

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

D.R., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS, Terre Haute, IN,
Employer**

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**Docket No. 08-801
Issued: August 14, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On September 7, 2007 appellant filed a timely appeal of a September 14, 2006 decision of a hearing representative for the Office of Workers' Compensation Programs which denied her claim for compensation and the February 9 and June 26, 2007 decisions denying her requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the case.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on August 10, 2005, as alleged; and (2) whether the Office properly refused to reopen her claim for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 25, 2006 appellant, then a 49-year-old registered nurse, filed a traumatic injury claim alleging that on August 10, 2005 she sustained a herniated disc while attempting to perform life support on an inmate. She submitted a work release form signed on February 2,

2006 by Dr. Kevin Macadaeg, a Board-certified anesthesiologist with a subspecialty in pain medicine. Dr. Macadaeg advised that appellant would be off work from February 1 through 3, 2006.

By letter dated March 16, 2006, the Office requested that appellant answer questions concerning the work incident and submit further medical evidence in support of her claim.

On March 18, 2006 appellant responded to the Office, noting that immediately after the incident she felt pain in her lumbar region and in her right knee and ankle. She noted that the pain progressively became unbearable.

In response to the Office's request for medical information, appellant submitted an October 20, 2005 magnetic resonance imaging (MRI) scan from Dr. Kent B. Remiey, a radiologist, who noted moderately advanced to advanced disc degeneration at L5-S1 with a moderate broad-based central disc herniation and additional focal right lateral disc extrusion that resulted in direct right S1 nerve root compression. Dr. Remiey also noted moderately advanced degenerative disc disease, mild to moderate disc degeneration at L4-5 without associated herniation and a small focal right lateral disc herniation at L2-3 without nerve root impingement. Appellant also submitted the results of a previous MRI scan of the lumbar spine taken on June 30, 2004 which was interpreted by Dr. John Calhoon, a Board-certified radiologist, as showing a broad-based, predominately left paracentral disc herniation at L4-5 with nerve root impingement on the left and bulging discs at T12-L1 and L5-S1.

In an October 7, 2005 medical report, Dr. Macadaeg indicated that he had not seen appellant for eight months. He noted no recent history of trauma and that appellant had "known degenerative spondylosis and L4 and L5 radicular irritations were suspected." Dr. Macadaeg opined, "My suspicion is that of a degenerative spondylosis and probable lumbar radicular irritation. The symptoms seem to be more so L5 and less so L4. Of interest is that her MRI scan shows a disc protrusion L4-5; however, this is to the left, the opposite side of her symptoms."

In a November 8, 2005 report, Dr. Kenneth L. Renkens, Jr., a Board-certified neurosurgeon, indicated that appellant told him that she experienced pain going down her right leg that started in August. He reviewed her MRI scan and it showed a large disc herniation, central and right sided at L5-S1, on the transitional segment. Dr. Renkens discussed treatment options with appellant and that she wished to proceed with surgery. On March 24, 2006 he performed a microlumbar discectomy, L5-S1. In an attending physician's report dated March 31, 2006, Dr. Renkens indicated that appellant was totally disabled from March 24 through May 7, 2006.

By decision dated April 17, 2006, the Office denied appellant's claim. It found that, although the evidence was sufficient to establish that the August 10, 2005 incident occurred as alleged, there was insufficient medical evidence to establish that appellant's lumbar disc condition was caused or contributed to by the employment incident.

On May 10, 2006 appellant requested review of the written record by an Office hearing representative.

In a May 3, 2006 report, Dr. Macadaeg noted that appellant's right leg symptoms resolved following the L5-S1 discectomy. He noted that he first saw appellant for back pain in July 2004 at which time her diagnosis was mild degenerative spondylosis and degenerative disc disease, mostly at L4-5. Dr. Macadaeg noted no classic signs or symptoms of radiculopathy at that time. In October 2005, appellant had a new complaint of severe back and right lower extremity pain that was quite classical for S1 radiculopathy. Dr. Macadaeg noted, "This was a new and distinct problem of which she described quite explicitly the activity whereby she felt her symptoms initiated when running after an inmate."

