United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 09-284**
	)	**Issued: November 19, 2009**
DEPARTMENT OF THE ARMY, CIVILIAN PERSONNEL ADVISORY CENTER, Fort Stewart, GA, Employer	)	

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

Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 10, 2008 appellant filed a timely appeal from the September 22, 2008 decision of the Office of Workers' Compensation Programs denying his request for further merit review of his claim. He also timely appealed the Office's February 8, May 16 and September 4, 2008 merit decisions, which denied his 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 has met his burden of proof to establish that he sustained an injury in the performance of duty; and (2) whether the Office properly refused to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 6, 2007 appellant, then a 54-year-old maintenance mechanic, filed an occupational disease claim alleging that, on November 2, 2007, he had increased work activities,

which included bending, stooping, lifting, walking and standing.[1] He noted that his back would "stiffen and cause burning in [his] legs and feet." Appellant also alleged that doing minor work on November 5, 2007 caused unbearable pain. He stopped work on November 6, 2007.

In a statement dated September 28, 2007, appellant alleged that his injury occurred from October 29 to November 5, 2007 and was a recurrence of his accepted claim for a back injury sustained in October 2002. He noted that he underwent surgery in August 2005, but it failed to resolve pain to his back and legs. The increased physical duties of appellant's job affected his back with any type of repetitive bending, stooping and lifting. Appellant stated that "just standing would stiffen and increase the pain in my back and numbness and burning into my legs with stinging in my feet which became unbearable." On November 2, 2007 he was tasked to drill pilot holes into precut wood for a week. Appellant noted that, as the pile became lower, he had to bend further down to lift the wood. On November 5, 2007 he had to cut wire and load debris.

In a December 12, 2007 report, Dr. Wayne M. Woodbury, Board-certified in physical medicine and rehabilitation, noted that appellant could not return to his regular duties as a maintenance mechanic "within the next year" due to the heavy lifting demands and contorted positions required for the position.

In a January 29, 2008 report, a nurse noted appellant's medication and advised that he complained of pain to the back, buttocks, back of the legs, groin and inner thighs.

By decision dated February 8, 2008, the Office denied appellant's claim. It found that he did not submit sufficient medical evidence to establish that his back condition was related to accepted work-related activities.

On February 19, 2008 appellant requested reconsideration and submitted additional evidence. In a January 29, 2008 duty status report, Dr. Woodbury indicated that appellant was not able to return to regular duty. He advised that appellant did not know how his injury occurred.

In a report dated February 28, 2008, Dr. Woodbury noted that appellant was seen for follow-up of lumbago. Appellant's pain was the same pain he had before in the lower spine and legs but now affected the cervical spine, right arm, the medial scapular boarder to the inferior portion of the scapula. Dr. Woodbury noted that "[p]art of the confusion stems directly from the fact that he was returned back to work and then almost immediately had a return of pain in the back and new symptoms in the neck."

In a February 29, 2008 report, Dr. Louis G. Horn, a Board-certified neurosurgeon, noted that despite returning appellant to work without restriction it did "not imply resolution of [appellant's] back pain." He opined that appellant's symptoms and inability to tolerate work

[1] Appellant actually filed a recurrence claim. However, the Office treated it as a new occupational disease claim. The record reflects that appellant has a prior claim for an injury to the back on October 23, 2002 under File No. xxxxxx427.

were a result of his ongoing back problem and not a new problem. Appellant also submitted reports from a physician's assistant and from a nurse.

By decision dated May 16, 2008, the Office denied modification of its February 8, 2008 decision.

Appellant requested reconsideration on June 12, 2008 and submitted additional evidence including several reports and treatment records from Dr. Woodbury. The Office also received additional nurse's notes from a physician's assistant. In a July 9, 2008 report, Dr. Horn recommended pain management.

On May 14, 2008 Dr. Woodbury noted that appellant was seen for lumbago. Appellant had upper lumbar pain which also traveled along the medial scapular border. Dr. Woodbury diagnosed lumbago and lumbar intervertebral disc with myelopathy. In a May 28, 2008 report, he opined that appellant had "tried to make it very clear that [he felt] the aches and pains in the lower back [were] stemming directly from his old prior injury." Appellant was released to work without restrictions. Dr. Woodbury noted that appellant's case was closed and he was determined to be free of his injury. Appellant injured himself at work on November 2 and 5, 2007 and had pain in new areas of the neck in addition to the lumbar region. In a June 11, 2008 report, Dr. Woodbury noted treating appellant for lumbago that he related was the "exact same pain he had before in the lower spine and legs but now has in addition cervical pain" and pain in the upper lumbar region. He noted that he had a "very long and detailed discussion about his injury and how when he was returned back to work essentially this cleared out the record and when injured the [Office] considered this to be a new injury even though it was an exacerbation of the old injury." Dr. Woodbury diagnosed lumbago and lumbar intervertebral disc with myelopathy.

On July 3, 2008 appellant stated that his back failed under the strain of his position. He submitted treatment notes dated March 4 to July 15, 2008 from Dr. Traina Pacurar, a Board-certified physiatrist, who advised that appellant had low back pain without surgery, hyperlipidemia, anxiety disorder, radiculopathy and neuropathy. Dr. Pacurar also diagnosed low back pain with myelopathy.

