

FACTUAL HISTORY

This is the second appeal in this case.¹ By decision dated June 17, 2004, the Board affirmed Office merit decisions dated October 1 and January 23, 2003 that denied appellant's claim for a right leg injury.² The Board's prior decision is incorporated herein by reference.

By letter received by the Office on August 8, 2004, appellant requested reconsideration and submitted additional evidence. In a July 14, 2004 report, Dr. Douglas L. Gamburg, an attending Board-certified orthopedic surgeon, stated that appellant was diagnosed on October 23, 2002 with an interstitial tear of the gastrocnemius muscle which was caused by appellant standing for long periods of time at work.³

By decision dated September 22, 2004, the Office denied modification of its prior decisions denying appellant's claim for a right leg injury.

Appellant requested reconsideration on October 12, 2004 and submitted additional evidence. In an October 7, 2004 report, Dr. Gamburg indicated that his July 14, 2004 report addressed the issue of causal relationship because it stated that appellant's gastrocnemius muscle tear occurred while she was at work.⁴

By decision dated February 23, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant further merit review of her claim.⁵

LEGAL PRECEDENT -- ISSUE 1

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.⁶ Second, the employee must

¹ See Docket No. 04-496 (issued June 17, 2004).

² On December 2, 2002 appellant, then a 58-year-old distribution window clerk, filed a claim alleging that on September 14, 2002 she reached for a drop box and her right leg "snapped."

³ Appellant also submitted medical reports relating to finger and blood pressure conditions. These reports are not relevant to her claim for a right leg injury. She also submitted a medical report concerning her right leg which was previously submitted.

⁴ Appellant also submitted medical reports previously considered by the Office.

⁵ Appellant submitted additional evidence subsequent to the Office decision of February 23, 2005. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal. The Board notes, however, that appellant may submit new evidence to the Office and request reconsideration of her claim.

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

submit medical evidence to establish that the employment incident caused a personal injury.⁷ An employee may establish that the employment incident occurred as alleged but fail to show that her disability or condition relates to the employment incident.

To establish a causal relationship between appellant's condition and any attendant disability claimed and the employment event or incident, she must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes 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. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁸

ANALYSIS -- ISSUE 1

In a July 14, 2004 report, Dr. Gamburg stated that appellant was diagnosed on October 23, 2002 with an interstitial tear of the gastrocnemius muscle which was caused by standing for long periods of time at work. However, appellant alleged that she sustained a traumatic injury on September 14, 2002 when she reached toward a drop box and her leg "snapped." Dr. Gamburg opined that appellant's muscle tear occurred over a period of time due to standing for long periods of time and he did not mention the date appellant alleged the right leg injury occurred, September 14, 2002. As Dr. Gamburg's explanation for the cause of appellant's muscle tear is inconsistent with her description of a right leg traumatic injury and the date that it occurred, this report is not sufficient to establish that appellant sustained a work-related right leg injury on September 14, 2002. Therefore, appellant failed to meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act⁹ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

"The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued."

⁷ *Shirley A. Temple*, 48 ECAB 404 (1997).

⁸ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, *supra* note 7.

⁹ 5 U.S.C. § 8128(a).

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office.¹⁰ When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.¹¹

ANALYSIS -- ISSUE 2

In support of her request for reconsideration, appellant submitted an October 7, 2004 report in which Dr. Gamburg indicated that his July 14, 2004 report addressed the issue of causal relationship because it stated that appellant's gastrocnemius muscle tear occurred while she was at work. However, this evidence is repetitious of his earlier reports which failed to mention the date appellant claimed as the date her right leg injury occurred, September 14, 2002, and he provided insufficient explanation as to the mechanism of injury, how the gastrocnemius muscle tear occurred. This report fails to address the inconsistency in Dr. Gamburg's July 14, 2004 report concerning the manner in which the right leg condition was sustained. As noted, appellant indicated that she sustained a traumatic injury on one particular day. Dr. Gamburg indicated that her condition was an occupational injury sustained over a period of more than one day. Due to these deficiencies, this report does not constitute relevant and pertinent evidence not previously considered by the Office.

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument or submit relevant and pertinent evidence not previously considered by the Office. Therefore, the Office properly denied her claim.

CONCLUSION

The Board finds that appellant failed to establish that she sustained a work-related right leg injury on September 14, 2002. The Board further finds that the Office did not abuse its discretion in denying her request for reconsideration.

¹⁰ 20 C.F.R. § 10.606(b)(2).

¹¹ 20 C.F.R. § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 23, 2005 and September 22, 2004 are affirmed.

Issued: April 12, 2006
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