United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 09-1155**
	)	**Issued: January 26, 2010**
U.S. POSTAL SERVICE, SEATTLE BULK MAIL CENTER, Federal Way, WA, Employer	)	

Appearances:
Ranier Brown, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 26, 2009 appellant, through her representative, filed a timely appeal from a February 12, 2009 decision of the Office of Workers' Compensation Programs denying merit review. As more than one year has elapsed between the filing of this appeal and the last merit decision dated March 18, 2008, the Board lacks jurisdiction to review the merits of this case.[1]

ISSUE

The issue is whether the Office properly denied merit review pursuant to 5 U.S.C. § 8128.

On appeal, appellant's representative contends that the March 18, 2008 Office decision denied appellant's claim on the grounds that the medical evidence was unreliable because the history provided by the physicians did not match her statement of history. Thus, appellant's factual statements regarding the history of her injury were relevant to the underlying issue.

[1] 20 C.F.R. §§ 501.2(c), 501.3.

FACTUAL HISTORY

On February 8, 2008 appellant, then a 48-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained a back condition as a result of repetitive lifting and unloading of letter trays. She stated that she first went to the chiropractor on November 30, 2007 and received treatment to release tension in her muscles. Appellant's back condition did not improve and she sought treatment from her physician in January 2008. On January 11, 2008 she fell after one of her legs gave out requiring hospitalization. Appellant claimed that she was bedridden since the fall and continued to receive treatment. The employing establishment controverted the claim. It indicated that appellant stopped working and had not returned.

In support of her claim, appellant submitted medical reports dated January 14 and 22, 2008 from Dr. Michael Tepper, a Board-certified internist, who diagnosed lower back pain and strain and excused appellant from work.

By letter dated February 14, 2008, the Office notified appellant of the deficiencies in her claim and requested additional evidence.

Appellant further submitted additional medical evidence, including medical reports dated January 7 through February 29, 2008 from Dr. Tepper who relayed appellant's complaints of low lumbar spine pain and diagnosed low back pain. In a February 27, 2008 medical report, Dr. Tepper stated that appellant's back pain may have been aggravated by a recent fall, as well as job-related lifting with a back strain. Further, in medical notes dated October 15, 2007 through February 7, 2008, he continued to excuse appellant from work due to low back pain.

By decision dated March 18, 2008, the Office denied the claim on the grounds that the medical evidence did not establish that appellant sustained a back injury as a result of her established employment duties. It noted that the medical evidence of record did not provide a consistent diagnosis or medical history of the claimed condition.

On December 30, 2008 appellant, through her representative, requested reconsideration.

In a February 29, 2008 statement, appellant stated that her back injury had progressed such that she had to be in a walker at all times as her legs would give out on her. Further, in a December 8, 2008 statement, she described her employment duties and attached a copy of her job description. Appellant stated that she did not have any outside activities or hobbies and that when she came home after eight hours of work she could barely move due to pain and soreness in her lower back and right leg.

In medical reports dated February 20 through April 9, 2008, Dr. Tepper reported appellant's complaints of low back pain. He noted that aggravating factors contributing to the back pain may have been a recent fall and job-related repetitive lifting with a back strain. Dr. Tepper diagnosed low back pain. In a February 20, 2008 medical note, he stated that appellant sustained a low back strain and that because her condition was not sufficiently improved she should avoid work for the next two weeks and continue physical therapy. Further,

in a March 6, 2008 note, Dr. Tepper stated that appellant was under his care and that she should be off work until February 12, 2008.

In medical reports dated March 28 and April 17, 2008, Dr. Virgil V. Becker, Jr., a Board-certified orthopedic surgeon, relayed appellant's statements that she performed heavy lifting and carrying in her position with the employing establishment. Appellant reported that she experienced progressively increasing low back pain around November 28, 2007 and on January 11, 2008 her right leg gave out requiring hospitalization. Appellant complained of low back and right leg pain with numbness and tingling. After a physical examination and a review of radiographic testing, Dr. Becker diagnosed disc herniation on the right side at the L4-5 level with marked right L5 radiculopathy.

Appellant submitted a February 4, 2008 physical therapy plan of care and a February 29, 2009 medical note, both signed by a physical therapist. She also submitted a January 14, 2008 prescription note from Dr. J. Scott Andrew, Board-certified in family medicine, stating that appellant should be off work for the following five days due to medical illness. Appellant further provided an occupational disease claim form and an attending physician's report relating to her separate claim for carpal tunnel syndrome.

Finally, appellant submitted duplicate copies of medical reports dated January 7 through February 7, 2008 from Dr. Tepper. She also provided a duplicate copy of her January 23, 2008 statement.