By decision dated September 14, 2006, the Office hearing representative affirmed the April 17, 2006 decision.

By letter dated January 24, 2007, appellant gave a further account with regard to her injury. She noted:

"The following is an account of my injury: while on duty on August 10, 2005 and being the only medical staff for the 15:30 -- midnight shift at the United States Maximum Security Penitentiary (USP) in Terre Haute, Indiana, I responded to an emergency call at approximately 1600.

"In response to this emergency call I was required to run over ¼ mile with gurney loaded with medical supplies (including oxygen tank and AED [automated external defibrillator]) which made the gurney heavy and awkward. As I turned the corner I felt a pain in my lower back. I continued to the housing unit in response to the emergency call and proceeded to provide emergency medical care to an inmate who was critically injured (murdered).

"The inmate was transported back to the Health Care Unit via gurney by other staff members. I was required to run with staff transporting the inmate on the gurney to continue providing medical care (while running).

"The pain continued but I am required to provide care until the Emergency Medical Service (EMS) arrives to transport the inmate to an outside hospital. After arriving at the Health Care Unit I had to reposition the inmate (alone) so that I could apply the AED and provide CPR [cardiopulmonary resuscitation] to the inmate until the EMS arrived and left with the inmate.

"After the EMS crew left with the inmate, I was required to provide care to the staff members that had been injured or had blood contact with the inmate. I then had to finish my shift requiring several miles of walking delivering medications etc."

She addressed the medical care she received following the incident. Appellant submitted a January 15, 2006 attending physician's report by Dr. Renkens, who stated that appellant had "transitional segment with hypoplastic disc at S1-2 near disc collapse L5-S1 and L1-2." Dr. Renkens checked a box wherein he indicated that this was caused or aggravated by the employment activity of "pain after running after inmate."

In a December 20, 2006 attending physician's report, Dr. Donald J. Adamov, a podiatrist, diagnosed peripheral neuropathy. He checked the box indicating that he believed it was caused or aggravated by employment activity, but did not set forth any history of employment-related activities.

In an attending physician's report dated December 29, 2006, a nurse practitioner indicated that appellant sustained a lumbar radiculopathy and peripheral neuropathy as a result of her employment. She noted the work history as pushing gurney at work with inmate murdered by another inmate. A nurse practitioner noted that appellant provided life support and injured her back in the process.

On February 9, 2007 appellant requested reconsideration.

In a decision dated March 15, 2007, the Office denied appellant's request for reconsideration, finding that the evidence submitted was duplicative in nature or did not provide any discussion regarding the issue of causal relationship between her diagnosed medical conditions and the August 10, 2005 incident.

On May 23, 2007 appellant requested reconsideration. She submitted personal statements and medical evidence that was previously of record.

By decision dated June 26, 2007, the Office found that appellant had not submitted sufficient information to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that an individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first 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

¹ 5 U.S.C. § 8122(a).

² *Id.*

the time, place and in the manner alleged.³ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁴

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to a specific condition of employment.⁵ Neither the fact that a condition became apparent during a period of employment nor appellant's belief that the employment caused or aggravated his condition is sufficient to establish causal relationship.

ANALYSIS -- ISSUE 1

Appellant attributed a herniated disc at L5-S1 to an incident on August 10, 2005 when she responded to an inmate emergency call. The Office accepted that the employment incident occurred as alleged. The issue is whether appellant submitted sufficient medical evidence to establish that her herniated disc was caused by this accepted incident. The Board finds that appellant did not submit medical evidence sufficient to establish that her herniated disc condition was caused or contributed to by this incident. The MRI scan reports did not address the cause of appellant's degenerative disc disease, mild to moderate disc herniation and focal right lateral disc extrusion. In an October 7, 2005 report, Dr. Macadaeg provided no statement with regard to what caused appellant's spondylosis or probable lumbar radicular irritation. Dr. Renken reached no conclusion as to why appellant had a large disc herniation for which he performed surgery on March 24, 2006. There is no medical evidence relating appellant's medical condition to the accepted incident of August 10, 2005. The Board finds that the Office properly denied appellant's claim for compensation in its decision dated April 17, 2006.

