

On May 14, 2002 appellant, a 50-year-old registered nurse, filed a Form CA-2 notice of occupational disease claiming that she sustained injury related to accepted January 4, 1996

injuries.¹ Appellant alleged injury to her neck and low back that was aggravated with physical and mental stress at work. Her symptoms included chronic left-sided neck and shoulder pain that caused left hand paresthesia and numbness, low back pain and lumbosacral subluxation that caused paresthesia and numbness of her right leg, which she attributed to her duties performing patient care.

The record reflects that on January 4, 1996 appellant filed a traumatic injury claim,² alleging that on that date she sustained right-sided back pain when she helped a patient out of his wheelchair. The case was accepted for a lumbar strain with subluxation. The Office determined that appellant's injuries had resolved by August 6, 1996 and terminated compensation benefits effective September 19, 1997. On April 15, 1997 appellant filed an occupational disease claim,³ alleging that her condition had deteriorated with constant backache with right-sided sciatic radiculopathy down her leg. On September 12, 1997 the Office denied appellant's claim for failure to establish fact of injury. Then the Office doubled the case records.

On June 27, 2002 Dr. Marvin Y. Hayami, a Board-certified internist, noted that in 2000 appellant had undergone a rigid esophagoscopy that resulted in an esophageal perforation and a fistula, which required further treatment and surgery. Appellant experienced progressive neck and throat pain, swallowing difficulties, a fistulous tract from her esophagus to her mediastinum, right phrenic nerve injury and right vocal cord paralysis and frequent aspiration and coughing. Dr. Hayami recommended some working restrictions. In an August 6, 2002 report, he noted that appellant complained of neck pain, back pain and associated right leg pain, dating to the January 1996 lifting incident. Dr. Hayami opined that, after testing, she had developed thoracic outlet syndrome causing difficulty with arm use. He reiterated her work activity restrictions and noted that she was being treated by a chiropractor.⁴

By decision dated October 1, 2002, the Office denied appellant's claim, finding that she had failed to establish that her thoracic outlet syndrome was caused or aggravated by the injury of January 4, 1996. The Office found that appellant had not presented sufficient medical evidence to establish a firm diagnosis in connection with the injuries of January 4, 1996.⁵

¹ Assigned claim No. A14-2011783.

² Assigned claim No. A14-0311802.

³ Assigned claim No. A14-0323806.

⁴ On June 26 and July 22, 2002 Dr. Stephen N. Clark, a chiropractor, diagnosed subluxations, upper and lower back pain, degenerative disc disease and thoracic outlet syndrome but did not present x-ray support. On August 13, 2002 the Office advised Dr. Clark that, in accordance with 5 U.S.C. § 8101(2), the term physician "includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."

⁵ The Office found that the reports from Dr. Clark, a chiropractor, could not be considered probative medical evidence as he failed to qualify as a physician. He failed to provide the x-rays he relied upon in diagnosing spinal subluxations.

By letter dated October 15, 2002, appellant requested a review of the written record.

By decision dated March 5, 2003, an Office hearing representative found that appellant failed to establish that her back condition or thoracic outlet syndrome was causally related to factors of her federal employment.

On February 5, 2004 appellant requested reconsideration of the March 5, 2003 decision. She submitted records of her medical care from the employing establishment commencing January 6, 2003, provided by Dr. Phillip W. Landes, Board-certified in physical medicine and rehabilitation, who noted that appellant had neck and shoulder pain that date, cervical spine degenerative joint disease, secondary upper back myofascial pain and possible vascular thoracic outlet syndrome with subclavian stenosis. Left subacromial tendonopathy, impingement, scapulothoracic dysfunction, chronic upper back and neck myofascial pain, chronic mechanical and myofascial low back pain, and right greater trochanteric bursitis were diagnosed. Physical therapy notes were also submitted.⁶ Medical records addressing appellant's upper respiratory problems, bibasilar interstitial scarring, reflux and parenchymal nodules were also provided.

In a November 14, 2003 report, Dr. Hayami summarized appellant's complaints and indicated that she reported increased neck, back and right leg pain, which had been intermittent since her injury from lifting a patient on January 4, 1996. She reported nagging back pain since that time which caused her to seek treatment from a chiropractor. Dr. Hayami indicated that both chiropractors who saw appellant believed that her injury from 1996 resulted in her current back pain. He indicated that appellant's August 12, 2002 cervical and August 18, 2002 lumbar magnetic resonance imaging scans revealed degenerated changes at L4-5 and L5-S1 resulting in stenosis. Dr. Hayami indicated that the original injury in 1996 may have been trivial but resulted in the degenerative spinal changes. He also stated that appellant developed thoracic outlet syndrome, which may have been caused by working overhead and extending her arms to work around patients. Dr. Dayami noted that her activity of reaching overhead could result in compression of the arteries and nerves of the thoracic outlet. He discussed appellant's rigid esophagoscopy that resulted in an esophageal perforation, which led to infection and surgery and which contributed to her complaints. Dr. Hayami concluded that appellant's left arm and neck symptoms were due to thoracic outlet syndrome and that she continued to have problems due to postoperative complications.

