United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	**Docket No. 08-237**
	)	**Issued: May 14, 2008**
DEPARTMENT OF TRANSPORTATION, TRANSPORTATION SECURITY ADMINISTRATION, Syracuse, NY, 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
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 31, 2007 appellant filed a timely appeal from a January 23, 2007 decision of the Office of Workers' Compensation Programs that denied his claim for a recurrence of disability. He also requested review of a July 24, 2007 nonmerit decision that denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues.

ISSUES

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a recurrence of disability on August 17, 2006 causally related to his accepted employment injury; and (2) whether the Office properly denied appellant's request for reconsideration without conducting a merit review.

FACTUAL HISTORY

On December 15, 2004 appellant, then a 42-year-old transportation security screener, filed a traumatic injury claim stating that he struck his right knee on the corner edge of a wall while moving a bag on December 14, 2004. He did not initially stop work. In a February 25, 2005 report, Dr. Glenn Axelrod, a Board-certified orthopedic surgeon, diagnosed right knee pain and medial meniscus tear. The Office accepted appellant's claim for right medial meniscus tear and authorized a right knee arthroscopy.

Appellant stopped work on February 26, 2005 and, on May 24, 2005, underwent a right knee diagnostic arthroscopy, partial medial meniscectomy and chondroplasty of the medial femoral condyle. Dr. Axelrod performed the procedure and noted a diagnosis of right medial meniscus tear with chondrosis of the medial femoral condyle. In a June 20 2005 report, he released appellant to return to regular duty as of June 27, 2005. Appellant returned to full-time regular duty on June 26, 2005. In an October 7, 2005 report, Dr. Axelrod advised that appellant reported that he still experienced some right knee pain but that it was "no where near what it was before the surgery." On examination, appellant had full range of motion with very mild medial tenderness and no instability. Dr. Axelord noted an impression of mild right knee pain probably secondary to some chondrosis of the medial femoral condyle. He recommended that appellant take anti-inflammatory medication as needed.

An August 28, 2006 physical therapy note indicated that appellant reported helping a friend move a television "over the weekend." The report noted that appellant's son assisted him, but that appellant's knee was "achy" and he "felt it" afterward. An August 30, 2006 follow-up physical therapy report noted that appellant reported soreness and diagnosed right knee pain and fatigue. In a September 1, 2006 note, the physical therapist indicated that appellant reported improvement.

In an August 24, 2006 report, Dr. Axelrod noted appellant's complaints of right knee pain and aching in the medial region. He stated that appellant "has had this aching medially all along." On physical examination, Dr. Axelrod noted no effusion, soft tissue swelling or instability, but found some "very mild tenderness medially, none elsewhere." He also noted that x-ray testing performed on August 17, 2006 revealed no significant abnormalities. Dr. Axelrod diagnosed right knee pain and medial compartment chondrosis. He noted that appellant inquired into whether he should be working overtime, but would like to work overtime because his wife was expecting another baby.

On August 31, 2006 appellant filed a recurrence of disability claim. He stated that his recurrence of disability occurred on August 17, 2006 and that he stopped work on August 18, 2006 and returned on September 3, 2006. Appellant explained that he had continuing pain since returning to work and that he had never completely recovered, noting that his knee pain often worsened over the course of a workweek. He attributed his claimed recurrence of disability to working overtime for nine days straight, for a total of 48 hours. Appellant provided an August 31, 2006 attending physician's report from Ruth McDonald, a physician's assistant, who diagnosed right knee pain. She indicated that he could resume regular work effective September 3, 2006. Appellant also provided an August 17, 2006 physical therapy prescription from Ms. McDonald.

On December 1, 2006 the Office advised appellant of the evidence needed to establish his claim for a recurrence of disability. He did not respond.

By decision dated January 23, 2007, the Office denied appellant's recurrence of disability claim on the grounds that the evidence provided did not establish that his claimed August 17, 2006 recurrence of disability was causally related to his accepted condition.

Appellant requested reconsideration and provided additional evidence, including an August 17, 2006 physical therapy progress note. In an August 18, 2006 x-ray report, Dr. Gerard McCrohan, a Board-certified diagnostic radiologist, noted there was no abnormality of the right knee except for a "cystic appearing lesion" in the posterior medial distal femur which was not significantly changed since a December 2004 x-ray.

In a February 14, 2007 report, Dr. Joseph P. Augustine, a Board-certified family practitioner, noted that appellant was seen in his office on August 17, 2006. He advised that Ms. McDonald, a physician's assistant in the practice, diagnosed right knee pain. Dr. Augustine stated that appellant reported increased right knee pain after his workload increased to 48 hours a week and working nine days straight. He stated: "Based on reviewing [appellant's] chart and the fact that he had a meniscal tear in his right knee in the past, working longer hours for a persistent time of nine days is consistent with the type of pain and aggravation he suffered at that time and thus any disability noted with regard to this matter I feel is medically justified."

