

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

KIMBERLY A. DOWD, Appellant)

and)

**DEPARTMENT OF HOMELAND SECURITY,
U.S. SECRET SERVICE, Boston, MA, Employer**)

**Docket No. 05-503
Issued: June 1, 2005**

Appearances:
Kimberly A. Dowd, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On December 22, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 7, 2004 and nonmerit decision dated October 4, 2004 denying her traumatic injury claim. Pursuant to 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 a traumatic injury while in the performance of duty; and (2) whether the Office properly denied appellant's request for a review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 31, 2003 appellant, a 32-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that, on September 21, 2003, she experienced a surge of pain in her left side and back while adjusting required equipment. She described the nature of injury as "protrusion of thoracic dis[c] (T7-8) midback."

In support of her claim, appellant submitted a letter dated November 25, 2003 signed by Dr. Angela O'Neal, a treating physician, relating appellant's allegations that she "turned quickly one day and developed [the] pain;" that the pain began in her abdomen and then spread to her back; that the pain consisted of a constant ache with some pins and needles in her abdomen as well; and that she had had the pain on her left side for two and a half months. Dr. O'Neal also stated that a report from a magnetic resonance imaging (MRI) scan of the thoracic spine revealed tiny central posterior T7-8 disc protrusion.

Appellant also submitted notes dated November 25, 2003 signed by Dr. O'Neal reflecting an impression of thoracic radiculopathy, as well as a tiny disc protrusion without clear impingement on roots; physicians' notes dated October 12, 2003 bearing illegible signatures reflecting appellant's claim that pain in her left side began three weeks prior to that date; a letter dated December 5, 2003 signed by Dr. O'Neal reiterating her diagnosis of thoracic radiculopathy; an unsigned emergency room report dated October 17, 2003 providing a diagnosis of abdominal pain; an unsigned emergency room report dated October 19, 2003 providing a diagnosis of abdominal pain with unclear etiology; a note dated January 5, 2003 signed by Dr. O'Neal reiterating her diagnosis of thoracic radiculopathy; and numerous physical therapy reports. Appellant submitted an unsigned report dated March 12, 2004 from her chiropractor, Dr. Matthew Kowalski, detailing the history of the alleged injury as described by appellant. Reportedly, appellant twisted her back while reaching to adjust some equipment, causing a sudden onset of left-sided midback pain. Dr. Kowalski indicated that appellant waited approximately three weeks before consulting her primary care physician, who was unable to confirm a diagnosis. Dr. Kowalski provided impressions of a small T7-8 individual disc protrusion; costovertebral dysfunction/capsulitis at the left T9-10 levels; and intercostals neuritis.

On April 6, 2004 the Office notified appellant that the evidence submitted was insufficient and advised her to provide additional documentation, including a diagnosis and a physician's opinion as to how his injury resulted in the diagnosed condition. The Office specifically asked appellant to provide a detailed description as to how the injury occurred, including the cause of the injury, and statements from any witnesses.

By decision letter dated May 7, 2004, the Office denied appellant's claim, stating that the evidence was insufficient to establish that she had sustained an injury under the Federal Employees' Compensation Act.¹

On May 10, 2004 appellant submitted responses to questions posed by the Office in conjunction with its insufficiency letter of April 6, 2004. She alleged that she delayed filing her claim because of "the uncertainty of the actual injury." Appellant stated that, although she originally believed that she had pulled a muscle and was later told she might have an organ problem, she was not diagnosed with the thoracic spine problem until the end of November 2003. Appellant noted that the reference made on the CA-1 form to an alleged laboratory accident and exposure to unknown chemicals was erroneous.

¹ 5 U.S.C. §§ 8101-8193.

Appellant submitted a witness statement by Jeffrey Yung from the employing establishment's Boston field office wherein he indicated that on or about September 21, 2003 appellant reported to him that she began to experience pain in her back while on duty as a post stander in New York on that date.

By letter dated July 1, 2004, appellant requested reconsideration of the Office's May 7, 2004 decision. In support of her request, appellant provided copies of previously submitted documents, including a letter from Dr. O'Neal dated December 5, 2003, a note from Dr. O'Neal dated January 5, 2003, and the witness statement from Jeffrey Yung dated April 30, 2004. Appellant also submitted a letter from Dr. Neal dated March 2, 2004 reflecting that appellant had had a second epidural block but continued to have significant pain and numbness on the left side, as well as a thoracic root problem. Dr. O'Neal provided a diagnosis of thoracic radiculopathy.

By decision dated October 4, 2004, the Office denied appellant's request for reconsideration, finding the evidence submitted in support of her request was duplicative and therefore insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

The Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.² The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."³

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of her claim. When an employee claims that she sustained a traumatic injury in the performance of duty, she must establish the "fact of injury," to-wit: she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged, and that such event, incident or exposure caused an injury.⁴

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast substantial

² 5 U.S.C. § 8102 (a).

³ This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB ____ (Docket No. 04-1257, issued, September 10, 2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

⁴ *Betty J. Smith*, 54 ECAB ____ (Docket No. 02-149, issued October 29, 2002); *see also Tracey P. Spillane*, 54 ECAB ____ (Docket No. 02-2190, issued June 12, 2003). The term "injury" as defined by the Act, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q), (ee).

doubt on a claimant's statements. The employee has not met her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁵

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.⁶ An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.⁷

Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion 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 established incident or factor of employment.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a traumatic injury in the performance of duty as alleged.

