United States Department of Labor
Employees' Compensation Appeals Board

THOMAS L. AGEE, Appellant	)	
and	)	**Docket No. 05-335**
	)	**Issued: April 19, 2005**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Vinton, VA, Employer	)	

Appearances:
Thomas L. Agee, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On November 23, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated August 25 and February 18, 2004. The February 18, 2004 decision denied his claim for a December 2, 2003 injury and the August 25, 2004 decision denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established an injury in the performance of duty on December 2, 2003; and (2) whether the Office properly denied appellant's March 10, 2004 reconsideration request without merit review of the claim.

FACTUAL HISTORY

On December 3, 2003 appellant, then a 53-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury on December 2, 2003,

when he slipped and fell while working with a chain saw on a steep embankment, twisting his lower back. A coworker provided a statement on the claim form that on December 2, 2003 appellant told him that he fell twice while using a chain saw. The coworker indicated that he was working away from appellant and did not see him fall. On the reverse of the claim form appellant's supervisor checked a box "yes" that his knowledge of the facts about the injury agreed with the statements of appellant.

By letter dated November 12, 2004, the Office requested additional evidence regarding the claim. In a decision dated February 18, 2004, the Office denied the claim for compensation. The Office found that the evidence was not sufficient to establish either the alleged incident or an injury causally related to the employment incident.

In a letter dated March 10, 2004, appellant requested reconsideration. He submitted a statement that he fell and twisted his low back and right leg while using a chain saw on a steep embankment. With respect to medical evidence, he submitted a form report dated December 3, 2003 with a diagnosis of a lumbosacral strain. The report is not signed and it is not clear who prepared the report. In a note dated December 17, 2003, Dr. Alvis Perry, an anesthesiologist, stated that appellant could return to regular duty on December 22, 2003.

By decision dated August 25, 2004, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that he or she sustained an injury while in the performance of duty.[2] In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally "fact of injury" consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[3]

ANALYSIS -- ISSUE 1

The initial question presented is whether an employment incident occurred as alleged on December 2, 2003. Although the Office found that the evidence was not sufficient to establish the incident, there are no inconsistencies in the factual evidence that cast serious doubt as to whether the incident occurred as alleged.[4] Appellant promptly filed a claim the following day

[1] 5 U.S.C. §§ 8101-8193.

[2] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

[3] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[4] *See Gene A. McCracken*, 46 ECAB 593 (1995), where the claimant did not give prompt notice of injury and gave inconsistent statements regarding the alleged incident.

alleging that he sustained an injury when he fell while on a steep embankment using a chain saw. A witness confirmed that appellant was working on December 2, 2003 and reported falling while working. The Board notes that an employee's statement regarding the occurrence of an employment incident is of great probative value and will stand unless refuted by strong or persuasive evidence.[5] The employing establishment did not contest that an incident occurred as alleged and no contrary evidence was presented. The Board finds that appellant has established an employment incident on December 2, 2003.

To meet his burden of proof in establishing an injury in the performance of duty, appellant must submit medical evidence on causal relationship between a diagnosed injury and the employment incident. The Board has held that medical evidence must be in the form of a reasoned opinion by a qualified physician based on a complete and accurate factual and medical history.[6] In this case appellant did not submit any probative medical evidence with respect to an injury causally related to the December 2, 2003 incident prior to the February 18, 2004 decision. Appellant, therefore, did not meet his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] the implementing regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(1) shows that [the Office] erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by [the Office]; or (3) constitutes relevant and pertinent evidence not previously considered by [the Office]."[8] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[9]

ANALYSIS -- ISSUE 2

On reconsideration appellant submitted a December 3, 2003 report that provided a history of a fall on the previous day and diagnosed a lumbosacral strain. However, this report is of no probative value as it was not signed by a physician and provides no indication that it was completed by a physician. A report may not be considered probative medical evidence unless it can be established that the person completing the report is a "physician" as defined in 5 U.S.C. § 8101(2).[10] The December 3, 2003 report is, therefore, not competent medical evidence and is

[5] *Thelma Rogers*, 42 ECAB 866 (1991).

[6] *Robert J. Krstyen*, 44 ECAB 227, 229 (1992).

[7] 5 U.S.C. § 8128(a) (providing that "[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.)"

[8] 20 C.F.R. § 10.606(b)(2).

[9] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[10] *Merton J. Sills*, 39 ECAB 572, 575 (1988).

not sufficient to require reopening the case for merit review. The December 17, 2003 note from Dr. Perry is not relevant and pertinent to the medical issue presented, as it does not address causal relationship between a diagnosed condition and the employment incident or provide any relevant evidence regarding that issue.

The underlying issue with respect to appellant's claim is a medical one and he did not submit new and relevant evidence on the issue presented. He did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit new evidence relevant and pertinent to the casual relationship issue. Accordingly, the Board finds that the Office properly denied the request for reconsideration without merit review of the claim. It is noted that on appeal appellant submitted additional medical evidence. The Board can review only evidence that was before the Office at the time of the final decisions under review.[11]

CONCLUSION

The Board finds that an employment incident occurred as alleged on December 2, 2003, but appellant did not submit medical evidence to establish an injury causally related to the employment incident. The March 10, 2004 reconsideration request did not meet the requirements of 20 C.F.R. § 10.606(b)(2) and, therefore, the Office properly denied the request without merit review of the claim.

[11] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2004 is modified to reflect that an employment incident occurred as alleged and affirmed as modified. The August 25, 2004 decision is affirmed.

Issued: April 19, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member