United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 07-1124**
	)	**Issued: October 3, 2007**
DEPARTMENT OF THE ARMY, CIVILIAN PERSONNEL ADVISORY CENTER, Fort Sill, OK, 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 March 19, 2007 appellant filed a timely appeal from a January 8, 2007 nonmerit decision of the Office of Workers' Compensation Programs that denied her request for reconsideration. She also appealed an August 14, 2006 decision of the Office that denied her traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained a low back injury on November 16, 2005; and (2) whether the Office properly denied her request for reconsideration without conducting further merit review.

FACTUAL HISTORY

On January 12, 2006 appellant, then a 42-year-old educational technician, filed a traumatic injury claim alleging that on November 16, 2005 she sustained injury to her low back, left leg, hips and buttocks while lifting a child. She did not stop work.

A December 28, 2005 magnetic resonance imaging (MRI) scan was obtained. Dr. Jonathan Rock, a Board-certified radiologist, noted appellant's complaints of low back pain and bilateral leg pain with tingling and weakness. He diagnosed moderate right foraminal stenosis with mild right acquired spinal stenosis and mild left neural foraminal stenosis secondary to broad based and right parasagittal annular disc bulge and facet hypertrophy, as well as degenerative disc disease at L5-S1. In a January 30, 2006 note, Dr. Thomas J. Leckman, an attending internist, stated that appellant had sciatica and should not lift more than 25 pounds. On February 7, 2006 Dr. J.D. Duncan, an osteopath, reported that appellant complained of low back pain radiating down her right hip and into her leg. He reiterated appellant's lifting restrictions and diagnosed lumbar radiculitis, lumbar stenosis at L5-S1, lumbar bulging disc at L5-S1, lumbar degenerative disc disease and unspecified hypertension. Appellant also submitted a February 27, 2006 report noting her physical therapy progress.

On March 21, 2006 the Office requested additional information concerning appellant's claim. No further evidence was submitted.

By decision dated April 21, 2006, the Office denied appellant's claim on the grounds that she failed to establish that an injury occurred at the time, place and in the manner alleged.

In an April 13, 2006 report, Dr. Duncan noted appellant's continuing complaints of left leg and thigh pain which were "not significant enough for surgery." He stated: "In regards to whether or not this is a new or old injury, this injury is an exacerbation of [appellant's] original injury on November 16, 2005 and is an ongoing problem." Dr. Duncan advised that appellant would have permanent restrictions on lifting, pushing or pulling over 10 pounds. Appellant also provided several medical reports predating her claimed traumatic injury. A December 9, 2003 MRI scan report from Dr. Howard Harper, a Board-certified radiologist, diagnosed mild to moderate right-sided spinal canal stenosis and mild right foraminal stenosis at L5-S1, due to the right parasagittal and foraminal component of a mild annular bulge. Dr. Harper also noted that appellant exhibited early signs of degenerative disc disease. On September 13, 2004 Dr. Duncan noted appellant's symptoms of back pain radiating into the right leg and diagnosed lumbar radiculitis, lumbar lateral recess stenosis, lumbar disc herniation and lumbar degenerative disc disease. He advised that an MRI scan revealed severe degenerative disc disease at L5-S1. On November 4, 2004 Dr. Duncan noted that appellant's symptoms were improving with medication but that, if her symptoms recurred, she might need a decompressive discectomy.

Appellant further explained the circumstances of her claim and noted that she had previously had similar symptoms but that they had resolved within a few days. She also provided additional treatment notes from her physical therapist and a July 9, 2004 report from Dr. Harper detailing the results of an MRI scan of her cervical spine.

On May 3, 2006 appellant requested reconsideration and resubmitted evidence previously of record.[1] In a February 28, 2001 form report, Dr. Leon Bybee, Board-certified in preventative medicine, diagnosed sciatica and checked a box indicating that her condition was caused or aggravated by her employment. In a June 1, 2006 lumbar spine x-ray report, Dr. Kevin Murray, a Board-certified radiologist, indicated that appellant had lumbosacral neuritis and diagnosed degenerative disc disease at L5-S1 with mild spondylolisthesis. Appellant also provided a May 22, 2006 report from Dr. Willis Chung, a Board-certified radiologist, who reviewed a lumbar spine MRI scan and diagnosed anterior subluxation at the L5 level with mild diffuse disc bulging, right greater than left, with minimal impingement. Additionally, a June 1, 2006 form report from Dr. Duncan diagnosed lumbar radiculitis and advised that appellant could perform sedentary work.

