United States Department of Labor
Employees' Compensation Appeals Board

A.L., Appellant	)	
and	)	**Docket No. 11-18**
	)	**Issued: August 12, 2011**
U.S. POSTAL SERVICE, PADDOCK BRANCH POST OFFICE, Ocala, FL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., 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 October 4, 2010 appellant, through counsel, filed a timely appeal from the July 22, 2010 merit decision of the Office of Workers' Compensation Programs' (OWCP) denying appellant's claim for an employment-related injury. The appeal is also timely filed from the September 15, 2010 nonmerit decision of OWCP denying appellant's request for reconsideration. Pursuant to the Federal Employee's Compensation Act (FECA)[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 has established that she sustained an injury in the performance of duty on October 19, 2009, as alleged; and (2) whether OWCP properly denied her request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

On appeal, appellant, through counsel, contends that OWCP's decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 19, 2009 appellant, then a 34-year-old rural carrier, filed a traumatic injury claim alleging that on that date, when pulling mail down from a flat case, she pulled something in her neck. With her claim, she submitted discharge instructions listing basic instructions for treating sprains and strains from an October 19, 2009 visit with a physician's assistant at Express Care as well as a note from the same physician's assistant asking that appellant be excused from work from October 19 through 22, 2009 due to a medical condition. The employing establishment controverted appellant's claim, alleging that medical evidence submitted did not provide a diagnosis or condition which could be linked to the claimed events.

By letter dated October 26, 2009, OWCP informed appellant that medical evidence of record was not sufficient to establish that she had a condition related to the October 19, 2009 incident of pulling down mail. Appellant was instructed to submit medical evidence in support of her claim.

In response, appellant submitted an October 22, 2009 health status report by Dr. Frank Reisner, a physician with a Board-certified specialty in emergency medicine, indicating that she was able to return to work but that until October 29, 2009 she had restrictions of no pushing, pulling and lifting.

A form report dated October 23, 2009, by an individual with an illegible signature at Express Care noted that appellant had cervical and shoulder pain. The individual checked a box indicating that the condition was caused or aggravated by appellant's employment. Appellant also submitted an October 29, 2009 note by Laurel Bryant indicating that appellant was able to return to work with restrictions of no use of the right upper extremity and no pushing, pulling or lifting over 10 pounds. Ms. Bryant noted that these restrictions were in effect until November 9, 2009.

Appellant also submitted further reports by Dr. Reisner. In an October 23, 2009 report, Dr. Reisner listed his impression as shoulder pain and cervical pain and stated that the onset date was the same as the date of the report. He noted that appellant was reaching up with right arm to pull case down and felt a pull in her right arm. In an October 22, 2009 report, Dr. Reisner listed his diagnoses as pain in joint involving shoulder region and cervicalgia. In an October 29, 2009 report, he listed his impression as "Unspecified. Cervicalgia. Low Back Pain."

Appellant also submitted notes from physical therapy.

By decision dated December 2, 2009, OWCP denied appellant's claim as it determined that she had not established fact of injury.

On December 10, 2009 appellant requested review of the written record.

Appellant continued to submit reports by Dr. Reisner. In a November 5, 2009 report, Dr. Reisner noted onset two to three weeks ago and stated that her condition occurred as a result of her work injury. He listed his impression as insomnia, anxiety state, unspecified; cervicalgia and low back pain. In a December 7, 2009 report, Dr. Reisner diagnosed lumbago, pain in joint involving shoulder region and cervicalgia. He noted that onset was six weeks ago and occurred

as a result of a pulling injury. Appellant also submitted more physical therapy reports. In a December 28, 2009 report, Dr. Reisner continued to diagnose her with cervicalgia and lumbago. In a January 11, 2010 report, he noted cervicalgia and shoulder pain.

On January 4, 2010 appellant had a magnetic resonance imaging (MRI) scan of her cervical spine. Dr. Jonathan C. Eugenio, a Board-certified radiologist, interpreted the MRI scan as evincing: (1) disc bulge at the level of C4-5 with a left paramedian disc herniation with anterior impression on the spinal cord; (2) disc bulge at the level of C5-6 with a posterior disc herniation with anterior impression on the spinal cord; and (3) disc bulge at the level of C6-7 with a posterior disc herniation which abuts the spinal cord. An MRI scan of the right shoulder of the same date was interpreted by Dr. Eugenio as evincing: (1) supraspinatus tendinopathy involving the distal aspect of the tendon; (2) small joint effusion; and (3) no evidence of a rotator cuff tear.

By decision dated February 19, 2010, OWCP's hearing representative affirmed the denial of appellant's claim. OWCP's hearing representative noted that appellant had not submitted medical evidence that clearly stated a diagnosis and related it to the specific incident claimed.