By decision dated February 12, 2009, the Office denied merit review on the grounds that the submitted medical reports dated January 2 through April 17, 2008 did not constitute new and relevant evidence as they did not address the cause of appellant's back condition.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[2] the Office's 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.[3] 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.[4] 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.[5]

[2] 5 U.S.C. §§ 8101-8193. 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).

[3] 20 C.F.R. § 10.606(b)(2).

[4] *Id.* at § 10.607(a).

[5] *Id.* at § 10.608(b).

ANALYSIS

Appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered in support of her request for reconsideration. Therefore, the issue is whether she submitted new evidence relevant to the instant issue regarding whether she sustained an injury causally related to her employment duties.

Appellant provided statements dated January 23, February 29 and December 8, 2008 describing her back injury and employment duties. Causation is a medical issue and generally requires rationalized medical evidence from a physician.[6] Thus, appellant's claims regarding her employment injury having no bearing on this issue as they are not relevant to this issue.[7]

Appellant submitted medical reports dated February 20 through April 9, 2008 from Dr. Tepper diagnosing low back pain. Dr. Tepper stated that aggravating factors contributing to the pain may have been a recent fall and job-related lifting with a back strain. These reports are almost identical to his February 27, 2008 medical report and, thus, constitute cumulative evidence which does not require the Office to reopen the case on the merits.[8] Further, in February 20 and March 6, 2008 notes, Dr. Tepper placed appellant off work. These notes are similarly cumulative of evidence already in the record. Further, Dr. Tepper did not address the cause of appellant's absence from work or the cause of her back condition. Thus, the notes are not relevant to the issue of causation.[9] Appellant further submitted duplicate copies of Dr. Tepper's medical reports dated January 7 through February 7, 2008. As these documents already existed in the record, they are duplicative and an insufficient basis for reopening the case.[10]

In medical reports dated March 28 through April 17, 2008, Dr. Becker diagnosed a disc herniation at L4-5 and marked right L5 radiculopathy. He reported appellant's complaints of low back and right leg pain with numbness and tingling. Dr. Becker also relayed appellant's statement regarding the history of her injury. These reports are similarly insufficient to constitute a basis to reopen the case. These reports do not address the cause of the diagnosed L4-5 disc herniation or L5 radiculopathy, thus, they are not relevant to the issue of whether appellant's employment caused an injury.[11]

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[6] *See D. Wayne Avila*, 57 ECAB 642 (2006).

[7] *See id*.

[8] *See F.R.*, 58 ECAB 607 (2007).

[9] Evidence that does not address the issue involved in the case does not constitute a basis for reopening the case. *A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009).

[10] Evidence that repeats or duplicates evidence already in the record has no evidentiary value and does not constitute a basis for reopening a case. *See Richard A. Neidert*, 57 ECAB 474 (2006).

[11] *See A.L., supra* note 9.

Appellant further submitted a February 4, 2008 physical therapy plan of care and a February 29, 2009 medical note, both signed by a physical therapist. As a physical therapist is not included in the definition of a physician under the Act, this evidence is not probative on the instant issue in the case.[12]

In a January 14, 2008 prescription note, Dr. Andrew stated that appellant should be off work due to medical illness. He did not address the cause of the illness or even mention appellant's back condition. Thus, it is irrelevant and does not constitute a basis for reopening the case.[13]

Finally, appellant provided a copy of her occupational disease claim and an attending physician's report relating to her carpal tunnel claim. As this evidence pertains to her separate claim for carpal tunnel syndrome and does not address her back condition, it is not relevant to the instant issue.[14]

On appeal, appellant's representative contends that the March 18, 2008 Office decision denied appellant's claim on the grounds that the medical evidence was unreliable because the history provided by the physicians did not match her statement of history. Thus, appellant's factual statements regarding the history of her injury were relevant to the underlying issue. The primary grounds for the Office's March 18, 2008 denial of appellant's occupational disease claim was the finding that she did not submit a rationalized medical report, based on a complete and accurate factual and medical history, relating her back condition to her employment duties. While factual inconsistencies are important, the central issue is the quality of the medical evidence. Causation is a medical issue which must be established by medical evidence.[15] As stated above, appellant's factual statements are not relevant to this issue and do not constitute a sufficient basis for reopening her case.

CONCLUSION

The Board finds that the Office properly denied merit review pursuant to 5 U.S.C. § 8128.

[12] *See* 5 U.S.C. § 8101(2).

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

[14] *See id.*

[15] *See D. Wayne Avila*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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