United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 09-1209**
	)	**Issued: November 25, 2009**
DEPARTMENT OF COMMERCE, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, Norfolk, VA, Employer	)	

Appearances:
Michelle A. Pelkey, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 3, 2009 appellant timely appealed the October 21, 2008 merit decision of the Office of Workers' Compensation Programs, which denied her traumatic injury claim. She also timely appealed the Office's December 31, 2008 decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on May 22, 2008; and (2) whether the Office properly denied appellant's November 9, 2008 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 2, 2008 appellant, a 32-year-old able-bodied seaman, filed a claim for "suspected" decompression sickness (DCS), which was allegedly due to a series of scuba training dives on May 22, 2008. She had been participating in a three-week diver training

program at the employing establishment's diving center in Seattle, WA. On the day in question, appellant had completed her final 3 dives of the class, for a total of 32 dives. Lieutenant Sean D. Cimilluca, executive officer of the diving center, described appellant's behavior that day as "short-tempered, inattentive and disrespectful." He also observed appellant "crying and acting belligerently." After completing her third dive of the day, appellant was evaluated by the on-site diving medical officer, Michelle A. Pelkey, a certified physician's assistant.[1] She was later transported to the Virginia Mason Medical Center emergency room.

Dr. Theodore G. Johnson treated appellant in the emergency room on May 22, 2008 for a reported "personality change." The history of injury was that appellant was in her third week of scuba diving class, with three dives most days. She had been doing well, without any problems until today when her instructors noted a personality change. Appellant had reportedly been agitated, argumentative and handling the equipment roughly. She was also described as being emotionally labile. Dr. Johnson noted that this was apparently a remarkable departure from her previous behavior. Appellant advised him that she was feeling frustrated because she received a telephone call with disappointing news about her rejection from a program to which she had applied. She indicated to Dr. Johnson that she was unaware she was behaving unusually. Earlier that day, appellant stated that she did not really feel up to diving. Dr. Johnson indicated that appellant felt somewhat diffusely achy in her muscles, and generally weak, but no dizziness, no focal neurological symptoms, no headache, neck pain or back pain and no joint pain. Appellant further reported that she had done her usual three dives earlier in the day at a maximum depth of 33 feet, and all were less than 35 minutes in duration. She reported having no problems with any of the day's dives and that she never had any diving-related problems in the past.

Appellant's emergency room lab results were essentially normal as were the physical and neurological examination results. She also had a computerized tomography (CT) scan of the head and a brain magnetic resonance imaging (MRI) scan, the latter of which was normal.[2] Appellant received oxygen in the emergency room and was later treated in a hyperbaric chamber for approximately four hours. Dr. Johnson indicated that the etiology of appellant's condition was unclear. He also noted that there was no contraindication to treating her with hyperbaric oxygen assuming no other etiology for her reported personality change was found.

By the following afternoon, appellant was completely asymptomatic and was discharged from the emergency room. The discharging physician, Dr. John C. Lacambra, noted that the MRI scan was completely normal and there was no indication of a CVA or other intracranial or metabolic abnormality. He further noted decreased potassium levels in the blood (mild hypokalemia), which could be supplemented with diet. Dr. Lacambra stated that it was "not clear that [appellant] had decompression illness."[3]

[1] The record includes treatment notes from Ms. Pelkey dated May 21, 2008. A physician's assistant is not considered a "physician," as that term is defined under 5 U.S.C. § 8101(2). *See e.g., Roy L. Humphrey*, 57 ECAB 238, 242 (2005). As such, Ms. Pelkey is not competent to render a medical opinion for purposes of determining appellant's entitlement to benefits under the Federal Employees' Compensation Act.

[2] The CT and MRI scans were administered to rule out the possibility of intracranial pathology, cerebral vascular accident (CVA), tumor or hemorrhage.

[3] Dr. Lacambra is Board-certified in emergency medicine.

According to Lt. Cimilluca, appellant returned to the diving center around noon on May 23, 2008, and by then she was exhibiting more typical behavior. He also noted that she was able to pass the final examination and she graduated from the class the following day.

In a letter dated September 17, 2008, the Office advised appellant that the evidence was insufficient to establish her claim. It specifically noted that there was no diagnosis of any condition resulting from the May 22, 2008 alleged injury. Appellant was advised to submit a narrative medical report from a physician indicating a firm diagnosis of any condition resulting from the alleged injury, she did not.

In a decision dated October 21, 2008, the Office denied appellant's claim. While the evidence supported that the claimed event occurred, it found that the medical evidence did not provide a diagnosis that could be connected to the event.

On November 9, 2008 appellant requested reconsideration. Her stated purpose in seeking reconsideration was to provide clarification of the causal relationship between her symptoms and the treatment she received. Appellant, however, did not submit any additional medical evidence.

By decision dated December 31, 2008, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.[5]

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment

[4] 5 U.S.C. §§ 8101-8193 (2006).

[5] 20 C.F.R. § 10.115(e), (f) (2008); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

incident that is alleged to have occurred.[6] The second component is whether the employment incident caused a personal injury.[7]

ANALYSIS -- ISSUE 1

Appellant's representative argues that recompression therapy, which appellant received on May 22 to 23, 2008, is the established standard of care for persons suffering from DCS or suspected DCS, and therefore, her claim should be accepted. Notwithstanding the fact that appellant received hyperbaric oxygen therapy, the record does not include a definitive medical diagnosis that has been attributed to the series of dives appellant completed on May 22, 2008. Neither Dr. Johnson nor Dr. Lacambra provided a specific diagnosis for appellant's reported personality change. Furthermore, Dr. Johnson indicated that the etiology of appellant's personality change was unclear and Dr. Lacambra stated that it was not clear that she had decompression illness. The doctors essentially could not ascribe a particular cause for appellant's reported personality change.

The fact that the etiology of a disease or condition is unknown or obscure does not relieve an employee of the burden of establishing a causal relationship by the weight of the medical evidence nor does it shift the burden of proof to the Office to disprove an employment relationship.[8] The Board finds that the Office properly denied appellant's traumatic injury claim in light of her failure to provide competent medical evidence which included a diagnosis causally related to the May 22, 2008 employment incident.

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.[9] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (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.[10] When an application for reconsideration 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.[11]

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

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

[8] *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

[9] 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(2).

[11] *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

Appellant's November 9, 2008 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[12] She also failed to satisfy the third requirement under section 10.606(b)(2). Appellant did not submit any relevant and pertinent new evidence with her November 9, 2008 request for reconsideration. Consequently, she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).[13]

CONCLUSION

Appellant has not established that she sustained an injury in the performance of duty on May 22, 2008. The Board further finds that the Office properly denied her November 9, 2008 request for reconsideration.

[12] *Id.* at § 10.606(b)(2)(i) and (ii).

[13] *Id.* at § 10.606(b)(2)(iii).

ORDER

IT IS HEREBY ORDERED THAT the December 31 and October 21, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 25, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board