By decision dated July 24, 2007, the Office denied appellant's request for reconsideration without conducting a merit review on the grounds that he had failed to submit new and relevant arguments or evidence sufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 10.5(x) of the Office's regulations provides, in pertinent part:

> "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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."[1]

The Board has held that in order to establish a claim for a recurrence of disability, appellant must establish that he suffered a spontaneous material change in the employment-related condition without an intervening injury.[2] Appellant has the burden of establishing that he sustained a recurrence of a medical condition[3] that is causally related to his accepted

[1] 20 C.F.R. § 10.5(x) (2002).

[2] *Carlos A. Marrero*, 50 ECAB 117 (1998).

[3] Recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a "need for further medical treatment after release from treatment," nor is an examination without treatment. 20 C.F.R. § 10.5(y) (2002).

employment injury. To meet his burden, appellant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[4] Where no such rationale is present, the medical evidence is of diminished probative value.[5]

ANALYSIS -- ISSUE 1

Appellant's claim was accepted by the Office for a right medial meniscus tear for which he underwent surgery in 2006. Therefore, he returned for regular full-time duty. The Board finds that appellant has not met his burden of proof to establish that his disability commencing August 17, 2006 was causally related to his accepted right knee condition.[6]

Appellant submitted an August 24, 2006 report from Dr. Axelrod, who noted that appellant experienced an aching sensation in the medial aspect of his right knee. He found mild tenderness in the medial region, but no swelling, effusion or instability. Dr. Axelrod did not address whether appellant's disability beginning August 18, 2006 was caused or aggravated by his accepted right knee injury or explain a spontaneous change in his medical condition resulting from the original injury. The Board finds that Dr. Axelrod's August 24, 2006 report is insufficient to establish a causal relationship between appellant's claimed August 17, 2006 recurrence of disability and his accepted right medial meniscus tear. The Board has held that a physician's opinion, which does not address causal relationship is of diminished probative value.[7] Dr. Axelrod's August 24, 2006 report failed to offer an opinion on causation and is insufficient to establish that appellant sustained a recurrence of disability causally related to his accepted right medial meniscus tear.

Appellant also provided the August 17 and 31, 2006 reports of Ms. McDonald, a physician's assistant. The Board notes that causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence from a physician.[8]

[4] *Ronald A. Eldridge*, 53 ECAB 218 (2001).

[5] *Albert C. Brown*, 52 ECAB 152 (2000).

[6] On appeal, appellant asserts that his physical therapist misreported statements that he helped a friend move a television. This misstatement, however, is not dispositive since, as noted in the text of the decision, the claim is deficient because the medical evidence does not sufficiently explain why the claimed recurrence of disability was caused by the December 14, 2004 employment injury.

[7] *See A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[8] *Paul E. Thams*, 56 ECAB 503, 509 (2005).

A physician's assistant is not defined as a physician under the Federal Employees' Compensation Act.[9] As such, Ms. McDonald's report is not probative on the issue of causal relationship.[10] This evidence does not establish a causal relationship between appellant's claimed recurrence of disability and his accepted right medial meniscus tear. Therefore, the Office properly denied his claim.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128 of the Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulations provides guidance for the Office in using this discretion.[11] The regulations provide that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(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]."[12]

Section 10.608(b) provides that when an application for review of the merits of a claim 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.[13] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[14]

[9] *See* 5 U.S.C. § 8101(2).

[10] *See George H. Clark*, 56 ECAB 162, 167 (2004) (a physician's assistant is not a physician as defined under the Act and any report from such individual does not constitute competent medical evidence).

[11] 20 C.F.R. § 10.606(b)(2) (1999).

[12] *Id.*

[13] *Id*. at § 10.608(b) (1999).

[14] *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS -- ISSUE 2

The Board finds that the Office improperly denied appellant's request for reconsideration without conducting a merit review. Appellant did not assert that the Office erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument. However, he did provide new and relevant medical evidence.

In a February 17, 2007 report, Dr. Augustine supported causal relationship, stating: "Based on reviewing [appellant's] chart and the fact that he had a meniscal tear in his right knee in the past, working longer hours for a persistent time of nine days is consistent with the type of pain and aggravation he suffered at that time and thus any disability noted with regard to this matter I feel is medically justified." The Board finds that Dr. Augustine's report is new and is relevant, as it addressed causal relationship relating appellant's current knee symptoms to his prior accepted meniscal injury and his work duties. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[15]

Therefore, the Office improperly denied appellant's request for reconsideration without conducting a merit review, as he met the third regulatory criterion by submitting new and relevant medical evidence. On remand, the Office should conduct a merit review of appellant's claim. After such further development as is deemed necessary, the Office shall issue an appropriate decision on the merits of the case.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability in the performance of duty. The Board also finds that the Office improperly denied appellant's request for reconsideration without conducting a merit review.

[15] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2007 decision of the Office of Workers' Compensation Programs is affirmed and the July 24, 2007 decision of the Office is set aside and the case remanded for further action consistent with this decision.

Issued: May 14, 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