United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 10-1983**
	)	**Issued: April 19, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Wilkes-Barre, PA, Employer	)	

Appearances:
Raymond A. Mazzarella, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 28, 2010 appellant timely appealed the July 9, 2010 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. He also timely appealed a June 2, 2010 merit decision which denied his traumatic injury claim. Pursuant to the Federal Employees' Compensation Act[1] and 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 in the performance of duty on May 19, 2009; and (2) whether the Office properly denied appellant's June 22, 2010 request for reconsideration under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, a 52-year-old housekeeping aide, filed a traumatic injury claim (Form CA-1) alleging that he sustained a low back injury on May 19, 2009. He was lifting a bucket to dump water when the injury occurred. The employing establishment controverted the claim. Since being advised of unacceptable performance in March 2009, appellant had filed four workers' compensation claims. The employer further noted that there were no witnesses to any of the alleged injuries.

Emergency room (ER) treatment records from May 19, 2009 indicated that appellant complained of low back pain. Appellant reported a history of chronic low back pain over the previous three months. That morning, he injured his low back after he tried to pick up a bucket of water. Dr. Fawaz Nassar, a Board-certified internist, diagnosed exacerbation of chronic low back pain and advised appellant to rest for the day. Appellant was to follow up with his primary care physician and obtain a lumbar magnetic resonance imaging (MRI) scan. Dr. Nassar excused him from heavy lifting, carrying and sudden bending until cleared by his primary care physician.

Appellant returned to the ER on May 21, 2009. His condition was noted to have improved. A lumbar MRI scan was administered on May 21, 2009 and interpreted as showing multilevel lumbar spondyloarthropathy.

On May 26, 2009 appellant was seen in the employee health unit by Dr. Nancy M. Gilhooley, a Board-certified family practitioner, who noted a history of intermittent back pain over the past 20 years. Dr. Gilhooley noted that he was recently seen in the ER and had been off work a few days due to back pain. Appellant rested over the weekend and currently denied any pain, numbness or tingling. Dr. Gilhooley reviewed the recent lumbar MRI scan and diagnosed lumbar disc disease with recurrent episodes. She recommended physical therapy and a home exercise program. Appellant could return to work with a 30-pound lifting restriction.

On May 28, 2009 the Office requested additional factual and medical information from appellant. It explained that the record was insufficient to establish that he experienced the alleged May 19, 2009 incident. Appellant was asked to approximate the weight of the bucket and describe how he lifted it. The Office further noted that there was no medical diagnosis resulting from the alleged employment incident. Additionally, it asked appellant to explain his six previous claims for low back conditions and comment on his employer's allegation that the claims were in response to the March 24, 2009 notification of unacceptable performance. Appellant responded that his employer was retaliating against him for being a whistleblower.

By decision dated July 6, 2009, the Office denied appellant's claim finding that he failed to establish that the May 19, 2009 lifting incident occurred as alleged.

Appellant requested an oral hearing, which was held on April 15, 2010. He testified that he strained his back on March 24, 2009 lifting a 20-gallon bucket from the sink to the floor. According to appellant, the May 19, 2009 injury was a preexisting injury because his back never improved following the March 24, 2009 injury. Although he believed that it was a recurrence, his employer advised him to file a claim for a new injury. Appellant testified that he did not recall whether he was mopping, lifting a bucket or buffing the floor on May 19, 2009.

By decision dated June 2, 2010, an Office hearing representative affirmed the July 6, 2009 denial of the claim, as modified. The hearing representative accepted that the May 19, 2009 bucket lifting incident occurred as alleged, but found the medical evidence insufficient to establish an injury related to this event.

On June 22, 2010 appellant requested reconsideration. He noted that his employer terminated his services in April 2010 because of his medical inability to perform the position of housekeeping aide. Appellant advised that the denial of his claim for a March 24, 2009 injury had been reversed. He referred to a September 29, 2009 decision, noting that the conditions that existed on March 24, 2009 were substantially identical to those of the May 19, 2009 injury. Appellant argued that the latter injury was a recurrence of the March 24, 2009 injury. He stated that he enclosed additional evidence from Dr. Matthew Berger, copies of the employer's removal action and a September 29, 2009 Office decision.