By decision dated August 14, 2006, the Office modified its previous decision to reflect that appellant had established that the incident occurred but denied the claim on the grounds that appellant did not establish a causal relationship between the diagnosed condition and the accepted employment incident.

Appellant requested reconsideration on October 5, 2006.

By decision dated January 8, 2007, the Office denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 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 disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.[3] 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.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a "fact of injury" has been established. 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.[5] Second, the

[1] Appellant submitted a letter from the Office indicating that she had a previous claim for an October 28, 1998 injury which was accepted for a lumbar sprain/strain, Office Claim No. 160324426. This claim is not part of the present appeal which pertains to Office Claim No. 262105219

[2] 5 U.S.C. §§ 8101-8193.

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[6]

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.[7] The opinion of the physician must be based on a complete factual and medical background of the claimant[8] and must be one of reasonable medical certainty[9] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[10]

ANALYSIS -- ISSUE 1

The Board finds that the November 16, 2005 lifting incident occurred as alleged. However, appellant has not established the causal relationship between her diagnosed lumbar conditions and the accepted employment incident.[11]

Appellant submitted several medical reports diagnosing various lumbar conditions, including degenerative disc disease. However, reports such as Dr. Rock's December 28, 2005 MRI scan report, Dr. Leckman's January 30, 2006 report, Dr. Duncan's February 7, 2006 report, Dr. Murray's June 1, 2006 x-ray report, Dr. Chung's May 22, 2006 MRI scan report and Dr. Duncan's June 1, 2006 form report do not address the causal relationship of appellant's diagnosed conditions and the November 16, 2005 employment incident. This evidence, therefore, is not probative on that issue.[12] Moreover, Dr. Bybee's 2001 report concerns a prior injury and predated the claimed 2005 injury.

Dr. Duncan's April 13, 2006 report, addressed causal relationship, stating: "In regards to whether or not this is a new or old injury, this injury is an exacerbation of [appellant's] original injury on November 16, 2005 and is an ongoing problem." However, he did not specifically relate appellant's condition to the lifting incident on November 16, 2005. Dr. Duncan, while

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[6] *Id.*

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

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

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

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

[11] On appeal before the Board, appellant submitted additional medical evidence. The Board, however, notes that it cannot consider this evidence for the first time on appeal because the Office did not consider this evidence in reaching its final decision. The Board's review is limited to the evidence in the case record at the time the Office made its final decision. 20 C.F.R. § 501.2(c).

[12] *See, e.g. Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (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).

noting a preexisting low back condition, did not explain how lifting at work would have caused or aggravated the diagnosed condition. The need for medical reasoning or rationale is particularly important since the evidence indicates that appellant had severe degenerative disc disease which preexisted the claimed November 16, 2005 injury. Dr. Duncan's report is insufficient to meet her burden of proof.

The medical evidence is insufficient to establish that the November 16, 2005 lifting incident caused or aggravated appellant's lumbar condition.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128 of the Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulation provides guidance for the Office in using this discretion.[13] The regulation provides that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."[14]

Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[15] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[16]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review. As noted above, in order to require the Office to reopen a claim for a merit review, appellant must either show that the Office erroneously applied or interpreted a specific point of law, advance a relevant argument not previously considered by the

[13] 20 C.F.R. § 10.606(b)(2) (1999).

[14] *Id.*

[15] 20 C.F.R. § 10.608(b) (1999).

[16] *Annette Louise*, 54 ECAB 783 (2003).

Office or present relevant and pertinent new evidence not previously considered by the Office.[17] Appellant has not met any of the above-listed criterias. She did not assert that the Office misinterpreted a specific point of law. Appellant also did not advance any new and relevant legal arguments not previously considered by the Office. She did not provide supporting legal arguments with her request for reconsideration. Finally, the record does not reflect that appellant submitted any medical evidence with her October 5, 2006 reconsideration request. Accordingly, the Board finds that the Office properly denied her October 5, 2006 reconsideration request without reaching the merits because appellant did not meet any of the above-listed three criteria warranting a merit review.

CONCLUSION

The Board finds that appellant did not meet her burden of proof in establishing that she sustained an injury in the performance of duty on November 16, 2005 and that the Office properly denied her request for reconsideration without conducting a merit review.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2007 and August 14, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 3, 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

[17] *See supra* note 14.