

**United States Department of Labor
Employees' Compensation Appeals Board**

L.P., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
PUERTO RICO NATIONAL CEMETERY,
Bayamón, PR, Employer**

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**Docket No. 07-832
Issued: July 16, 2007**

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 February 2, 2007 appellant filed a timely appeal of the April 5 and December 21, 2006 decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office properly denied further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 10, 2006 appellant, a 53-year-old cemetery caretaker, filed an occupational disease claim alleging that he sustained an unspecified employment-related condition on or about

July 19, 2004.¹ No medical evidence accompanied his claim. The Office subsequently advised appellant of the need for both factual and medical information regarding his claimed condition and the circumstances that gave rise to the alleged employment injury.

In a December 29, 2005 statement, appellant indicated that he had been employed as a cemetery caretaker since March 10, 2001. His duties included “lowering or raising, handling and driving heavy equipment through uneven or rough terrain.” After a year of performing these duties, appellant began to experience pain in his neck and lower back. He also reported numbness and an itching sensation in his arms from the shoulders down to his fingertips. Appellant initially believed his condition was due to germs, bacteria or some sort of disease he was exposed to during the interment process. However, he later saw a neurologist who diagnosed a cervical problem and recommended surgery. Appellant also stated that his condition worsened as he continued to work.

A September 29, 2003 x-ray of the cervical spine revealed osteopenia and cervical spondylosis. Appellant also submitted a July 23, 2005 cervical magnetic resonance imaging (MRI) scan that showed spondylosis at C3-4, C4-5 and C6-7, with foraminal stenosis. The MRI scan also revealed narrowing of the central canal at C4-5, with a possible central disc extrusion and focal compressive myelopathy at C4-5.

Dr. Damaris Torres-Berrios, a Board-certified neurologist, examined appellant on August 23, 2005 and diagnosed cervical radiculopathy. She noted that a recent MRI scan showed evidence of foraminal stenosis and C4-5 compression. Appellant underwent a bone density screening on September 9, 2005 which revealed mild osteopenia in the spine and hips. A similar study of the upper extremities showed severe osteopenia of the proximal and distal radius and ulna. There was also evidence of mild osteopenia on the distal portions. On September 28, 2005 appellant had an upper extremity electromyogram and nerve conduction (EMG/NVC) velocity study, the results of which were normal.²

Dr. Victor M. Rios-Lebron, a Board-certified neurosurgeon, saw appellant on October 18, 2005 and diagnosed cervical herniated disc. He prescribed a Philadelphia collar for appellant’s neck.

In a report dated January 14, 2006, Dr. Torres indicated that appellant had been a patient since July 19, 2005, when he presented with complaints of upper extremity pruritus, paresthesia and dysesthesia, left arm greater than right. On physical examination there was evidence of decreased sensation to pinprick at left deltoid area. Also, there was a positive Tinel’s sign bilaterally. Additionally, Dr. Torres noted an inability to stand on heels and left positive Hoffman’s sign. Appellant’s cervical MRI scan and EMG/NCV study showed symptoms and signs corresponding to a multilevel cervical spondylosis with myelopathy that was worse at

¹ The Form CA-2 referenced an attached document for specific details, however, this document is not included in the record.

² The reported history was that appellant complained of hand and arm paresthesia and pain. Although the EMG/NCV results were normal, the study did not exclude the possibility of sensory branch involvement and the neurologist who interpreted the results indicated that appellant’s symptoms suggested a central neuropathic pain secondary to compressive myelopathy.

C4-5. Dr. Torres further indicated that appellant had been referred to a neurosurgeon who recommended surgery. Appellant was prescribed Neurontin to help with his symptoms, but use of this pain medication did not result in any significant improvement. Because of his condition, Dr. Torres recommended that appellant not perform work as a cemetery caretaker.

In a decision dated April 5, 2006, the Office denied appellant's claim. Appellant did not establish that his diagnosed cervical condition was causally related to his employment as a cemetery caretaker.

The Office later received an August 10, 2006 duty status report from Dr. Torres which included a diagnosis of cervical myelopathy, with symptoms dating back to July 19, 2005. According to Dr. Torres, appellant remained totally disabled. In a September 19, 2006 form report she identified appellant's work restrictions.

Appellant requested reconsideration on September 22, 2006. He submitted an additional statement dated September 21, 2006, wherein he explained that his condition had worsened. Appellant described the various physical activities associated with his job as a cemetery caretaker and noted that he had recently been assigned light-duty work. He also stated that he recently saw a physiatrist who advised him that his condition would not change with medication or therapy and that he must either continue light-duty work or undergo surgery as previously recommended. Additionally, appellant submitted an August 22, 2006 prescription from Dr. Rios for another Philadelphia collar. The prescription included a diagnosis of cervical stenosis. The Office also received documentation regarding appellant's September 20, 2006 light-duty assignment. Dr. Torres provided a November 9, 2006 report regarding appellant's continuing work restrictions.

By decision dated December 21, 2006, the Office denied appellant's September 22, 2006 request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁴ An employee may establish that an injury occurred in the performance of

³ 5 U.S.C. § 8101 *et seq* (2000).

⁴ 20 C.F.R. § 10.115(e), (f) (2006); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

duty as alleged but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.⁵

To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁶

ANALYSIS -- ISSUE 1

While there is medical evidence indicating the presence of a cervical condition, none of the physicians of record have attributed appellant's cervical condition to his employment duties as a cemetery caretaker. Neither Dr. Rios nor Dr. Torres provided explanation of how appellant's cervical condition was caused or aggravated by his employment or otherwise offered an opinion regarding the etiology of this condition. Appellant has failed to establish a causal relationship between his claimed condition and his federal employment. Accordingly, the Office properly denied appellant's January 10, 2006 occupational disease claim.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits.⁷ 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.⁸ 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.⁹

ANALYSIS -- ISSUE 2

Appellant's September 22, 2006 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

⁵ *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁶ *Victor J. Woodhams*, *supra* note 4.

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ 20 C.F.R. § 10.608(b).

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).¹⁰

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 September 22, 2006 request for reconsideration. Although the Office received additional evidence that was not previously of record, none of the new information submitted addressed the relevant question of causal relationship. Because the Office denied the claim based on a failure to establish causal relationship, any evidence submitted on reconsideration must not only be new, but also relevant and pertinent to the issue of causal relationship. The additional information from Dr. Torres and Rios does not address causal relationship. Consequently, although new, this additional evidence does not warrant reopening the record for further merit review. As there was no relevant and pertinent new evidence for the Office to consider, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).¹¹ 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 September 22, 2006 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty. Additionally, the Office properly denied appellant's request for a review of the merits of his claim.

¹⁰ 20 C.F.R. § 10.606(b)(2)(i) and (ii).

¹¹ 20 C.F.R. § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the December 21 and April 5, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 16, 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