United States Department of Labor
Employees' Compensation Appeals Board

B.R., Appellant	)	
and	)	**Docket No. 10-1159**
	)	**Issued: January 19, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Buffalo, NY, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 24, 2010 appellant filed an appeal from a November 25, 2009 merit decision of the Office of Workers' Compensation Programs and a March 10, 2010 nonmerit decision denying her request for reconsideration. 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 established a recurrence of disability beginning July 3, 2008 causally related to her March 4, 1994 work injury; and (2) whether the Office properly denied her request for merit review of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. The Office accepted appellant's claim for a right ankle strain, when she slipped and fell on a wet surface on March 4, 1994. In a May 16, 2000 decision, the Board reversed an August 31, 1998 Office decision terminating her

compensation benefits effective June 21, 1997.[1] In an April 14, 2005 decision, the Board affirmed Office decisions dated March 8 and July 2, 2004, which terminated appellant's compensation benefits effective March 21, 2004 and which found that she failed to establish that her ongoing disability after that date was a result of her employment injury.[2] The facts of the case as set forth in the Board's prior decisions are hereby incorporated by reference.

On August 18, 2008 appellant filed a claim for a recurrence of disability. She attributed a lump on her ankle to the March 3, 1994 injury. Appellant noted that the recurrence occurred on July 3, 2008 and on July 8, 2008 she received medical treatment. She stated that her ankle never fully healed and always had a lump on it. Appellant denied other injuries and stated that she was limited to four hours a day light duty for the remainder of her employment. The employing establishment noted that she had not been employed for over five years.

In an August 15, 2008 report, Dr. Jennifer F. Wool-Cottone, a podiatrist, noted seeing appellant on July 8, 2008. She noted that it had been two years since she last saw appellant and recounted the history of injury. Dr. Wool-Cottone also noted that two years earlier a magnetic resonance imaging (MRI) scan showed a lipoma along the right foot and lateral aspect of the ankle. She diagnosed chronic pain and discomfort and swelling. Dr. Wool-Cottone recommended another MRI scan and physical therapy.

In an October 6, 2008 letter, the Office advised appellant that its previous decisions as well as the Board's April 14, 2005 decision found that her accepted right ankle sprain had resolved. It also noted that she had not been employed by the Federal Government in over five years. Appellant was advised of the deficiencies of her claim and requested to submit additional factual and medical evidence to support her claimed recurrence.

Appellant submitted a statement and a duplicative copy of Dr. Wool-Cottone's August 15, 2008 report.

By decision dated February 27, 2009, the Office denied appellant's recurrence claim. It found that there was no medical evidence providing a rationalized opinion that the claimed recurrence was due to the accepted work injury.

On March 11, 2009 appellant disagreed with the Office's decision and requested a telephonic hearing, which was held on August 11, 2009. She described the March 4, 1994 incident and the medical care received. Appellant stated that she continues to have residuals of the March 4, 1994 injury and described the circumstances of the claimed recurrence.

Subsequent to the hearing, treatment notes from Dr. Wool-Cottone dated July 8, 2008 and July 21, 2009 were received. The July 8, 2008 treatment note was duplicative of her August 15, 2008 report. The July 21, 2009 treatment note indicated that appellant had not been seen since July 8, 2008 and that she presented as a diabetic requesting reevaluation of possible surgical intervention of her right foot lipoma. Dr. Wool-Cottone noted that appellant felt this was

[1] Docket No. 99-679 (issued May 16, 2000).

[2] Docket No. 04-1910 (issued April 14, 2005).

secondary to a workplace injury where she had sustained a significant injury to her right foot and ankle. She recommended obtaining a new MRI scan before surgery.

By decision dated November 25, 2009, an Office hearing representative affirmed the prior decision. The hearing representative found that the medical evidence was insufficient to establish that the March 4, 1994 injury caused or aggravated the claimed lipoma.

On February 19, 2010 the Office received appellant's request for reconsideration. Appellant indicated that, since her March 4, 1994 work injury, her ankle had a lump on it which got progressively worse.

In a January 22, 2010 report, Dr. Wool-Cottone provided a synopsis of appellant's care since November 29, 2006. She related that appellant presented with concerns regarding severe, constant pain of her right foot and ankle which she felt was secondary to a workplace injury in which she suffered severe inversion/sprain of her right foot and ankle. Dr. Wool-Cottone indicated that there was a mass present along the lateral border of the right foot and ankle which was consistent with a lipoma and confirmed by MRI scan. She stated that appellant continued to have discomfort in that area and, during her last visit of July 21, 2009, she wanted to have the lipoma surgically removed. Dr. Wool-Cottone indicated that appellant would benefit from surgical removal of the lipoma as well as a repeat MRI scan. She also noted that appellant stated that she could not ambulate or stand for greater than 10 minutes at time without pain and discomfort.

