

**United States Department of Labor
Employees' Compensation Appeals Board**

MYRTLE J. FORD-SEXTON, Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Kansas City, MO, Employer)

Docket No. 05-1702
Issued: December 5, 2005

Appearances:
Myrtle J. Ford-Sexton, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 9, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 18, 2004, finding that she failed to establish that she sustained an injury as alleged, and a January 27, 2005 decision, denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions in this case.

ISSUE

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury causally related to factors of her federal employment; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been on appeal before the Board.¹ In a January 26, 2004 decision, the Board vacated the Office's May 22, 2003 and December 3, 2002 decisions and remanded the case for referral to an appropriate Board-certified specialist to obtain an opinion regarding the causal relationship between the identified work factors and appellant's physical condition.² The facts and the history contained in the prior appeal are incorporated by reference.³

By letter dated April 12, 2004, the Office referred appellant for a second opinion examination with Dr. Dale Dalenberg, a Board-certified orthopedic surgeon. The Office forwarded her medical records, a statement of accepted facts and a description of appellant's employment duties.

In a June 22, 2004 report, Dr. Dalenberg noted examining appellant on May 17, 2004, reviewed her history of injury and treatment and conducted a physical examination. He reported normal sensation throughout the lower extremities, negative straight leg raising, some back soreness and no lower extremity atrophy. Dr. Dalenberg indicated that appellant's gait was normal and that she became "tearful" during the examination. He diagnosed lumbar disc degeneration at L4-5 with disc space narrowing as shown by her most recent radiograph and magnetic resonance imaging (MRI) scan. Dr. Dalenberg also noted that appellant did not currently have any symptoms of lumbar radiculopathy. He opined that she did not sustain a work-related injury as her condition was degenerative in nature and unrelated to her specific work duties. Dr. Dalenberg determined that appellant's condition resulted from the natural progression of her underlying condition as she did not have a specific work injury and there were no diagnostic findings. He opined that her onset of symptoms appeared to be due to a "natural variation of symptoms." Dr. Dalenberg stated that appellant "may have undergone temporary aggravations of her condition with her history of pushing and pulling at work, but that would have been no more than the average daily variation of backache symptoms with a degenerative back condition that she would sustain with work or nonwork duties." He opined that she "did not have a permanent aggravation of the condition with her work duties." Dr. Dalenberg explained that appellant's history did not suggest that her work activities contributed to her symptoms as opposed to ordinary every day activities. He noted that she had documented lumbar tenderness but there were unexplained aspects with regard to appellant's presentation which included her emotional symptoms, anger and depression.

¹ Docket No. 03-2299 (issued June 26, 2004).

² The record reflects that appellant has a prior accepted claim for bilateral carpal tunnel syndrome and a contusion to the right index finger. She has preexisting back pain since childhood, arthritis in the back, depression, insomnia, gastrointestinal trouble, tobacco abuse, (a pack a day), headaches, severe breast inflammations, hysterectomy and bladder repair in 1981, right index finger infection in 1998, with surgical drainage, hammer toe deformities of both feet, several toes, superficial spider varicose veins and some full varicosities, hiatus hernia diagnosed on August 21, 2001 and mild erythematous (hyperemic) gastropathy. She has several other claims under claim Nos. 112004466 for an injury on October 31, 1999, No. 112004578 for an injury on November 5, 2000; No. 112004071 for an injury on August 14, 2001 and 112019871 for an injury on September 10, 2003.

³ Appellant stopped work on February 25, 2002 and retired in February 2004.

By decision dated July 1, 2004, the Office denied appellant's claim. It determined that the weight of the medical evidence was represented by Dr. Dalenberg and supported that appellant did not have an orthopedic condition in her hip, leg, back, feet or right knee, which was causally related to her federal employment activities.

On July 20, 2004 appellant requested a hearing.

In an August 16, 2004 report, Dr. Richard E. Rattay, a Board-certified orthopedic surgeon, advised that on May 20, 2004 appellant underwent left ulnar nerve surgery, left carpal tunnel release at the wrist, left thumb and right ring and long finger corticosteroid injection. He opined that her left ulnar nerve compressive neuropathy at the elbow and left median compressive neuropathy at the wrist or carpal tunnel syndrome were aggravated and contributed to by her employment.

On September 20, 2004 the Office hearing representative determined that the case was not in posture for a hearing and remanded the matter. The Office hearing representative noted that Dr. Dalenberg indicated that appellant's employment activities of pushing and pulling may have temporarily aggravated her underlying condition, but also noted that appellant's condition had nothing to do with her work activities. The hearing representative noted that these findings required clarification.

