

FACTUAL HISTORY

On August 23, 2006 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim alleging that on August 16, 2006 she sustained a herniated disc after she lifted and carried two parcels. She also noted in the claim form that she was previously “hit from behind in postal vehicle in June injury on back.”

In support of her claim, appellant submitted a disability certificate signed by Dr. Arthur S. Lieberman, an osteopath, indicating that she was under his care from August 21 through 29, 2006 and was totally incapacitated during this period of time. The note also indicated that appellant was able to return to work on August 29, 2006. Subsequently, she submitted two notes dated August 31, 2006 by Dr. Lieberman wherein he indicated that appellant was under his care and totally disabled from August 30 through September 30, 2006. Dr. Lieberman listed his diagnoses as, *inter alia*, disc herniation L2-3, lumbar myositis, L3-4 tear, degenerative disc disease and L4-5 lateral disc herniation.

By letter dated October 3, 2006, the Office requested that appellant submit further information.

In an October 3, 2006 disability certificate, Dr. Lieberman indicated that appellant was under his care and totally disabled from September 29 through October 31, 2006 for a herniated lumbar disc. He noted that appellant would be able to return to work on November 1, 2006.

By decision dated November 7, 2006, the Office denied appellant’s claim. It found that, although appellant filed a timely claim establishing that the incident occurred as alleged, she did not provide medical evidence establishing that her claimed medical condition resulted from the accepted incident.

Subsequent to the decision, appellant submitted an attending physician’s report form from Dr. Lieberman signed on October 5, 2006 indicating that she had a herniated lumbar disc/radiculopathy that was caused or aggravated by the June 1, 2006 “mail truck accident,” when she was rear-ended while sitting in her mail truck.¹ Dr. Lieberman indicated that appellant was totally disabled from September 29 through October 31, 2006. Appellant also submitted a duty status report dated October 5, 2006 from Dr. Lieberman indicating that she was not able to perform her regular work.

On December 11, 2006 appellant requested reconsideration. In support thereof, she submitted the results of a magnetic resonance imaging (MRI) scan study conducted on August 21, 2006, which found that appellant had a small to moderate sized central disc herniation at the L2-3 level; a small left lateral disc herniation located in the left neural canal and foramen at the L4-5 level; and a disc bulging asymmetric to the left with a tear of the left posterior aspect of the annulus fibrosis.

In a November 1, 2006 report, Dr. Lieberman recited appellant’s history of being in a vehicular accident on June 1, 2006 and that following this accident she had a moderate to severe

¹ The Board notes that appellant did not file a compensation claim for the June 1, 2006 incident.

muscular spasm in the lumbosacral region with motion restriction on flexion and extension. He noted that, while appellant had a history of low back problems, these findings were more significant than previously seen. Dr. Lieberman noted that appellant returned on August 19, 2006 and was seen by one of his colleagues complaining of severe pain in low back. He then noted:

“On August 21, [2006] after completion of the MRI [scan,] [appellant] returned to our office and provided history of another injury to low back. She stated that, on August 16, [2006], she was attempting to carry several heavy boxes up a flight of stairs for delivery and, as a result, felt an increase in the already present low back pain. Physical examination did reveal more limitation on flexion that was previously noted and a total inability to extend in the upright position. Marked myospasm was present. In keeping with the nature and severity of these findings, an intra-articular injection of Xylocaine and Depo-Medrol was given into the lumbo-sacral paravertebral region. The purpose of this procedure is to provide immediate, although temporary anesthetic relief as well as anti-inflammatory agents directly to the affected musculature. [Appellant] was advised to refrain from any activity including her occupational duties while additional evaluation and treatment was performed.

“[Appellant] has attended an intensive course of out patient physical therapy and has also been seen in consultation with Dr. K. Sidhu, orthopedic surgeon, who did not feel she was a surgical candidate at this time but did recommend the possible use of epidural blocks to provide some relief to [her].

“It is additionally felt that the indirect injury of affected region which occurred on August 16, [2006] compounded the severity of the already existing problems.

“As of her most recent examination of October 30, [2006] [appellant] remains totally disabled. We are in the process of arranging appointments for epidural blocks.

“We hope this information will suffice to respond to any and all concerns you may have with regarding ... ongoing care and treatment as well as causal relationship to occupational injury.”

Appellant also submitted postoperative instructions from St. John Oakland Hospital dated November 20, 2006 for an “injury” on August 16, 2006. These instructions instruct her to schedule an epidural in one to two weeks.