Appellant timely requested review of the written record and submitted a May 3, 2006 report from Dr. Macadaeg, who noted that he initially saw appellant in July 2004 at which time she had mild degenerative spondylosis and degenerative disc disease. He noted that in October 2005 there was a new complaint of back and right lower extremity pain that was classical for S1 radiculopathy. Appellant contended that this was a new problem and that her symptoms were initiated when running to an inmate emergency call. The hearing representative properly denied appellant's claim for compensation. At that time, appellant had made no statement that she was injured while running. Although Dr. Macadaeg indicated that her symptoms began after running, he did not provide a date for this incident or an opinion relating appellant's symptoms to the work incident.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor her belief that her condition was caused, precipitated or aggravated by her employment is

³ *John J. Carlone*, 41 ECAB 345 (1989).

⁴ *Shirley A. Temple*, 48 ECAB 404 (1997).

⁵ *Katherine J. Friday*, 47 ECAB 591 (1996).

sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence.⁶

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under 5 U.S.C. § 8128(a), the Office's regulations provide that the application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁷

A timely request for reconsideration may be granted if the Office determines that the employee has represented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and is reviewed on the merits.⁸

ANALYSIS -- ISSUE 2

Appellant did not argue that the Office erroneously applied or interpreted a specific point of law, or raise legal arguments not previously considered. The Office further found that appellant did not submit any relevant and pertinent new evidence.

The Board finds, however, that appellant submitted relevant and pertinent new evidence in support of her February 9, 2007 request for reconsideration sufficient to require the Office to reopen appellant's case for merit review.

The Board notes that appellant submitted a more complete statement with regard to how the incident occurred on August 10, 2005. The reason that appellant's case was initially denied was based on the insufficiency of the medical evidence to establish a causal relationship between the August 10, 2005 incident and her injury. Her additional statement is relevant to the reason the claim was denied. The hearing representative noted that appellant alleged that she was injured when providing life support to a patient but that there was insufficient medical evidence to support her claim. Appellant's statement of January 24, 2007 provides a more complete description of her response to the inmate emergency call, included running with a gurney loaded with heavy medical supplies. This is consistent with Dr. Macadaeg's statement that appellant provided a history of injuring herself while "running after an inmate."

⁶ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁷ 20 C.F.R. §10.606.

⁸ 5 U.S.C. §§ 8101-8193, § 8128(a). The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted the Office under section 8128(a) of the Act. See *Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

Appellant also submitted medical evidence in support of her February 9, 2007 request for reconsideration, including the reports of Drs. Renken and Adamov.⁹ The Board notes that this evidence is relevant to the grounds upon which the Office denied her claim. The requirement of reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge the burden of proof. The requirement pertaining to the submission of evidence specifies only that the evidence be relevant and pertinent and not previously considered by the Office.¹⁰ If the Office determines that this new evidence lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.

As appellant submitted evidence in support of her request for reconsideration which meets the third standard for obtaining a merit review of her case, the Board finds that the Office should have reopened the case for further review on the merits. The Board will remand the case to the Office for a review of the merits of this case.

CONCLUSION

The Board finds that appellant did not establish that she sustained an injury in the performance of duty on August 10, 2005, as alleged. The Board finds that the Office improperly denied appellant's request for reconsideration without reviewing the case on the merits.

⁹ Appellant also submitted a report by a nurse practitioner. However, this report does not constitute probative medical evidence inasmuch as a physician's assistant is not considered a physician under the Act. 5 U.S.C. § 8102(2).

¹⁰ *Sydney W. Anderson*, 53 ECAB 347 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 14, 2006 is affirmed. The decisions of the Office dated June 26 and March 15, 2007 are set aside and the case is remanded for further action consistent with this decision.

Issued: August 14, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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