In a March 10, 2010 decision, the Office denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

Section 10.5(x) of the Office's regulations provide that a recurrence of disability means any disability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[3]

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[4] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that

[3] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[4] *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

conclusion with sound medical rationale.[5] Where no such rationale is present, medical evidence is of diminished probative value.[6]

ANALYSIS -- ISSUE 1

The Office accepted that on March 4, 1994 appellant sustained a right ankle strain. On August 18, 2008 appellant filed a claim for recurrence of her March 4, 1994 injury commencing July 3, 2008 attributing the lump on her right foot to the March 4, 1994 work injury. The employing establishment noted that she had been separated from her employment for over five years.

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability or a medical condition on or after July 3, 2008 due to her March 4, 1994 work injury.

In her August 15, 2008 report and in her July 8, 2008 treatment note, Dr. Wool-Cottone detailed the results of appellant's July 8, 2008 visit. She noted the history of injury and that appellant had a lipoma along the right foot and ankle lateral aspect. Dr. Wool-Cottone failed to provide any explanation as to the cause of appellant's onset of complaints or disability around July 3, 2008 or to specifically address whether the lipoma and disability were causally related to the March 4, 1994 work injury or how conditions had changed since March 21, 2004. The Board notes that it previously affirmed an Office termination decision finding that residuals of the March 4, 1994 work injury had resolved effective March 24, 2004. Dr. Wool-Cottone did not explain how a spontaneous change in the right ankle strain occurred on July 3, 2008. The Office did not accept a lipoma as being employment related and she did not explain how this condition was related to appellant's accepted work injury.[7] In her treatment note of July 21, 2009, Dr. Wool-Cottone noted that appellant felt that her right foot lipoma was secondary to her workplace injury, but she did not provide her own opinion stating that appellant's current condition was work related, nor did she provide a rationalized opinion regarding the causal relationship between appellant's condition and the March 4, 1994 work injury. Therefore, Dr. Wool-Cottone's reports are insufficient to meet appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.[8] She failed to submit rationalized medical evidence establishing

[5] *I.J.*, 59 ECAB 408 (2008); *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[6] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[7] *See G.A.*, 61 ECAB ___ (Docket No. 09-2153, issued June 10, 2010) (for conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship).

[8] *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

that her claimed recurrence of disability is causally related to the accepted employment injury and therefore the Office properly denied her claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,[9] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[10] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.[11]

ANALYSIS -- ISSUE 2

The Office denied appellant's recurrence claim finding that the medical evidence was insufficient to establish her claim. In her reconsideration request, appellant reiterated her belief that the lipoma was related to the March 4, 1994 injury. Her request does not show that the Office erroneously applied the law because she did not identify a point of law that was erroneously applied or interpreted. Appellant's request also did not advance any new relevant legal arguments not previously considered by the Office.

The additional medical report from Dr. Wool-Cottone submitted by appellant, although new, is not relevant and pertinent evidence not previously considered by the Office. In her January 22, 2010 report, she provided a synopsis of appellant's care since November 29, 2006 and indicated appellant's belief that her condition was employment related. Dr. Wool-Cottone stated that appellant would benefit from surgical removal of the lipoma as well as a repeat MRI scan. The Board notes that Dr. Wool-Cottone's synopsis of appellant's care since November 29, 2006 generally repeats or duplicates information contained in her reports previously of record.[12] Dr. Wool-Cottone also failed to specifically address the pertinent issue of whether the March 4, 1994 work injury spontaneously recurred or whether it caused or aggravated the lipoma. Thus, it is not relevant to the particular issue presented in this appeal and does not warrant a reopening of the case for merit review.[13]

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[9] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(1)-(2). *See Susan A. Filkins*, 57 ECAB 630 (2006).

[11] *Id*. at § 10.608(b). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

[12] Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case. *A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009); *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[13] *See D.K.*, 59 ECAB 141 (2007); *Johnnie B. Causey*, 57 ECAB 359 (2006) (the submission of evidence which does not address the particular issue involved in a case does not constitute a basis for reopening the claim).

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

On appeal, appellant notes that Dr. Wool-Cottone indicated that past medical records from appellant's other physician's regarding her symptoms and mass should be referenced. She contends that medical record supports that her ankle never healed and that her case should never have been closed. The Board notes, however, that the medical evidence in the record does not support a recurrence causally related to the March 4, 1994 work injury. In its April 14, 2005 decision, the Board affirmed the Office's termination of appellant's benefits effective March 21, 2004.[14] Appellant did not subsequently submit sufficient evidence to establish that a spontaneous change in the right ankle condition or otherwise submit medical evidence establishing that the lipoma was caused or aggravated by the March 4, 1994 injury.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability beginning July 3, 2008 causally related to her March 4, 1994 work injury. The Board further finds that the Office properly denied her request for reconsideration.

[14] Absent further review of this issue by the Office, that finding is *res judicata*. *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 10, 2010 and November 25, 2009 are affirmed.

Issued: January 19, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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