On November 1 and 4, 2004 the Office requested clarification from Dr. Dalenberg and provided him with a copy of the Office hearing representative's decision and statement of accepted facts.

In a November 12, 2004 report, Dr. Dalenberg explained that, on examination there was no evidence that appellant's back problem was caused by her employment factors. He indicated that she described her injury as a "cumulative injury" which occurred from lifting and pulling patients in the course of her job duties. Dr. Dalenberg noted that there was no history of a specific injury or an objective injury and that physical examination showed only mild diffuse tenderness, no neurological findings, no significant limitation of range of motion and a normal gait without ambulatory aids. He referred to the diagnostic studies and indicated that they only showed mild L4-5 disc space narrowing and mild degenerative spondylotic changes of the lumbar spine. Dr. Dalenberg stated that appellant's subjective symptoms were consistent with discogenic back pain. He advised that she had a profound emotional overlay, indicating a psychological component to her symptoms and had complained of total body pain that could not be explained by work factors with a history of other diffuse aches and pains. Dr. Dalenberg determined that appellant had discogenic low back pain that was likely related to the degenerative L4-5 disc. He explained that "there was never a work injury but she did become symptomatic over a period of time when she happened to be working." Dr. Dalenberg noted that appellant had other, unrelated symptoms during the same period of time including "noncardiac chest pain, tension headaches, knee effusion, hammertoes and neuropathic pain in her upper extremities." He explained that it was unreasonable that these symptoms were caused by employment factors "in the absence of a specific injury history and with such mild degenerative changes on her imaging studies and such a paucity of significant physical findings."

Dr. Dalenberg further related that, although appellant believed that her symptoms were caused by pushing and pulling at work over a period of time, the medical record was not enough to support her claim. He explained that the “insidious onset of low back pain due to degenerative disease is usually multifactorial and there is often no reason (in the absence of a specific injury history) to believe that it was caused during 8 hours per day at work, when the usual person spends 16 hours per day away from work.” Further, Dr. Dalenberg noted that aging could also be a factor. Regarding any aggravation, he advised that there was no material objective change in her condition due to her federal employment and, therefore, no permanent aggravation. Regarding a temporary aggravation, Dr. Dalenberg explained that there were no objective findings on examination, therefore, no temporary aggravation. He stated that appellant had a preponderance of subjective symptoms over objective findings. Dr. Dalenberg further noted that, if a variation in subjective symptoms with work tasks qualified as a temporary aggravation, then appellant did have temporary aggravations of her condition on a day to day basis. He added that, if a variation in subjective symptoms was regarded by the Office as constituting a “temporary aggravation,” then the aggravations should be regarded as having ceased when the activities causing the pain ceased, such as when she left work for the day.

By decision dated November 18, 2004, the Office denied appellant’s claim for compensation. The Office found that Dr. Dalenberg provided a rationalized opinion that she did not have an orthopedic condition in her hip, leg, back, feet or right knee, causally related to factors of her federal employment.

By letter dated December 14, 2004, appellant requested reconsideration and submitted additional medical evidence, including copies of previously received treatment notes dated February 23, March 19, April 13, September 12 and 20, 2001 from Dr. Mark Lee, a Board-certified family practitioner, a November 28, 2001 treatment note from Dr. Robert Takacs, a Board-certified orthopedic surgeon, a March 5, 2002 medical report from Dr. David J. Clymer, Board-certified orthopedic surgeon, and an April 18, 2002 hospital admission and discharge summary.

Appellant also submitted an October 30, 2003 report, in which Dr. Lee summarized her history of injury and treatment and referred to his prior reports. He noted appellant’s current symptoms and treatment. Dr. Lee advised that appellant had nonspecific synovitis involving her knees which produced recurrent effusions which were chronic and intermittent changing conditions. Dr. Lee explained that he had attempted in the past to modify her work to reduce her symptoms and retard the progress of her conditions.

By decision dated January 27, 2005, the Office denied appellant’s request for reconsideration, finding that she failed to submit either new and relevant evidence or legal contentions not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees’ Compensation Act⁴ has the burden of establishing the essential elements of his or her claim, including the fact that the

⁴ 5 U.S.C. §§ 8101-8193.

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 and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

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 causal relationship, generally, 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. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁷

ANALYSIS -- ISSUE 1

Appellant alleged that her hip, leg, back, feet and right knee conditions were causally related to her federal employment activities. While she has established that her workplace activities included lifting, walking and pulling at work, the medical evidence is insufficient to establish that her conditions were caused or aggravated by her federal employment factors.

