, with limited work restrictions as before. He did not address the relevant issue of why appellant stopped work on March 29, 2006. As such, this evidence is insufficient to warrant reopening the record.

Dr. LaBan's January 5, 2007 report is also insufficient to warrant merit review. This report is essentially duplicative of prior reports from Dr. LaBan relating appellant's ongoing back and leg complaints to his lumbar degenerative disease.[17] He described appellant's "underlying spinal stenosis" as a "provocative and recurrent source of low back pain." Dr. LaBan did not address why appellant's accepted injury of December 14, 2001 precluded him from performing the limited-duty assignment of outbound dispatch announcer on or after March 29, 2006. This latest report is, therefore, insufficient to warrant reopening the record for merit review. Accordingly, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[18]

Because appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the March 16, 2007 request for reconsideration.

CONCLUSION

Appellant has not established that he sustained a recurrence of disability on March 29, 2006 causally related to his December 14, 2001 employment injury. The Board further finds that the Office properly denied appellant's March 16, 2007 request for a review of the merits of his claim.

[17] Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim. *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

[18] 20 C.F.R. § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2007 and December 21, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 15, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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