United States Department of Labor
Employees' Compensation Appeals Board

R.V., Appellant	)	
and	)	**Docket No. 09-2345**
	)	**Issued: August 16, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Omaha, NE, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 25, 2009 appellant filed a timely appeal from the July 14, 2009 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and an August 13, 2009 nonmerit decision denying his request for reconsideration.[1] 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 sustained an injury while in the performance of duty on May 27, 2009; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] Appellant submitted evidence with his appeal. As the Board is limited to reviewing evidence that was in the record at the time the Office made its decision, any new evidence cannot be considered by the Board. *Avalon C. Bailey*, 56 ECAB 223 (2004).

FACTUAL HISTORY

On May 27, 2009 appellant, a 30-year-old police officer, filed a traumatic injury claim alleging that he sustained injuries to his lower back in the performance of duty when the vehicle in which he was a passenger was rear ended on that date. He complained of pain radiating from his lower back down his right leg.

In a letter dated June 10, 2009, the Office informed appellant that he had not submitted sufficient information or evidence to establish his claim. Appellant was advised to provide a detailed account of the alleged injury and a physician's report with a diagnosis and a rationalized opinion as to how the diagnosed condition was caused by the claimed event.

In a May 27, 2009 attending physician's report, Brenda Avent, a nurse practitioner, diagnosed "muscle spasm lower back with tingling from buttocks to thigh." The date of injury was identified as May 27, 2009, and the history of injury was described as "MVA [motor vehicle accident]." Ms. Avent provided no response to the question as to whether appellant's condition was caused or aggravated by employment activities.

In treatment notes from the employee health clinic dated May 27, 2009, Ms. Avent again diagnosed muscle spasms of the lower back. She stated that on May 27, 2009 appellant was riding in the back seat of a federally-owned vehicle, which was rear ended by another vehicle. The notes were co-signed by Dr. Merle T. McAlevy on June 8, 2009. In May 29, 2009 follow-up notes, Dr. McAlevy found appellant was experiencing more tingling in the buttocks and pain radiating into both legs.

In a statement dated June 16, 2009, appellant reiterated his account of the motor vehicle accident. He alleged that he sustained a lower back injury, which resulted in radicular pain down his right leg.

In a decision dated July 14, 2009, the Office denied appellant's claim. Although it accepted that the May 27, 2009 motor vehicle accident occurred as alleged, the Office found there was no probative medical evidence which provided a diagnosis that could be connected to the established event.

On July 22, 2009 appellant requested reconsideration. He submitted a police report describing the May 27, 2009 motor vehicle accident wherein the vehicle in which he was riding was rear ended.

In a decision dated August 13, 2009, the Office denied appellant's reconsideration request on the grounds that the evidence submitted did not warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] The phrase "sustained while in the performance of duty" is regarded as

[2] 5 U.S.C. § 8102(a).

the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.[3]

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim, including the fact that the 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 or specific condition for which compensation is claimed is causally related to the employment injury.[4] When an employee claims that he sustained a traumatic injury in the performance of duty, he must establish the fact of injury, consisting of two components, which must be considered in conjunction with one another. The first is whether the employee actually experienced the incident that is alleged to have occurred at the time, place and in the manner alleged. The second is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.[5]

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 specific conditions of employment.[6] An award of compensation may not be based on appellant's belief of causal relationship.[7] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[8] Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under the Act.[9]

Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported

[3] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

[4] *Robert Broome*, 55 ECAB 339 (2004).

[5] *Deborah L. Beatty*, 54 ECAB 340 (2003). *See also Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002). The term "injury" as defined by the Act, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q)(ee).

[6] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[7] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[8] *Id.*

[9] 20 C.F.R. § 10.303(a).

by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[10]

ANALYSIS -- ISSUE 1

The Office accepted that appellant was a federal employee, that he timely filed his claim for compensation benefits and that the May 27, 2009 workplace incident occurred as alleged. The issue is whether appellant submitted sufficient medical evidence to establish that the employment incident caused an injury. The medical evidence of record does not contain a rationalized medical opinion from a physician explaining how the work-related accident caused or aggravated any back condition or disability. Therefore, appellant has failed to satisfy his burden of proof.

Ms. Avent, a nurse practitioner, indicated that appellant was involved in a motor vehicle accident on the date in question and diagnosed muscle spasm of the lower back with tingling from the buttocks to the thighs. As a nurse practitioner is not considered a "physician" under the Act, her report does not constitute probative medical evidence.[11]

May 27 and 29, 2009 notes co-signed by Dr. McAlevy contain a description of the May 27, 2009 accident and a diagnosis of muscle spasms of the lower back. However, Dr. McAlevy did not provide any opinion that the diagnosed condition was caused or aggravated by the May 27, 2009 incident.[12] Therefore, this evidence is of limited probative value. The record does not contain a physician's rationalized opinion explaining how appellant's back condition was causally related to the May 27, 2009 incident.

Appellant expressed his belief that his back condition resulted from the accepted employment incident. The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[13] Neither the fact that the condition became apparent during a period of employment, nor the belief that the condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.[14] Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to

[10] *John W. Montoya*, 54 ECAB 306 (2003).

[11] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as "physician" as defined in 5 U.S.C. § 8101(2). Section 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[12] *John W. Montoya*, 54 ECAB 306 (2003). *See also A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999) (medical evidence which does not offer an opinion regarding the cause of an employee's condition is of limited probative value).

[13] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[14] *Id.*

submit. Therefore, appellant's belief that his condition was caused by the work-related incident is not determinative.

The Office advised appellant to provide a comprehensive medical report which described his symptoms, test results, diagnosis, treatment and the doctor's opinion, with medical reasons, on the cause of his condition. Appellant failed to submit sufficient medical documentation in response to the Office's request. The medical evidence of record does not address how his back condition was caused or aggravated by the employment incident. Appellant has not met his burden of proof to establish that he sustained an injury on May 27, 2009 causally related to factors of his federal employment.

Appellant disputes the denial of his claim on the basis that the Office accepted a traumatic injury claim filed by a co-employee, who sustained similar injuries in the May 27, 2009 motor vehicle accident and was seen by the same doctor. As noted, he 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 specific conditions of employment.[15] Appellant's burden, which is separate from that of his fellow employee, can be met only by the presentation of rationalized medical opinion evidence. In this case, he has failed to submit sufficient medical evidence to establish his claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[16] the Office regulations provide that the evidence or argument submitted by 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) constitute relevant and pertinent new evidence not previously considered by the Office.[17] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[18] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[19] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[20]

[15] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[16] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

[17] 20 C.F.R. § 10.606(b)(2).

[18] *Id.* at § 10.607(a).

[19] *Id.* at § 10.608(b).

[20] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ANALYSIS -- ISSUE 2

Appellant's July 22, 2009 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant submitted a police report describing the May 27, 2009 motor vehicle accident. This report merely reiterated information previously received and reviewed by the Office. It is therefore cumulative and duplicative in nature.[21] As the basis of the Office's decision denying appellant's claim was medical in nature; the police report, which addressed the factual element of the claim, is irrelevant to the issue at hand. The Board finds that the police report does not constitute relevant and pertinent new evidence not previously considered by the Office.[22] The Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained a traumatic injury in the performance of duty on May 27, 2009. The Board further finds that the Office properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[21] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

[22] *See Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 13 and July 14, 2009 are affirmed.

Issued: August 16, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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