United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
	)	**Docket No. 08-2092**
and	)	**Issued: April 21, 2009**
	)	
DEPARTMENT OF THE ARMY, MASSACHUSETTS NATIONAL GUARD, Milford, MA, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 22, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated January 8, 2008 in which the Office denied modification of the decision dated September 27, 2007 denying his claim. He also appealed a May 8, 2008 decision denying merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of the case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a pulled muscle in the right calf while in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration pursuant to 8128(a).

FACTUAL HISTORY

On March 26, 2007 appellant, a 59-year-old education technician, filed a claim alleging that, on the same day, while jogging up stairs at work, he pulled a muscle in his right calf. He did not stop work.

Appellant submitted physical therapy notes dated March 26 to May 10, 2007 noting treatment of a right calf injury. He also submitted a physician's assistant note dated March 26, 2007, in which he was treated for a pulled right calf muscle which occurred when he was running up stairs at work. Findings upon examination revealed a limp, mild swelling and tenderness of the calf. Appellant was diagnosed with muscle strain of the right calf.

By letter dated August 14, 2007, the Office advised appellant of the type of factual and medical evidence needed to establish his claim and requested that he submit such evidence, particularly requesting that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors.

In a decision dated September 27, 2007, the Office denied appellant's claim as the evidence was not sufficient to establish that he sustained the alleged injury on March 26, 2007. It found that the initial evidence of file supported that events occurred as alleged but the medical evidence was insufficient to establish a diagnosis causally related to the incident on March 26, 2007.

On December 19, 2007 appellant requested reconsideration. He submitted a statement dated December 19, 2007 requesting that the Office pay for the recommended physical therapy. Appellant submitted an attending physician's report from Dr. Michael Tremblay, an osteopath and Board-certified family practitioner, dated March 26, 2007. Dr. Tremblay noted that appellant reported running up steps and hyperextending his right foot and experiencing a sharp pain in his calf muscle. He noted findings of mild swelling and tenderness of the calf muscle and diagnosed muscle strain of the right calf.

In a decision dated January 8, 2008, the Office reviewed the merits of the claim but found that the claim remained denied on the grounds that the medical evidence was not sufficient to establish that appellant's condition was caused by the March 26, 2007 work incident.

On January 10, 2008 appellant requested reconsideration. He submitted a statement and noted that he injured his calf on March 26, 2007 while running up stairs at work. Appellant indicated that he initially sought treatment from Dr. Tremblay who recommended physical therapy. He indicated that his injury was work related and that physical therapy should be paid for by the Office. Appellant resubmitted a March 26, 2007 attending physician's report prepared by Dr. Tremblay and two copies of his December 19, 2007 letter to the Office requesting that they pay for his physical therapy.

By a decision dated May 8, 2008, the Office denied appellant's reconsideration request on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

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 filed within the applicable time limitation 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[2]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[3] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[4]

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.[5] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a right calf injury while running up stairs at work. Although the evidence supports that the incident occurred on March 26, 2007 as alleged, the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Gary J. Watling*, 52 ECAB 357 (2001).

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

[4] *Id*.

[5] *Leslie C. Moore*, 52 ECAB 132 (2000).

[6] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

Board finds that the medical evidence is insufficient to establish that appellant sustained a right calf injury causally related to the March 26, 2007 work incident.

On August 14, 2007 the Office advised appellant of the type of medical evidence needed to establish his claim. Appellant did not submit a rationalized medical report from an attending physician addressing how the March 26, 2007 work incident may have caused or aggravated his claimed condition.

In support of his claim, appellant submitted physical therapy notes dated March 26 to May 10, 2007 for treatment of a right calf injury. He also submitted a physician's assistant note dated March 26, 2007 noting treatment for a pulled right calf muscle. However, physical therapists and physician's assistants are not competent to render a medical opinion under the Act.[7] Therefore, these reports are not sufficient to meet appellant's burden of proof.

Appellant submitted a March 26, 2007 attending physician's report from Dr. Tremblay, which noted that appellant reported running up steps and hyperextending his right foot and subsequently experiencing a sharp pain in his calf muscle. Dr. Tremblay noted findings of mild swelling and tenderness of the calf muscle and diagnosed muscle strain of the right calf. However, he appears merely to be repeating the history of injury as reported by appellant without providing his own opinion regarding whether appellant's condition was work related. To the extent that Dr. Tremblay is providing his own opinion, did not provide a rationalized opinion explaining the reasons why any diagnosed conditions were caused or aggravated by particular factors of employment.[8] Therefore, this report is insufficient to establish appellant's claim.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[9] Causal relationships must be established by rationalized medical opinion evidence. Appellant failed to submit such evidence and the Office therefore properly denied his claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[10] the Office has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[11] which provide that a claimant

[7] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

[8] *See Jimmie H. Duckett, supra* note 6.

[9] *See Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b).

may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that must: "(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) constitute s relevant and pertinent new evidence not previously considered by [the Office."]

Section 10.608(b) provide that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[12]

ANALYSIS -- ISSUE 2

Appellant's January 10, 2008 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office.

Appellant submitted a narrative statement dated January 10, 2008 and noted that he injured his calf on March 26, 2007 while running up stairs at work and sought treatment from Dr. Tremblay. He indicated that he went to physical therapy for nine sessions and the Office failed to pay for two of the sessions and he believed that his injury was work related and all the physical therapy should be covered. However, this is insufficient to show that the Office erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered. The Board notes that the factual aspects of appellant's claim noted in his letter are not in dispute and were not the basis of the Office's prior denial of the claim.

Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted a copy of the January 8, 2008 Office decision, two copies his letter to the Office dated December 19, 2007 requesting that his physical therapy services be paid and the March 26, 2007 attending physician's report prepared by Dr. Tremblay. However, these medical reports are duplicative of evidence previously submitted and were considered by the Office in its decisions dated September 27, 2007 and January 8, 2008 and found insufficient. 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] Therefore, these reports are insufficient to require the Office to reopen the claim for a merit review. The Office's January 8, 2008 decision denied the claim because there was no medical evidence supporting

[12] *Id.*

[13] *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

that employment factors caused his claimed right calf injury. Thus, the underlying issue is medical in nature. But, as noted above, appellant did not submit any new and relevant medical evidence with his reconsideration request.

Appellant did not show that the Office erroneously applied or interpreted a point of law, advance a point of law or fact not previously considered by the Office and he did not submit relevant and pertinent evidence not previously considered by the Office. Consequently, he was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2).

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a right calf injury causally related to his March 26, 2007 employment incident. The Board further finds that the Office properly denied appellant's request for reconsideration.[14]

ORDER

IT IS HEREBY ORDERED THAT the May 8 and January 8, 2008 and September 27, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 21, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[14] With his request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).