In a decision dated July 9, 2010, the Office denied appellant's June 22, 2010 request for reconsideration. It found that the evidence purportedly enclosed with his request for reconsideration was not part of the record.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[2]

To determine if an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred.[3] The second component is whether the employment incident caused a personal injury.[4]

ANALYSIS -- ISSUE 1

Appellant claimed he hurt his lower back on May 19, 2009 while lifting a bucket to dump water. It is the employee's burden to establish that his or her injury occurred at the time, place and in the manner alleged.[5] An injury does not have to be confirmed by an eyewitness to establish that it occurred in the performance of duty.[6] An employee's statement regarding the

[2] 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996).

[5] *H.G.*, 59 ECAB 552, 560 (2008); *Delphyne L. Glover*, 51 ECAB 146, 147-48 (1999).

[6] *H.G.*, *supra* note 5.

circumstances surrounding an injury is of great probative value and will be accepted unless refuted by persuasive evidence.[7] The employee's statement must be consistent with the surrounding facts and circumstances as well as the employee's subsequent course of action.[8] The Board notes that the Office hearing representative accepted that the May 19, 2009 employment incident occurred as alleged.

While appellant established that the May 19, 2009 employment incident occurred as alleged, the medical evidence does not establish that he sustained a low back injury as a result of the bucket-lifting incident. The May 19, 2009 ER records did not include a specific medical diagnosis. Dr. Nassar's assessment was any exacerbation of chronic low back pain. As the Office hearing representative noted, pain is generally considered a symptom, not a firm medical diagnosis.[9] A May 21, 2009 lumbar MRI scan revealed multilevel lumbar spondyloarthropathy. The radiology report noted complaints of severe low back pain since March 2009, but did not otherwise state whether any employment factors contributed to the diagnosed condition. On May 26, 2009 Dr. Gilhooley diagnosed lumbar disc disease with recurrent episodes. However, she too did not address how the diagnosed condition was related to the May 19, 2009 employment incident.

In order to satisfy his burden of proof, appellant must submit probative medical evidence demonstrating that the May 19, 2009 employment incident caused a personal injury.[10] Because the medical reports of record do not include any specific injury-related diagnosis, he has failed to establish an injury arising from the accepted lifting incident. Accordingly, the Office properly denied appellant's traumatic injury claim.

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.[11] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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.[12] When an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[13]

[7] *Michelle Kunzwiler*, 51 ECAB 334, 335 (2000).

[8] *Id.*

[9] *See R.W.*, Docket No. 10-1320 (issued March 7, 2011).

[10] *John J. Carlone*, *supra* note 4.

[11] 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606(b)(2).

[13] *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

Appellant's June 22, 2010 request for reconsideration did not allege or demonstrate 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. Appellant's contentions regarding employer's decision to terminate employment and the adjudication of his March 24, 2009 injury claim are not issues relevant to the deficiencies noted in the medical evidence of record. Therefore, he 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).[14] The Board further notes that appellant did not submit any evidence with his June 22, 2010 request for reconsideration. Appellant claimed to have submitted a new medical report, an Office decision and documents regarding his removal. However, these items are not part of the record on appeal. Appellant did not submit any relevant and pertinent new evidence with his June 22, 2010 request for reconsideration. Therefore, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).[15]

Because appellant's application for reconsideration did not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office properly denied the June 22, 2010 request for reconsideration without reopening the case for a review on the merits.

CONCLUSION

Appellant did not establish that he sustained an injury in the performance of duty on May 19, 2009. The Board further finds that the Office properly denied his June 22, 2010 request for reconsideration.

[14] *Id.* at § 10.606(b)(2)(i) and (ii).

[15] *Id.* at § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the July 9 and June 2, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 19, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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