United States Department of Labor
Employees' Compensation Appeals Board

STANLEY H. DUNIHUE, JR., Appellant	)	
and	)	**Docket No. 05-1418**
	)	**Issued: September 16, 2005**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Denver, CO, Employer	)	

Appearances:
Stanley H. Dunihue, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 25, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated March 15, 2005, which found he had not established an injury in the performance of duty and a nonmerit decision dated May 20, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on December 28, 2004; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 30, 2004 appellant, a 56-year-old city carrier, filed a traumatic injury claim alleging that he twisted his ankle, lower back, neck and struck his shoulder elbow, back and head when he fell to the ground on December 28, 2004 while entering a vehicle. In an attached statement, appellant noted, "as I lifted my right leg, my left ankle twisted as my left ankle gave out and I fell to the ground." He noted as he "fell to the ground my elbow struck the street and

the curb my middle back, snapping my head back striking the ground." Appellant related since a minor stroke his "leg would not respond and things would fall from my hand."

In December 30, 2004 physician activity status report, Dr. Ann T. Dickson diagnosed lumbar strain and ankle sprain.

In a December 30, 2004 report, Dr. Dickson noted that appellant fell when his legs gave out on him while he was getting into his vehicle on December 28, 2004. With regard to his leg giving out, she noted that appellant reported:

> "[T]hat this has been a constant problem for him since he had a stroke about three [to] four months ago. He initially had substantial loss of balance, but had two home physical therapy sessions and recovered substantially…. He continues to have paresthesias on the entire left side of his body from the head to the toes, but has minimal functional loss. He feels that he is weaker on the left side than on the right, though he usually is able to move his arms and legs at will."

Dr. Dickson diagnosed lumbar strain and left ankle sprain. As to the cause of appellant's fall, she attributed it "to his preexisting stroke, and would not have occurred if that disability was not present."

In a December 30, 2004 duty status report (Form CA-17), accompanying the medical narrative of the same date, Dr. Dickson diagnosed left ankle sprain and right lumbar strain. She noted that appellant sustained an injury on December 28, 2004 when his "legs gave out and [he] fell." Dr. Dickson stated that this is "not a work-related injury" and that appellant may need restrictions "due to nonwork-related conditions."

The employing establishment controverted the claim on the form stating that the injury was not employment related as it was due to nonemployment-related conditions.

In a decision dated March 15, 2005, the Office denied appellant's claim on the grounds that his fall was due to a preexisting condition and therefore an idiopathic fall. Therefore, his injury was not sustained in the performance of duty.

In a letter dated May 2, 2005, appellant requested reconsideration. Appellant contended that he twisted his ankle while trying to enter the vehicle "and when the additional pressure was applied to my knee by my full weight my leg gave out because of the ankle and weight applied." He submitted a November 18, 1997 medical statement from the Colorado Department of Labor and Employment, an October 19, 1997 military retirement physical, a copy of a July 19, 2002 traumatic injury claim form, an October 25, 1996 report releasing appellant to light duty by Dr. Michael J. Willig, an August 29, 2004 medical status report and a January 2, 1986 "Addendum to Medical Board" discussing appellant's allergies.

In a nonmerit decision dated May 20, 2005, the Office denied appellant's request for request for reconsideration.[1]

LEGAL PRECEDENT -- ISSUE 1

It is a well-settled principle of workers' compensation law and the Board has so held, that an injury resulting from an idiopathic fall -- where a personal, nonoccupational pathology causes an employee to collapse and suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of employment -- is not within the coverage of the Federal Employees' Compensation Act.[2] Such an injury does not arise out of a risk connected with or in the course of employment and it, therefore, is not compensable.[3] But when the fall is unexplained and, therefore, attributable neither to the employment nor to the claimant personally, the risk is neutral, and an injury arising in the course of employment from neutral risk is compensable.[4] The question of causal relationship is a medical one and must be resolved by probative medical evidence.[5] In evaluating whether the medical evidence is sufficient to meet the Office's burden of proof to establish that the claimant's fall was due to an idiopathic condition rather than an employment exposure, the Board has considered whether there is evidence of a preexisting condition,[6] the clarity of the medical evidence attributing the fall to the idiopathic condition and the extent of the medical evidence attributing the fall to the idiopathic condition.[7] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, neither can such opinion be speculative or equivocal. The opinion should be one of reasonable medical certainty.