In a decision dated January 23, 2007, the Office reviewed appellant’s claim on the merits but determined that the evidence was not sufficient to warrant modification of the November 7, 2006 decision. In this decision, the Office “highly recommended” that appellant file a separate

traumatic injury claim for benefits from the June 1, 2006 motor vehicle accident if she believed that her condition as causally related to this accident.²

By letter dated July 6, 2007, appellant, through her attorney, filed a request for reconsideration. In support thereof, she submitted a June 7, 2007 medical report wherein Dr. T.A. Podolsky, an osteopath, concluded that appellant's lumbar condition was caused by the trauma from the motor vehicle accident on June 1, 2006.

By decision dated October 3, 2007, the Office denied appellant's request for reconsideration of the merits on the grounds that there was no relevant evidence submitted to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act³ 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.⁴

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 the time, place and in the manner alleged.⁵ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁶

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.⁷ Neither the fact that a

² On May 16, 2007 appellant filed a traumatic injury claim alleging that on May 25, 2006 she was "hit from behind in mail truck" by a stolen vehicle and sustained back pain, neck pain and headaches. She also noted that she hit her right arm on the door. On July 2, 2007 appellant's claim was accepted for lumbosacral contusion, Office File No. 092082345. This claim has since been administratively closed.

³ 5 U.S.C. § 8122(a).

⁴ *Id.*

⁵ *John J. Carlone*, 41 ECAB 345 (1989).

⁶ *Shirley A. Temple*, 48 ECAB 404 (1997).

⁷ *Katherine J. Friday*, 47 ECAB 591 (1996).

condition became apparent during a period of employment nor appellant's belief that the employment caused or aggravated her condition is sufficient to establish causal relationship.

ANALYSIS -- ISSUE 1

In the instant case, appellant filed a claim alleging that she injured her back when she lifted and carried two parcels on August 16, 2006. The Office accepted that the August 16, 2006 incident occurred at the time, place and in the manner alleged. Thus, the Board must consider on appeal whether appellant sustained an injury causally related to the August 16, 2006 employment incident.

In support of her claim, appellant submitted multiple notes and reports by Dr. Lieberman, her treating osteopath. In treatment notes dated from August 31 through October 5, 2006, Dr. Lieberman indicated that appellant was totally disabled from August 30 through October 31, 2006 due to a herniated disc. In these notes and reports he, however, does not attribute appellant's lumbar condition to the August 16, 2006 employment incident. In fact, in his attending physician's report dated October 5, 2006, Dr. Lieberman attributed appellant's herniated lumbar disc/radiculopathy to her June 1, 2006 mail truck incident. As these reports do not attribute appellant's lumbar condition to the accepted August 16, 2006 incident, these reports are insufficient to establish that she sustained a medical condition as a result of the August 16, 2006 employment incident. In a medical report dated November 1, 2006, Dr. Lieberman indicates that, when appellant returned on August 21, 2006, she noted that on August 16, 2006, while attempting to carry several heavy boxes up a flight of stairs for delivery, she felt an increase in the already present back pain. Dr. Lieberman noted that physical examination did reveal more limitation on flexion than had been previously noted and in addition a total inability to extend in the upright position. He further noted that the injury of August 16, 2006 "compounded the severity of her already existing problems." However, Dr. Lieberman never determined that appellant sustained a specific medical condition or made a specific diagnosis of injury as a result of the August 16, 2006 employment incident. He also did not provide a well-rationalized opinion explaining why he believed that appellant's increase in symptoms was caused by the August 16, 2006 injury. Dr. Lieberman's opinion with regard to the effects of the August 16, 2006 employment incident is vague and speculative and insufficient to establish a causal relationship. Finally, the notes from St. John Oakland Hospital merely note an August 16, 2006 injury but do not indicate where and how the injury was sustained and whether it resulted in a specific medical condition accompanied by medical rationale. Accordingly, as appellant has not submitted medical evidence establishing that the accepted employment incident resulted in a personal injury, she has failed to establish her claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, 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 relevant legal argument

not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.⁸

ANALYSIS -- ISSUE 2

In requesting reconsideration, appellant did not submit any new relevant legal argument not previously considered by the Office, nor did she allege that the Office erroneously applied or interpreted a specific point of law. Consequently, she was not entitled to a review of the merits of the claim based on the first and second requirements of section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the only evidence that appellant submitted on reconsideration was a report by Dr. Podolsky, which linked her condition to her motor vehicle accident. Dr. Podolsky, however, never mentioned the incident of August 16, 2006 in his opinion. This report was therefore insufficient to require further review on the merits. Accordingly, the Office properly denied reconsideration.

CONCLUSION

The Board finds that appellant did not establish that she sustained an injury in the performance of duty on August 16, 2006, as alleged. The Board further finds that the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 3 and January 23, 2007 and November 7, 2006 are affirmed.

Issued: July 14, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board