By decision dated September 4, 2008, the Office denied modification of the May 16, 2008 decision. It advised appellant that his back condition was currently accepted under his other File No. xxxxxx427 and open for medical care.

On September 9, 2008 appellant requested reconsideration. He contended that his existing back condition never resolved. On August 4, 2008 Dr. Gary P. Kaufman, a Board-certified neurological surgeon, stated that appellant requested that he "assume responsibility for writing his medications." Dr. Kaufman noted that he had declined to accept the patient due to his complex medical history.

By decision dated September 22, 2008, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that insufficient evidence was submitted.

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 disability and/or specific condition 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 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; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that 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. 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. 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]

ANALYSIS -- ISSUE 1

Appellant alleged that his back condition resulted from bending, stooping, lifting, walking and standing at work and particularly noted that his condition was due to his activities associated with drilling pilot holes into precut wood from October 29 through November 5, 2007. The evidence supports that he performed these duties as part of his job. However, appellant submitted insufficient medical evidence to establish that his back condition was caused or aggravated by these particular duties. The Office properly developed appellant's claim as an occupational disease claim since he attributed his condition to new employment factors occurring over a period of more than one day.[6]

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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

[5] *Id.*

[6] 20 C.F.R. § 10.5(q) (defines the term occupational disease).

Appellant submitted reports from Dr. Horn, who recommended pain management and opined that his condition had not resolved. Dr. Horn stated that appellant's symptoms and inability to tolerate work "are a result of his ongoing back problem and not those of some new problem." The Board does not have appellant's prior back claim on this appeal. To the extent that Dr. Horn was addressing the present claim, he did not provide a specific diagnosis or explain how appellant's back condition was caused or aggravated by the specific work factors alleged by appellant. His reports are insufficient to establish appellant's claim.

Dr. Woodbury opined that he had "tried to make it very clear that [he felt] the aches and pains in the lower back [were] stemming directly from his old prior injury." The Board notes that the present claim concerns a new occupational disease and does not pertain to his prior back injury claim. Furthermore, Dr. Woodbury noted that appellant injured himself at work on November 2 and 5, 2007 and was now experiencing "pain in new novel areas of the neck in addition to the old lumbar region." He did not provide any further explanation to address how these activities at work caused or aggravated a cervical or lumber condition. The Board has long held that medical opinions not containing rationale on causal relation are entitled to little probative value are generally insufficient to meet appellant's burden of proof.[7] On June 11, 2008 Dr. Woodbury attributed appellant's condition to his previous claim for a back injury. He also related that appellant "now has in addition cervical pain and he is complaining of pain in the upper lumbar region as well." Dr. Woodbury noted that "when he was returned back to work … it was an exacerbation of the old injury." This is insufficient to establish appellant's claim as Dr. Woodbury did not adequately explain how particular work activities, such as bending or lifting, caused or aggravated a diagnosed medical condition upon appellant's return to work. Other reports submitted by Dr. Woodbury do not address causal relationship and are of limited probative value. The reports of Dr. Pacurar are insufficient to establish the claim as the physician did not support causal relationship.[8]

The record also contains reports from physician's assistants and nurses. Section 8101(2) of the Act[9] defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law. Health care providers such as nurses, acupuncturists, physician's assistants and physical therapists are not physicians under the Act. Their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.[10]

[7] *Carolyn F. Allen*, 47 ECAB 240 (1995).

[8] *See K.W.*, 59 ECAB ___ (Docket No. 07-1669, issued December 13, 2007) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[9] *See* 5 U.S.C. § 8101(2). *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[10] *Jane A. White*, 34 ECAB 515, 518 (1983).

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[11] Neither the fact that the condition became apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship. Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to submit.[12]

As there is no probative, rationalized medical evidence addressing and explaining why appellant's back condition was caused and/or aggravated by factors of his employment, appellant has not met his burden of proof in establishing that he sustained a medical condition in the performance of duty causally related to factors of employment.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[13] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(1) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(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 [the Office]."[14]

Section 10.608(b) provides 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.[15]

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of his claim and requested reconsideration on September 9, 2008. The underlying issue on reconsideration is medical in nature. However, appellant did not submit any relevant or pertinent new medical evidence on the issue of whether he sustained an injury in the performance of duty.

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[11] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[12] *Id.*

[13] 5 U.S.C. § 8128(a).

[14] 20 C.F.R. § 10.606(b).

[15] *Id*. at § 10.608(b).

In his September 9, 2008 request for reconsideration appellant reiterated his previous arguments. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.[16] Appellant did not provide any relevant and pertinent new evidence. 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. 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).[17] He also submitted an August 4, 2008 report from Dr. Gary Kaufman, who stated that he declined to accept appellant as a patient. This report is not relevant or pertinent to the issue on appeal. Dr. Kaufman did not provide any opinion regarding whether appellant's back condition was caused or aggravated by work factors. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[18]

Consequently, the evidence submitted by appellant on reconsideration does not satisfy any of the three criteria, noted above, for reopening a claim for merit review. Therefore, the Office properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty. The Board also finds that the Office properly refused to reopen his case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[16] *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

[17] 20 C.F.R. § 10.606(b)(2).

[18] *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 22 and 4, May 16 and February 8, 2008 are affirmed.

Issued: November 19, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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