United States Department of Labor
Employees' Compensation Appeals Board

S.C., Appellant	)	
and	)	**Docket No. 09-913**
	)	**Issued: October 23, 2009**
DEPARTMENT OF THE AIR FORCE, AIR NATIONAL GUARD, NEVADA NATIONAL GUARD-HRO-ICPA, Carson City, NV, Employer	)	

Appearances:
Alan J. Shapiro, Esq., 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 February 25, 2009 appellant filed a timely appeal from a November 18, 2008 merit decision of the Office of Workers' Compensation Programs' Branch of Hearings and Review affirming the Office's March 13, 2008 merit decision that denied her claim. The Board also has jurisdiction over an August 8, 2008 Office merit decision denying appellant's subpoena request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of appellant's claim.

ISSUES

The issues are: (1) whether appellant has satisfied her burden of proof to establish that she sustained an injury in the performance of duty on December 9, 2003; and (2) whether the Office properly denied appellant's subpoena request.

FACTUAL HISTORY

On December 17, 2003 appellant, a 44-year-old storage and issue/inventory technician, filed a traumatic injury claim (Form CA-1) for "lumps and bruises" sustained on December 9, 2003 when a metal bin lid fell and landed on her. The Office noted that it did not receive this claim from the employing establishment until December 3, 2007.

Appellant submitted treatment reports dated May 10, 2001, February 10, 2006, June 5 and 13, 2007, in which Dr. Chris B. Mathis, Board-certified in family medicine, diagnosed appellant with neck pain, acute finger pain and edema.

By report dated June 2, 2007, Dr. Clarke Cole diagnosed neck pain.

Appellant submitted an October 16, 2007 report signed by Dr. Jennifer A. Sahm, who diagnosed appellant with neck pain. Dr. Sahm also diagnosed cervical spine degenerative disc disease, neck pain and exacerbation of left shoulder pain.

On October 16, 2007 Dr. Michael Noh, a radiologist, reported that x-rays of appellant's cervical spine revealed minimal retrolisthesis, advanced degenerative changes and bilateral neural foraminal narrowing at the C5-6 level.

By decision dated March 13, 2008, the Office denied the claim because the evidence of record did not establish the identified December 9, 2003 employment incident produced a personal injury.

Appellant disagreed and on April 9, 2008 requested a hearing.

By letter dated June 9, 2008, appellant, through her attorney, requested that subpoenas be issued for a copy of appellant's workers' compensation file in possession of the employing establishment. The request also sought information from listed individuals who, appellant alleged, "[had] discoverable information concerning the claims, counter claims and defenses in this action."

By decision dated August 8, 2008, the Office hearing representative denied the subpoena request because it did not explain why appellant wanted the information, how it would demonstrate that she sustained a personal injury causally related to the accepted December 9, 2003 employment incident, or why a subpoena was the best method for obtaining the information. The hearing representative noted that, by statute, the Office, not the employing establishment, was custodian of appellant's workers' compensation claim file and that if appellant wanted a copy all she need to do was file a request.

A hearing was conducted on September 5, 2008. Appellant's attorney argued that appellant's case involves a "late, late manifesting … injury situation."

Appellant submitted a January 17, 2008 note in which Dr. Mathis reported that appellant had progressive neck, shoulder, right arm pain with intermittent periods of weakness and numbness. Dr. Mathis noted:

> "I am unable to say that this is a work[-]related injury. I do not see work[-]related injuries in my office, and since this injury occurred in December of 2003 and I did n[o]t see [appellant] at this time, but next saw her in my office in June of 2004 for unrelated issues, I do n[o]t feel qualified to make this determination."

Appellant submitted a January 24, 2008 report in which Dr. Timothy Martin, a Board-certified diagnostic radiologist, reported an MRI scan of appellant's right shoulder revealed early degenerative changes to appellant's acromioclavicular joint and acromion process without impingement on the underlying rotator cuff tendon. Additionally, an MRI scan of appellant's cervical spine revealed moderately advanced chronic degenerative disc disease at the C5-6 level with a degenerative disc osteophyte complex producing mild to moderate bilateral neuroforaminal encroachment.

Appellant submitted a January 29, 2008 report in which Dr. Quiton Thomas, Board-certified in family medicine, diagnosed appellant with a nonspecific degenerative intervertebral disc condition and cervicalgia. On April 3, 2008 Dr. Thomas expanded this diagnosis to include shoulder and upper arm sprain and strain.

Appellant submitted an undated note in which she reviewed the medical history as well as a statement, dated October 2, 2008, signed by her attorney.

