United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
and	)	**Docket No. 07-560**
	)	**Issued: June 22, 2007**
DEPARTMENT OF THE NAVY, U.S. MARINE CORPS-AIR STATIONS, San Diego, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 21, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated January 31, 2006 denying his occupational claim and a November 17, 2006 nonmerit decision denying his reconsideration request. 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 met his burden of proof in establishing that he developed an occupational disease in the performance of duty; and (2) whether the Office properly denied his request for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 4, 2005 appellant, then a 56-year-old fuel distribution systems worker, filed an occupational disease claim alleging that his work conditions caused or aggravated his lower back and sciatic nerve dysfunction. His condition began on January 21, 2000 and he

realized the causal relationship to his work on October 21, 2005. The employing establishment controverted the claim.

By letter dated November 17, 2005, the Office informed appellant of its receipt of his claim and that additional factual and medical information were required in order to adjudicate his claim.[1] In response, appellant submitted an undated statement, received on November 21, 2005. He alleged that on January 21, 2000 he fell on his back, left hip and left elbow in the performance of duty. Appellant stated that this injury in conjunction with years of driving a rough riding bumpy fuel truck caused or aggravated his lower back and sciatic nerve disorder. He submitted copies of dispensary permits from the employing establishment dated June to November 2005; his health record from the Naval Medical Center dated June to September 2005; reports dated June 30, July 28, November 3 and 29, 2005 from the employing establishment's occupational health unit which noted his chronic lower back pain and sciatica, and reports from Kaiser Permanente dated October 2005, noting a low back strain/sprain/pain.

Reports from Dr. Andrew Tutino, a chiropractor, were also submitted. In letters dated June 3 to December 2005, Dr. Tutino provided examination findings of the thoracic spine, lumbar spine, sacral range and pelvic area and noted the treatment provided. Some reports identified subluxation in either the right lower lumbar region, the left lower lumbar range or the entire lumbar spine.

By decision dated January 31, 2006, the Office denied appellant's claim finding that the medical evidence submitted was insufficient to establish that the claimed medical condition resulted from the accepted events.

On October 20, 2006 appellant requested reconsideration of the January 31, 2006 decision. Additional evidence was not received.

By decision dated November 17, 2006, the Office denied appellant's request for reconsideration finding that the evidence submitted in support of the request did not warrant a merit review.[2]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[3] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any

[1] As the employing establishment, in its controversion of the claim, had indicated that appellant was treated by a chiropractor, the Office also advised appellant of the situations in which a chiropractor is recognized as a physician under the Federal Employees' Compensation Act.

[2] On appeal, appellant submitted new medical evidence. However, the Board has no jurisdiction to review evidence that was not before the Office at the time of its final decision. *See* 20 C.F.R. § 501.2(c); *George A. Rodriguez*, 57 ECAB ___ (Docket No. 05-490, issued November 18, 2005).

[3] 5 U.S.C. §§ 8101-8193.

disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[4] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury and an occupational disease.[5]

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;[6] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[7] and (3) medical evidence establishing 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.[8]

Generally, causal relationship may be established only by rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that 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.[9] The opinion of the physician must be based on a complete factual and medical background of the claimant,[10] must be one of reasonable medical certainty[11] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12]

ANALYSIS -- ISSUE 1

The Office accepted that appellant was a federal employee, that he timely filed his claim for compensation benefits and that he was exposed to the various conditions as alleged at work. The issue, therefore, is whether he has submitted sufficient medical evidence to establish that his back and sciatica nerve conditions are related to his work. The Board finds that the medical evidence submitted does not provide a rationalized medical opinion establishing that either the January 21, 2000 work incident or his other work exposures caused or aggravated appellant's medical conditions or disability.

[4] *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

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

[7] *Marlon Vera*, 54 ECAB 834 (2003); *Roger Williams*, 52 ECAB 468 (2001).

[8] *Ernest St. Pierre*, 51 ECAB 623 (2000).

[9] *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[10] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[11] *John W. Montoya*, 54 ECAB 306 (2003).

[12] *Judy C. Rogers*, 54 ECAB 693 (2003).

The reports from the employing establishment and Kaiser Permanente fail to provide a physician's opinion as to the causal relationship of appellant's back condition to his employment. Therefore, this evidence is of limited probative value. The Board has long held that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[13]

The reports from Dr. Tutino, appellant's chiropractor, are also insufficient to establish his claim. Dr. Tutino provided detailed results of his examination, and, diagnosed subluxation. However, a chiropractor is considered a physician for purposes of the Act only where he treats a spinal subluxation as demonstrated by x-ray to exist.[14] There is no indication in the reports that Dr. Tutino obtained or reviewed x-rays in rendering his diagnosis of subluxation. As he does not meet the statutory definition of physician, his reports lack probative value.

In this case, there is insufficient medical evidence of record establishing a causal relationship between a diagnosed condition and the accepted work factors. The Office advised appellant of the type of medical evidence required to establish his claim; however, he failed to submit such evidence. An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between his claimed condition and his employment.[15] To establish causal relationship, appellant must submit a physician's report in which the physician reviews those factors of employment identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination and appellant's medical history, explain how these employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[16] Appellant failed to submit such evidence and, therefore, failed to satisfy his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

The Act[17] provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[18]

---

[13] *Michael E. Smith*, 50 ECAB 313 (1999).

[14] Section 8101(2) of the Act provides as follows: (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*, 39 ECAB 572, 575 (1988).

[15] *Patricia J. Glenn*, 53 ECAB 159 (2001).

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

[17] 5 U.S.C. § 8101 *et seq*.

[18] 20 C.F.R. § 10.605.

The application for reconsideration 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.[19]

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 these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.[20] Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[21]

ANALYSIS -- ISSUE 2

In appellant's request for reconsideration, he did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. He also did not submit any new and relevant evidence with his reconsideration request. As appellant set forth no argument and offered no new evidence, the Board finds that appellant is not entitled to a review of the merits of his claim based on the above-noted requirements under section 10.606(b)(2).[22]

Accordingly, the Board finds that the Office properly denied appellant's request for merit review.

[19] 20 C.F.R. § 10.606.

[20] *Donna L. Shahin*, 55 ECAB 192 (2003).

[21] 20 C.F.R. § 10.608.

[22] 20 C.F.R. § 10.606(b)(2).

CONCLUSION

Appellant has not met his burden of proof in establishing that he developed an occupational disease in the performance of duty and that the Office properly denied appellant's request for merit review.

ORDER

IT IS HEREBY ORDERED THAT the November 17 and January 31, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 22, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board