In a decision dated May 7, 2004, the Office reviewed Dr. Hayami's November 14, 2003 report and determined that it was speculative about what employment factors caused thoracic outlet syndrome and the activities that could result in thoracic outlet syndrome. The Office found that Dr. Hayami's opinion was not unequivocal that such activities caused the claimed condition. The notes dated January 10, 2003 were speculative regarding the diagnosis of "possible left thoracic outlet syndrome."

On July 2, 2004 appellant, through her representative, requested reconsideration of the May 7, 2004 decision. No further medical evidence was submitted.

⁶ These reports were dated June 17, July 1 and 12 and December 2 and 10, 2002, February 25 and March 13, 18 and 27, 2003.

By decision dated July 28, 2004, the Office denied reconsideration of the merits. The Office found that appellant had provided no basis for reopening her claim.

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in an occupational disease claim, an employee must submit the following: (1) medical evidence establishing the presence or existence of a condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the condition; and (3) medical evidence establishing that the employment factors identified by the employee were the proximate cause of the condition or illness, for which compensation is claimed or stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁷

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between an employee's diagnosed conditions and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed conditions and the specific employment factors identified by the employee.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to establish her claim because she failed to provide sufficient medical evidence that established a definitive diagnosis and addressed the causal relationship between her present conditions and the factors of her federal employment.

Appellant submitted an August 6, 2002 report from Dr. Hayami, who proposed a diagnosis of thoracic outlet syndrome, without mentioning or explaining the causal relationship of this condition with any factors of her federal employment. He also advised that appellant had an iatrogenic esophageal perforation, which needed treatment. Dr. Hayami did not explain how appellant's thoracic outlet syndrome was causally related to her employment. His reports are not sufficient to establish causal relationship with her implicated employment factors. He noted her condition may have been caused by overhead lifting but this opinion is speculative in nature.

Appellant requested reconsideration and submitted multiple reports from Dr. Landes, who submitted copies of treatment records that provided diagnoses and treatment modalities. None of these reports discusses the causal relationship between appellant's diagnosed conditions and specific factors of her employment. Therefore, these reports are of diminished probative value and are insufficient to establish her claim. The accompanying treatment records from

⁷ Donna L. Mims, 53 ECAB 730 (2002).

⁸ *Id.*

other health care personnel were not provided by a physician as defined by 5 U.S.C. § 8101(2) and therefore they do not constitute probative medical evidence.⁹

Appellant also submitted a November 14, 2003 report from Dr. Hayami, who indicated that her neck, back and right leg complaints had been intermittent since January 4, 1996. Dr. Hayami opined that appellant's thoracic outlet syndrome may have been caused by appellant working overhead and extending her arm to work around a patient. As noted, this opinion is speculative in nature. The Office properly found that Dr. Hayami did not adequately address how or what nursing duties would cause appellant's condition. Therefore, his reports are insufficient to establish appellant's claim.

CONCLUSION -- ISSUE 1

The Board finds that appellant has failed to establish that her multiple conditions on May 14, 2002 were causally related to specific factors of her federal employment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁰ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) provide relevant and pertinent new evidence that was not previously considered by the Office.¹¹ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his application for review within one year of the date of that decision.¹² When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for further review on the merits.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant did not meet her burden of proof to require reopening of her case for further reconsideration of her claim on its merits.

Appellant, through her representative, requested reconsideration of the May 7, 2004 decision. However, she failed to submit any medical evidence to support her request. Appellant failed to show that the Office erroneously applied or interpreted a specific point of law; failed to

⁹ A physical therapist is not a physician under the Federal Employees' Compensation Act. *Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996); *Barbara J. Williams*, 40 ECAB 649 (1988). See the Act, 5 U.S.C. § 8101(2).

¹⁰ 5 U.S.C. § 8101 *et seq.* Under section 8128 of the Act, "[t]he Secretary of labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b)(2).

¹² 20 C.F.R. § 10.607(a).

¹³ 20 C.F.R. § 10.608(b).

advance a relevant legal argument not previously considered by the Office; and failed to provide relevant and pertinent new evidence that was not previously considered by the Office.¹⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for further review on the merits.¹⁵

In this case, appellant failed to submit any evidence or argument in support of her reconsideration request, such that the Office was required to deny the application without reopening the case for further review on its merits.

CONCLUSION -- ISSUE 2

The Board finds that the Office properly denied appellant's request for merit review of its May 7, 2004 decision under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 7, 2004 is affirmed.

Issued: January 18, 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

¹⁴ 20 C.F.R. § 10.606(b)(2).

¹⁵ 20 C.F.R. § 10.608(b).