United States Department of Labor
Employees' Compensation Appeals Board

V.L., Appellant	)	
and	)	**Docket No. 07-1391**
	)	**Issued: October 16, 2007**
DEPARTMENT OF VETERANS AFFAIRS, HOUSTON VETERANS AFFAIRS MEDICAL CENTER, Houston, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 26, 2007 appellant filed a timely appeal from December 20, 2006 and April 12, 2007 decisions of the Office of Workers' Compensation Programs that denied her request for reconsideration and a September 7, 2006 decision that affirmed the denial of her occupational disease 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 developed an occupational disease in the performance of duty; and (2) whether the Office properly denied appellant's requests for reconsideration without conducting a merit review.

FACTUAL HISTORY

On December 15, 2005 appellant, then a 47-year-old food service worker, filed an occupational disease claim alleging that she developed left and right shoulder pain in the

performance of duty. She stated that she was assigned to the task of bagging bread and sealing it in plastic bags on December 4, 2005. Appellant first realized her injury on December 4, 2005 and first related it to her employment on December 10, 2005. She stopped work on December 15, 2005.

On December 22, 2005 the Office requested additional information concerning appellant's claim.

By decision dated January 24, 2006, the Office denied appellant's occupational disease claim on the grounds that there was no medical evidence of record providing a diagnosis that could be connected to her work activities.

The Office subsequently received an undated statement from appellant noting that she called in sick to work on December 17, 2005 due to a shoulder injury, which she characterized as "a recurrent pain based on the weather." In a December 16, 2005 statement, she explained that she experienced shoulder pain while bagging bread and asserted: "When I work on the bread machine for a long time my shoulders get worse."

In a December 16, 2005 treatment note, Dr. J. Ortiz-Toro, an employing establishment physician specializing in occupational health, diagnosed shoulder pain and overexertion. Regarding causal relationship, he stated: "No apparent traumatic event, may be secondary to adiposity and morbid obesity." In a December 16, 2005 form report, Clayton Enders, a physician's assistant, indicated by check marks on the report that appellant had a work-related condition that had not resolved. He diagnosed bilateral shoulder pain and advised that appellant could work eight hours daily within restrictions. Mr. Enders also provided a treatment slip dated December 16, 2005 noting that appellant could return to duty.

In a December 28, 2005 note, Dr. Ryan Buffington, a family practitioner, indicated that appellant could return to work with restrictions on December 29, 2005.

On December 28, 2005 the employing establishment offered appellant a limited-duty assignment, which she accepted.

On August 26, 2006 appellant requested reconsideration and provided an August 2, 2006 magnetic resonance imaging (MRI) scan report from Dr. Son Luke Huynh, a Board-certified radiologist, detailing diagnostic testing results for her right shoulder. Dr. Huynh diagnosed a tear of the supraspinatus tendon near its insertion point without significant proximal retraction and without muscle atrophy, abnormal high signal at the infraspinatus tendon without complete disruption consistent with sprain or partial tear, and degenerative hypertrophy of acromioclavicular joint with impression upon supraspinatus muscle and tendon.

By decision dated September 7, 2006, the Office denied modification of its January 24, 2006 decision.

Appellant requested reconsideration on September 27, 2006. She indicated that she had new medical evidence in support of her claim. However, the record does not reflect that the Office received an additional submission.

By decision dated December 20, 2006, the Office denied appellant's reconsideration request without conducting a merit review of the claim.

On January 24, 2007 appellant again requested reconsideration.

By decision dated March 19, 2007, the Office denied appellant's reconsideration request without conducting a merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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.[2] 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.[3]

An occupational disease or injury is one caused by specified employment factors occurring over a longer period than a single shift or workday.[4] The test for determining whether appellant sustained a compensable occupational disease or injury is three-pronged. To establish the factual elements of the claim, appellant must submit: "(1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the 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 factors identified by the claimant."[5]

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.[6] The opinion of the physician must be based on a complete factual and medical background of the

[1] 5 U.S.C. §§ 8101-8193.

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

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

[4] *D.D.*, 57 ECAB ___ (Docket No. 06-1315, issued September 14, 2006).

[5] *Michael R. Shaffer*, 55 ECAB 386, 389 (2004), *citing Lourdes Harris*, 45 ECAB 545 (1994); *Victor J. Woodhams*, *supra* note 3.

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

claimant[7] and must be one of reasonable medical certainty[8] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9]

ANALYSIS -- ISSUE 1

The Office accepted that the claimed work events occurred as alleged, that appellant bagged bread from a machine. However, it found that appellant did not provide medical evidence supporting that the work activities caused a specific diagnosed condition. The Board finds that appellant has not met her burden of proof, as she has not submitted medical evidence supporting that the employment incidents caused a specific injury.

In support of her claim, appellant submitted a December 16, 2005 treatment note from Dr. Ortiz-Toro who diagnosed shoulder pain and overexertion. In addressing the cause of appellant's condition, Dr. Ortiz-Toro stated, "No apparent traumatic event, may be secondary to adiposity and morbid obesity." This report is not sufficient to establish her claim as the physician did not address or explain how a particular diagnosed medical condition was caused or aggravated by the accepted employment factors. Instead, Dr. Ortiz-Toro advised that appellant's condition might be secondary to adiposity and morbid obesity.

Appellant also provided a December 28, 2005 return-to-work certificate from Dr. Buffington and an August 2, 2006 MRI scan report from Dr. Huynh. The Board finds that neither report is sufficient to establish that appellant sustained a shoulder condition causally related to her employment, as neither addresses the question of causal relationship. The Board has held that medical evidence which does not offer an opinion on causal relationship is of little probative value on that issue.[10]

Appellant also submitted reports from Mr. Enders, a physician's assistant. However, his opinion is not probative as it was not rendered by a physician.[11] Mr. Enders is a physician's assistant, therefore, his reports are not competent medical evidence pursuant to the Act.[12] Accordingly, Mr. Enders' reports are not probative to establish that appellant's shoulder condition was causally related to her employment.

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

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

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

[10] *See A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006).

[11] *See 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).

[12] *George H. Clark*, 56 ECAB ___ (Docket No. 04-1572, issued November 30, 2004).

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 regulations provide 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
>
> "(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]."[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 reconsideration requests without conducting a merit review in its December 20, 2006 and April 12, 2007 decisions. As noted, to warrant a review on the merits a request for reconsideration must clearly state the grounds on which it is based and must assert that the Office misinterpreted or misapplied a point of law, articulate a new legal argument not previously advanced, or present new and relevant evidence not previously considered by the Office. Neither appellant's September 27, 2006 reconsideration request, which the Office denied on December 20, 2006, nor her January 24, 2007 request, which the Office denied on April 12, 2007, met the above-listed criteria. In both requests, appellant simply stated that she requested reconsideration but did not articulate the basis for her request which meets one of the three above-noted criteria. She did not assert that the Office misapplied or misinterpreted a point of law, she did not raise a new legal argument and she did not submit relevant and pertinent new evidence. In her September 27, 2006 request, appellant stated that she had new evidence in support of her claim. However, the record reflects

[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).

that the Office did not receive any additional medical evidence. In her January 24, 2007 request, appellant neither made reference to new medical evidence nor indicated that she intended to submit any. Accordingly, the Board finds that appellant did not meet the above-listed criteria warranting a merit review and thus the Office properly denied both reconsideration requests without reaching the merits.[17]

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she developed an occupational disease in the performance of duty, and that the Office properly denied her reconsideration requests without conducting a merit review.

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2007, December 20 and September 7, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 16, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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

[17] 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).