[1] The Board notes that subsequent to the Office's May 20, 2005 nonmerit decision appellant requested the Office reactivate his claim number 12-20012082 for treatment for an apparent slip and fall on ice in the performance of duty in October 2002 resulting in neck and shoulder injuries. Appellant also submitted additional medical evidence. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *see Michael A. Grossman*, 51 ECAB 673 (2000); *Kimberly Kelly*, 51 ECAB 582 (2000); *Caroline Thomas*, 51 ECAB 451 (2000); *Sherry L. McFall*, 51 ECAB 436 (2000).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Martha G. List*, 26 ECAB 200 (1974); *Gertrude E. Evans*, 26 ECAB 195 (1974); *Rebecca C. Daily*, 9 ECAB 255 (1956); *see also* A. Larson, *The Law of Workers' Compensation* §§ 9, 9.01 (2000).

[4] *Margreate Lublin*, 44 ECAB 945, 958 (1993).

[5] *Robert J. Choate*, 39 ECAB 103 (1987); *John D. Williams*, 37 ECAB 238 (1985).

[6] *Karen K. Levene*, 54 ECAB ___ (Docket No. 02-25, issued July 2, 2003) (which the Board noted that the claimant had a diagnosis of seizure disorder of seven years' duration, and that her physician attributed her fall to a seizure episode).

[7] *Santosh C. Verma*, 53 ECAB __ (Docket No. 00-1512, issued December 12, 2001) (which the Board noted that both of the physicians included in the record attributed the claimant's fall to stress, anxiety and depression).

ANALYSIS -- ISSUE 1

In this case, the medical evidence establishes that appellant's fall on December 28, 2004 was due to a personal, nonoccupational pathology. In her December 30, 2004 narrative report, Dr. Dickson opined that appellant's fall was due "to his preexisting stroke, and would not have occurred if that disability was not present." In the CA-17 of the same date, the doctor diagnosed left ankle sprain and lumbar strain resulting from his legs having given out, resulting in a fall on December 28, 2004. She concluded therein that the injury was not work related.

Dr. Dickson provided a clear opinion that appellant's fall was due to his preexisting stroke. She also noted that appellant had a history of his leg giving out. Appellant stated that "I lifted my right leg, my left ankle twisted as my left ankle gave out and I fell to the ground." Dr. Dickson's definite and clear report establishes that appellant's fall was due to his idiopathic condition of a preexisting stroke. She does not support appellant's argument that his fall was unexplained. Consequently, this is not a case in which the medical evidence does not provide any explanation for appellant's fall and the fall is therefore unexplained.[8] The Board finds that the medical evidence establishes that appellant has an idiopathic condition, a preexisting stroke, and Dr. Dickson's December 30, 2004 report establishes with a reasonable degree of medical certainty this condition caused his fall on December 28, 2004.

There is also no evidence of any intervening work condition that contributed to appellant's incident or injury. Appellant stated that he fell directly on the ground without striking anything else in his descent. As appellant has not established that his fall was caused by employment factors and there is no evidence that he struck his body against an object, the fall is considered idiopathic and noncompensable.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[9] vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[10]

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal

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[8] *Compare Steven S. Saleh*, 55 ECAB ___(Docket No. 03-2232, issued December 12, 2003) (which the medical evidence offered no clear diagnosis of a specific condition and no medical attribution of the fall to an idiopathic condition); *Marie G. Marello*, 52 ECAB 363, 366-67 (2001) (which the medical evidence noted that at times there was no clear etiology for syncope); *Janice H. Sligh*, Docket No. 03-1621 (issued March 31, 2004); *Carolyn O'Neal*, Docket No. 03-2064 (issued December 16, 2003) and *Joey W. Jessup*, Docket No. 02-2126 (issued May 12, 2003) (which there was no medical evidence of an idiopathic condition).

[9] 5 U.S.C. § 8128(a) ("[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[10] *Jeffrey M. Sagrecy*, 55 ECAB ___ (Docket No. 04-1189, issued September 28, 2004); *Veletta C. Coleman*, 48 ECAB 367 (1997).

argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[11] 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.[12] 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.[13]

ANALYSIS -- ISSUE 2

Appellant's May 2, 2005 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant 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).[14] Appellant also failed to satisfy the third requirement under section 10.606(b)(2). He submitted an November 18, 1997 medical statement from the Colorado Department of Labor and Employment, an October 19, 1997 military retirement physical, a copy of an July 19, 2002 traumatic injury claim form, an October 25, 1996 report releasing appellant to light duty by Dr. Willig, an August 29, 2004 medical status report and a January 6, 1986 "Addendum to Medical Board" discussing appellant's allergic reactions. None of this evidence is relevant or pertinent to the issue at hand, *i.e.*, whether appellant sustained an injury in the performance of duty on December 28, 2004. Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office and, therefore, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[15] 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 May 2, 2004 request for reconsideration

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty on December 28, 2004. The Board further finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(2).

[12] 20 C.F.R. § 10.608(b).

[13] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[14] 20 C.F.R. §§ 10.606(b)(2)(i) and (ii).

[15] 20 C.F.R. § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 20 and March 15, 2005 are affirmed.

Issued: September 16, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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