By decision dated November 18, 2008, the Office hearing representative accepted that the December 9, 2003 incident occurred as alleged but affirmed the Office's March 13, 2008 decision because the evidence of record did not establish the accepted December 9, 2003 employment incident caused appellant's alleged medical conditions.[1] The hearing representative also affirmed the Office's decision denying appellant's subpoena request.

LEGAL PRECEDENT -- ISSUE 1

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. 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.[2] Second, the employee must submit

[1] On appeal, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision.)

[2] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[3]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.[4]

ANALYSIS -- ISSUE 1

The Office hearing representative accepted that the December 9, 2003 incident occurred as alleged. Appellant's burden is to establish that this incident caused a compensable medically-diagnosed personal injury. This is a medical issue which can only be proven by probative, rationalized medical opinion evidence. Appellant has not produced such evidence and therefore has not satisfied her burden of proof.[5]

The relevant medical evidence consists of reports and notes from Drs. Cole, Martin, Mathis, Noh, Sahm and Thomas. These notes and reports are of little probative value on the issue of causal relationship as they provided no opinion explaining how the identified December 9, 2003 incident caused a compensable medically-diagnosed personal injury. Dr. Mathis specifically stated that he was unable and unqualified to state that appellant's condition was work related. Although Drs. Cole, Mathis and Sahm diagnosed pain, pain is a symptom, not a compensable medical diagnosis.[6] Furthermore, Drs. Cole, Mathis and Sahm provided no opinion concerning how the conditions they diagnosed, which included degenerative disc disease, were caused by the accepted December 9, 2003 employment incident. Reports lacking an opinion on causal relationship have little probative value.[7] These deficiencies reduce

[3] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[4] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[5] Appellant submitted reports from a physician assistant and a physical therapist. Because healthcare providers such as nurses, acupuncturists, physician's assistants and physical therapists are not considered physicians under the Act, their reports and opinions do not constitute competent medical evidence. (5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983). Therefore, these reports are insufficient to satisfy appellant's burden of proof.

[6] *Robert Broome*, 55 ECAB 339, 342 (2004).

[7] *See Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value).

the probative value of these notes, reports and the opinions contained therein such that they are insufficient to satisfy appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. The fact that appellant's claimed condition became apparent during a period of employment, her belief that her condition was aggravated by her employment or an assertion that appellant's condition is a "late, late manifesting … injury situation" is insufficient to establish causal relationship.[8]

Appellant has not satisfied her burden of proof and therefore has not established that she sustained an injury in the performance of duty on December 9, 2003.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[9] The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[10]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[11] Section 10.619(a)(1) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[12]

The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[13] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable

[8] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007)*; Ruth R. Price*, 16 ECAB 688, 691 (1965).

[9] 5 U.S.C. § 8126(1).

[10] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[11] *Id.*

[12] 20 C.F.R. § 10.619(a)(1).

[13] *Gregorio E. Conde*, 52 ECAB 410 (2001).

exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.[14]

ANALYSIS -- ISSUE 2

On April 9, 2008 appellant requested an oral hearing. By letter dated June 9, 2008, appellant, through her attorney, requested subpoenas be issued for a copy of appellant's workers' compensation file in possession of the employing establishment and "information" from listed individuals who appellant alleged "[had] discoverable information concerning the claims, counter claims and defenses in this action." By decision dated August 8, 2008, the Office denied appellant's subpoena request because appellant had not explained why she wanted the information, how it would demonstrate that she sustained a personal injury causally related to the accepted December 9, 2003 employment incident, or why subpoena was the best method or only opportunity for obtaining such information. The hearing representative properly advised appellant that, by statute, the Office, not the employing establishment, was custodian of appellant's workers' compensation claim file and that if appellant wanted a copy all she need do was file a request.

The Board finds that the hearing representative properly exercised its discretion when it denied appellant's subpoena request because she did not explain why the information sought was relevant, why a subpoena was the best method to obtain the evidence in question and why there was no other means by which the testimony could have been obtained. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[15] It is not enough to show that the evidence could be construed so as to produce a contrary factual conclusion.[16] As appellant has not shown that the personnel records in question cannot be obtained by other means, the Board finds that the hearing representative did not abuse her discretion in denying appellant's request for a subpoena.[17]

CONCLUSION

The Board finds appellant has not satisfied her burden of proof to establish that she sustained an injury in the performance of duty on December 9, 2003. The Board also finds that the Office properly denied her subpoena request.

[14] *Claudio Vazquez*, 52 ECAB 496 (2001).

[15] *V.T.*, 58 ECAB ___ (Docket No. 06-1347, issued October 19, 2006).

[16] *Joseph P. Hofmann*, 57 ECAB 456 (2006).

[17] *See Tina D. Francis*, 56 ECAB 180 (2004).

ORDER

IT IS HEREBY ORDERED THAT the November 18, August 8 and March 13, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 23, 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