In its May 7, 2004 decision, the Office accepted that appellant's September 21, 2003 work-related incident occurred as alleged. However, appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to the accepted employment incident.⁹ She has failed to meet this burden of proof.

Medical evidence of record consists of notes and reports from Dr. O'Neal dated November 11 and December 5, 2003 and January 5¹⁰ and March 4, 2004; numerous physical therapy notes; unsigned emergency room reports dated October 17 and 19, 2003; physician's notes bearing an illegible signature dated October 12, 2003; and an unsigned report from Dr. Kowalski, appellant's chiropractor, dated March 12, 2004. None of the medical evidence of

⁵ See *Paul Foster*, 56 ECAB ____ (Docket No. 04-1943, issued December 21, 2004).

⁶ *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

⁷ *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

⁸ *John W. Montoya*, 54 ECAB ____ (Docket No. 02-2249, issued January 3, 2003).

⁹ *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

¹⁰ The Board presumes that a note signed by Dr. O'Neal, dated January 5, 2003 but received by the Office on February 3, 2004, was actually signed on January 5, 2004.

record provides a rationalized medical opinion regarding the existence of a causal relationship between the accepted employment incident and appellant's current condition.

Emergency room reports dated October 17 and 19, 2003 provided a diagnosis of abdominal pain with unclear etiology. However, they lack probative value in that they are unsigned and specifically indicate that the cause of appellant's condition was unknown. Notes dated October 12, 2003 reflect that appellant's left side pain began three weeks prior to that date; however, the signature on the document is illegible, and there is no discussion of causation.

Although appellant's primary care physician, Dr. O'Neal, provided a diagnosis of thoracic radiculopathy on November 25, 2003, none of her numerous reports contained an opinion, rationalized or otherwise, as to the cause of appellant's condition.

The only detailed history of the alleged work-related incident was encompassed in an unsigned report dated March 12, 2004 from appellant's chiropractor, Dr. Kowalski. Dr. Kowalski's report lacks probative value for several reasons. First, the report was unsigned. It is well established that, in order to constitute competent medical opinion evidence, the medical evidence submitted must be signed by a qualified physician.¹¹ Second, in that he was not treating appellant for a subluxation as demonstrated by x-ray, Dr. Kowalski does not qualify as "physician" as defined in 5 U.S.C. § 8101(2).¹² Finally, the fact that the report, containing the first detailed accounting of the alleged injury by a physician, was submitted six months after alleged injury, casts serious doubt on its credibility.

There is no medical evidence of record which explains the physiological process by which the alleged September 21, 2003 incident would have caused appellant's diagnosed condition. Moreover, appellant's allegation that her condition is due to a work-related injury is of no probative value. The mere facts that she may have developed a condition during a period of employment and that she believes that the condition was caused by employment factors is not sufficient to establish a causal relationship.¹³ Therefore, appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, 8 the Office's regulations provide that 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) submit relevant and pertinent new evidence not

¹¹ See *James A. Long*, 40 ECAB 538 (1989); *Merton J. Sills*, 39 ECAB 572 (1988).

¹² A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician under section 8101(2) of the Act, which provides: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist, and subject to regulation by the secretary." See *Merton J. Sills*, *supra* note 11.

¹³ *Dennis M. Mascarenas*, *supra* note 7.

previously considered by the Office.¹⁴ 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.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 2

In support of her reconsideration request, appellant provided copies of previously submitted documents, including a letter from Dr. O'Neal dated December 5, 2003 and a note from Dr. O'Neal dated January 5, 2003. Appellant also submitted a letter from Dr. O'Neal dated March 2, 2004 reflecting that appellant continued to have significant pain and numbness on the left side, as well as a thoracic root problem, and providing a diagnosis of thoracic radiculopathy. The Board finds that the documents submitted in support of appellant's request for reconsideration are duplicative and therefore do not constitute a basis for reopening a case.¹⁷

Subsequent to the issuance of the Office's May 7, 2004 decision but prior to her request for reconsideration, appellant submitted a response to a questionnaire presented by the Office in conjunction with its insufficiency letter of April 6, 2004. She alleged that she delayed filing her claim because of "the uncertainty of the actual injury." Appellant stated that although she originally believed that she had pulled a muscle and was later told she might have an organ problem, she was not diagnosed with the thoracic spine problem until the end of November 2003. Appellant also submitted a statement dated April 30, 2004 from Mr. Yung wherein he indicated that, on or about September 21, 2003, appellant reported to him that she began to experience pain in her back while on duty as a post stander in New York on that date. The Board finds that appellant's response and Mr. Yung's statement regarding the fact of injury are not relevant, as her claim was denied on the basis that she had failed to establish a causal relationship between the alleged employment injury and her diagnosed condition, nor did appellant show that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Therefore, the Board finds that appellant failed to meet any of the standards under section 8128(a) of the Act which would require the Office to reopen the case for merit review.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a traumatic injury in the performance of duty. The Board further finds that 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).

¹⁴ 20 C.F.R. §§ 10.606(b)(2).

¹⁵ 20 C.F.R. § 10.608(b). See *Annette Louise*, 54 ECAB ____ (Docket No. 03-445, issued August 26, 2003).

¹⁶ 20 C.F.R. § 10.607(a).

¹⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

ORDER

IT IS HEREBY ORDERED THAT the October 4 and May 7, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 1, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member