Appellant requested reconsideration in a February 9, 2010 report, Dr. Reisner listed his impression as cervicalgia, who noted that this condition has existed for an extended amount of time and was the result of a work injury. In a May 19, 2010 report, Dr. Reisner listed his impression as lumbago, pain in joint involving shoulder region and cervicalgia. He listed onset as unknown but again indicated that it was the result of a work injury.

By decision dated July 22, 2010, OWCP denied modification of its prior decision.

On August 13, 2010 appellant requested reconsideration.

By decision dated September 15, 2010, OWCP denied reconsideration without merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA[2] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,[3] including that she is an "employee" within the meaning of FECA[4] and that she filed her claim within the applicable time limitation.[5] The employee must also establish that she sustained an

[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[4] *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[5] *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must 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 he or she actually experienced the employment incident at the time, place and in the manner alleged.[7] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

In order to satisfy the burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[9] Neither the fact that the 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.[10]

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained an injury on October 19, 2009 while pulling down mail. The Board notes that there is no dispute that this incident occurred as alleged. OWCP denied the claim, however, as appellant failed to submit sufficient medical evidence to establish a diagnosis or the causal relationship between any diagnosis and the accepted incident.

The Board finds that the medical evidence does not establish that appellant sustained a diagnosed condition that was casually related to the accepted employment incident. Rationalized medical evidence under FECA generally consists of an opinion from a physician that is of reasonable medical certainty, is based on a complete actual and medical background and explains the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[11] The October 23, 2009 report contained an illegible signature. The report by Laurel Bryant does not indicate if she is a physician as defined under FECA. These reports do not constitute probative medical evidence under FECA, as neither report was signed by an identifiable physician.[12] Section 8101(2) of FECA provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic

[6] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[8] *T.H.*, 59 ECAB 388 (2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[9] *Gary L. Fowler*, 45 ECAB 365 (1994).

[10] *Phillip L. Barnes*, 55 ECAB 426 (2004); *Jamel A. White*, 54 ECAB 224 (2002).

[11] *M.T.*, Docket No. 07-2215 (issued February 25, 2008).

[12] *Roy L. Humphrey*, 57 ECAB 238, 242 (2005).

practitioners within the scope of their practice as defined by State law.[13] The Board has held that the reports of therapists and physician's assistants have no probative value on medical questions because therapists are not competent to render medical opinions under FECA.[14] Accordingly, the reports of the physical therapists and physician's assistants do not constitute medical evidence under FECA. The reports by Dr. Eugenio concerning the diagnostic tests are not sufficient to establish appellant's claim as they do not address the issue of causal relationship.[15]

The medical reports from Dr. Reisner indicate that appellant had cervical pain (or cervicalgia) as well as pain in the joint involving the shoulder region and low back pain (lumbago). The Board has generally held that a diagnosis of pain is not a firm medical diagnosis. Absent more in the way of medical rationale, does not constitute a basis for the payment of compensation.[16] Although Dr. Reisner noted that appellant had insomnia and anxiety, he did not address how this was related to the accepted employment incident. A general statement that appellant's condition was related to the employment incident is not sufficient; a rationalized medical opinion explaining causal relationship is necessary.

The Board finds that appellant failed to establish that the October 19, 2009 employment incident caused an injury, she has not met her burden of proof. 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 the belief that the condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.[17] Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[18] its regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[19] To be entitled to a merit review

[13] 5 U.S.C. § 8101(2).

[14] *Id.;J.B.*, Docket No. 10-1994 (issued May 5, 2011); *D.P.*, Docket No. 10-1678 (issued April 4, 2011).

[15] *J.C.*, Docket No. 10-1491 (issued March 23, 2011).

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

[17] *Y.M.*, Docket No. 10-1617 (issued May 9, 2011).

[18] 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[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).

[19] 20 C.F.R. § 10.606(b)(2).

of OWCP's 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.[20] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[21]

ANALYSIS -- ISSUE 2

In her request for reconsideration of OWCP's July 22, 2010 merit decision, appellant did not argue that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not considered by OWCP. She did not submit any pertinent new and relevant medical evidence. Accordingly, the Board finds that OWCP properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her request for reconsideration.[22]

CONCLUSION

The Board finds that appellant has not established that she sustained an injury in the performance of duty on October 19, 2009, as alleged. The Board further finds that OWCP properly denied appellant's request for reconsideration without merit review of the claim under 5 U.S.C. § 8128(a).

[20] *Id.* at § 10.607(a).

[21] *Id.* at § 10.608(b).

[22] *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 15 and July 22, 2010 are affirmed.

Issued: August 12, 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