United States Department of Labor
Employees' Compensation Appeals Board

JUANA E. VARGAS, Appellant	)	
and	)	**Docket No. 04-1709**
	)	**Issued: December 17, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Seattle, WA, Employer	)	

Appearances:
Juana E. Vargas, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 28, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs' decisions dated April 30, 2004, which denied her request for reconsideration. The Board also has jurisdiction over a June 30, 2003 merit decision that denied her occupational disease claim. The Board has jurisdiction over the merits of the case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues on appeal are: (1) whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty; and (2) whether the Office properly refused to reopen appellant's claim for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 2, 2003 appellant, then a 35-year-old letter clerk, filed an occupational disease claim alleging that she developed right shoulder pain and difficulty breathing while lifting and

pulling objects at work. She first became aware of the injury and its relation to her work on November 9, 2002. Appellant did not stop work. An October 28, 2002 duty status form accompanied the claim. It was signed by T. Daniels, a registered nurse, who advised that appellant was fit for duty on October 28, 2002 due to a nonwork-related October 20, 2002 car accident affecting the neck and back.

In a letter dated April 18, 2003, the Office advised appellant that the evidence submitted was insufficient to establish her claim, and requested that she submit additional supportive factual and medical evidence. A copy of the letter was also provided to the employing establishment.

By letter dated April 28, 2003, the employing establishment controverted the claim. Helen Lee, a human resources specialist, advised that appellant was terminated on March 20, 2003, and that she reported the injury on April 2, 2003 after her employment was terminated. Copies of appellant's medical questionnaires, an unsigned statement from the agency, employment duties and notification of personnel action were provided.

By decision dated June 30, 2003, the Office denied appellant's claim, noting that, while the evidence supported that the claimed events occurred, the medical evidence was insufficient to relate her conditions to her federal employment.

By letter dated April 20, 2004, appellant requested reconsideration and enclosed additional evidence. Appellant contended that she was terminated for walking off the job due to being harassed by a coworker, and that the termination was later reduced to a letter of warning. Appellant indicated that she was depressed and in pain due to the injury. The evidence submitted consisted of authorization requests for physical therapy dated November 10, December 1, 11 and 22, 2003; a March 30, 2004 report from Shanna Haft, a nurse, who indicated that appellant sought treatment for chronic back pain, an October 29, 2003 evaluation form Dr. Robert G. Swyden, a Board-certified family practitioner, who diagnosed musculoligamentous strain of the cervical spine and radiculopathy of the right leg, and opined that appellant was unable to work; a March 27, 2003 statement regarding why appellant left work on March 17, 2003; a March 26, 2004 report from Linda McDermott, a nurse practitioner, urging that appellant's claim be reopened and a billing statement.

By decision dated April 30, 2004, the Office denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors identified by the claimant.[1]

ANALYSIS -- ISSUE 1

It is not disputed that the alleged employment conditions of lifting and pulling objects at work occurred.

However, appellant did not submit medical evidence to support that the claimed conditions were caused or aggravated by lifting and pulling at work. There is no medical evidence addressing whether appellant's employment caused or aggravated any medical condition. As noted above, part of appellant's burden of proof includes submission of such medical. Although she submitted a duty status form, a nurse, the Board notes, is not defined as a physician under the Act.[2] Although the Office advised appellant in a letter dated April 18, 2003 that it was her responsibility to establish that an injury occurred as a result of performing her duties, appellant submitted no corroborating evidence within the allotted time, such as a report by a physician who treated her.

LEGAL PRECEDENT -- ISSUE 2

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[3] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[4] Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[5]

[1] *Solomon Polen*, 51 ECAB 341 (2000).

[2] Health care providers such as nurses, acupuncturists, physician's assistants, and physical therapists are not physicians under the Act. Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value. *Jan A. White*, 34 ECAB 515, 518 (1983).

[3] 20 C.F.R. § 10.608(a) (1999).

[4] 20 C.F.R. § 10.606(b)(1)-(2).

[5] 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 2

By letter dated April 20, 2004, appellant requested reconsideration and enclosed additional evidence. She again contended that she experienced pain due to repeated lifting of heavy mail. She also alleged that she was depressed. Appellant provided a statement with respect to her leaving work on March 17, 2003. As noted, the Office accepted that the claimed employment incident but found that appellant had not provided adequate medical evidence to establish an injury due to the employment factors alleged. Therefore, the Board finds that appellant's contentions or belief of a causal relationship is not relevant to the issue, which is medical in nature.

Appellant also submitted reports from nurses. As noted, a nurse is not defined as a physician under the Act.[6] Therefore, these reports are not relevant as they do not constitute probative medical evidence.[7]

Appellant also submitted a report from Dr. Swyden. However, this report, although new, is not relevant as it did not address whether any condition was caused or aggravated by accepted factors of her federal employment.

Appellant has failed to show that the Office erred in interpreting a point of law and has not advanced any relevant legal argument not previously considered by the Office. Furthermore, she did not submit relevant and pertinent medical evidence. Appellant failed to meet any of the three requirements for reopening her claim for a merit review, the Office properly denied her reconsideration request.[8]

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty. The Board also finds that the Office properly refused to reopen appellant's claim for merit review.[9]

[6] *Supra* note 3.

[7] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[8] *Id*.

[9] On appeal appellant submitted additional evidence to support her claim. The Board's jurisdiction, however, is limited to reviewing the evidence that was before the Office at the time of its final decision. The Board, therefore, has no jurisdiction to review any evidence submitted to the record after the Office's April 30, 2004 decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 30, 2004 and June 30, 2003 are hereby affirmed.

Issued: December 17, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member