Appellant submitted an April 16, 2004 report, in which Dr. Rattay opined that her left ulnar nerve compressive neuropathy at the elbow and left median compressive neuropathy at the wrist or carpal tunnel syndrome were aggravated and contributed to by her employment. However, he did not include any discussion as to how these conditions were caused or aggravated by specific factors of appellant’s employment. A medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship that is unsupported by medical rationale.⁸ This report is insufficient to meet appellant’s burden of proof.

⁵ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *Id.*

⁸ *Robert S. Winchester*, 54 ECAB ____ (Docket No. 00-800, issued November 8, 2002).

The Office referred appellant for a second opinion examination with Dr. Dalenberg. The Board finds that his reports, as a whole, are well reasoned and do not support that any specific employment factors caused or aggravated her condition. Dr. Dalenberg opined that appellant did not sustain a work-related injury and explained that her condition was degenerative in nature and unrelated to specific work duties. He explained that her condition resulted from the natural progression of her underlying condition as she did not have a specific work injury supported by diagnostic findings. Dr. Dalenberg noted that appellant had documented lumbar tenderness but, that there were unexplained aspects with regard to her presentation which included her emotional symptoms, anger and depression. In a November 12, 2004 supplemental report, he explained that, on examination there was no evidence that appellant's back problem was caused by factors of her federal employment. Dr. Dalenberg noted that there was no history of any specific injury. He explained that physical examination of appellant revealed only mild diffuse tenderness, with no neurological findings, no significant limitation of range of motion and a normal gait. Dr. Dalenberg explained that her subjective symptoms were related to discogenic back pain and opined that she had a psychological component to her symptoms that was not explained by work factors. He stated that the onset of low back pain due to degenerative disease was usually multifactorial without a specific injury and also noted that aging could be a factor. Regarding any employment-related aggravation, Dr. Dalenberg advised that there was no material objective change in appellant's condition that occurred due to her federal employment and, therefore, no permanent aggravation. He opined that there was no temporary aggravation as there were no objective findings on examination. However, Dr. Dalenberg noted that, if a variation in subjective symptoms was regarded as a "temporary aggravation," then the aggravations would have ceased when appellant stopped working. The Board finds that the medical reports of Dr. Dalenberg constitute the weight of medical opinion. Appellant has submitted insufficient medical evidence to establish that her hip, leg, back, feet or right knee conditions were caused or aggravated by factors of her federal employment.

There is no probative, rationalized medical evidence to establish that these conditions were caused or aggravated by factors of appellant's employment. She has not met her burden of proof in establishing that she sustained a medical condition in the performance of duty causally related to factors of employment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁹ the Office regulations provide that a claimant's application for reconsideration must be submitted in writing and set forth arguments or contain evidence that either: (1) shows 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) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁰ To be entitled to a merit review of an Office decision

⁹ 5 U.S.C. § 8128(a). Under section 8128(a) of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹⁰ 20 C.F.R. §§ 10.609(a) and 10.606(b).

denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.¹¹ 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.¹²

ANALYSIS -- ISSUE 2

Appellant requested reconsideration on December 14, 2004 and submitted additional medical evidence, including copies of previously received treatment notes dated February 23, March 19, April 13, September 12 and 20, 2001 from Dr. Lee, a Board-certified family practitioner, November 28, 2001 treatment note from Dr. Takacs, a Board-certified orthopedic surgeon, a March 5, 2002 medical report from Dr. Clymer, a Board-certified orthopedic surgeon, and an April 18, 2002 hospital admission and discharge summary. The Board notes that this evidence was previously of record and considered by the Office. It does not constitute a basis for reopening the claim for reconsideration of the merits.

Appellant also submitted an October 30, 2003 report, in which Dr. Lee summarized appellant's history of injury and treatment and referred to his prior reports. However, while this report was a new report, it is not relevant and pertinent new evidence, as he repeated his previous findings. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹³ Appellant is not entitled to a merit review because the information provided in this report was not new, relevant or pertinent. She did not advance a relevant legal argument that had not been previously considered by the Office. Appellant did not argue that the Office erroneously applied or interpreted a specific point of law. Consequently, she is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under section 10.606(b)(2). Accordingly, the Board finds that the Office properly denied appellant's December 14, 2004 request for reconsideration.

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 further finds that the Office properly denied appellant's request for reconsideration.

¹¹ 20 C.F.R. § 10.607(a).

¹² 20 C.F.R. § 10.608(b).

¹³ *Freddie Mosley*, 54 ECAB ____ (Docket No. 02-1915, issued December 19, 2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 27, 2005 and November 18, 2004 are affirmed.

Issued: December 5, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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