United States Department of Labor
Employees' Compensation Appeals Board

A.H., Appellant	)	
and	)	**Docket No. 10-2103**
	)	**Issued: July 5, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Greenville, NC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 10, 2010 appellant filed a timely appeal from a June 14, 2010 merit decision of the Office of Workers' Compensation Programs which denied her traumatic injury claim and a July 22, 2010 decision which denied her request for reconsideration. Pursuant to the Federal Employees' Compensation Act[1] and 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 sustained a back injury on May 3, 2010 in the performance of duty; and (2) whether the Office properly denied her request for reconsideration pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 4, 2010 appellant, then a 45-year-old health technician, submitted a claim for traumatic injury alleging that on May 3, 2010 she sprained or strained her low back. She bent over to draw blood from a patient and felt a shooting pain down the left side of her body and thigh. Appellant stopped work on May 3, 2010.

On May 11, 2010 the Office advised appellant that the evidence submitted was insufficient to support her claim because she failed to provide evidence of a firm medical diagnosis resulting from her May 3, 2010 employment incident. It requested that she provide a detailed, narrative medical report from her physician which included a history of the injury, examination and treatments received, results of examinations and tests, medical diagnosis and the physician's opinion, supported by medical rationale, explaining how the employment incident caused or aggravated the alleged low back condition.

In a May 10, 2010 letter, the employing establishment controverted appellant's claim as the medical evidence failed to provide a diagnosis of any condition resulting from the May 3, 2010 incident. It noted that appellant's supervisor stated on the incident report that appellant previously complained of back problems, which were caused and aggravated by working hard on the alleged incident date.

In a May 3, 2010 handwritten health record, Dr. Stephen Lynch, a Board-certified family practitioner, saw appellant for complaints of back pain. She stated that her back bothered her for sometime and believed that positioning at work aggravated her back pain.

In a May 10, 2010 medical form, a nurse practitioner noted appellant experienced musculoskeletal pain in her back and diagnosed her with herniation.

In a May 10, 2010 form, appellant complained of ongoing lower back pain since May 3, 2010. She stated that she felt acute pain when she stood up from drawing blood at work. Appellant tested positive for urinary frequency and nocturia.

Appellant provided handwritten chart records with an illegible signature dated from September 16, 2009 to May 3, 2010. On May 3, 2010 she complained of low back pain radiating down her left leg and stated she was injured at work. Appellant also submitted several work excuse slips. On May 4, 2010 Dr. Quentin Mewborn, Jr., a Board-certified family practitioner, confirmed that on May 3, 2010 she was seen in his office and would be unable to work until further notice. In May 10, 21 and 28, 2010 work excuse slips, a nurse practitioner stated that appellant was treated in their office that day and was still unable to work.

By decision dated June 14, 2010, the Office denied appellant's claim on the grounds of insufficient evidence establishing fact of injury. It accepted that the May 3, 2010 work incident occurred as alleged, but the medical evidence failed to provide a medical diagnosis that could be connected to the employment incident.

On July 15, 2010 appellant submitted a request for reconsideration and submitted a July 15, 2010 work capacity evaluation form by Dr. Mewborn, which limited appellant to working six hours a day with restrictions. Dr. Mewborn noted that she had not reached

maximum medical improvement and also explained that her treatment was interrupted because she had an unrelated surgery. Appellant also resubmitted the September 16, 2009 to May 3, 2010 notes of Dr. Mewborn.

In a July 22, 2010 decision, the Office denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a). It found that the evidence submitted was irrelevant and immaterial because it did not address the specific medical issue in appellant's claim. The Office determined that, because appellant's request did not meet any of the requirements for obtaining reconsideration, she was not entitled to merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[2] has the burden of proof to establish the essential elements of her claim by the weight of the reliable, probative and substantial evidence[3] including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.[5] 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.[6] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[7] An employee may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.[8]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or opinion as to causal relationship.[9] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the

[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[4] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989); *M.M.*, Docket No. 08-1510 (issued November 25, 2010).

[5] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

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

[7] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[8] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[9] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

employee's diagnosed condition and the specified employment factors or incident.[10] 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.[11]

ANALYSIS -- ISSUE 1

The Office accepted that the May 3, 2010 employment incident occurred, as alleged. The Board finds that appellant failed to meet her burden of proof to establish that she sustained a back condition causally related to the accepted employment incident.

The medical evidence of record fails to provide a history of injury, medical diagnosis or a physician's opinion explaining how low back or any low back condition resulted from the accepted May 3, 2010 incident. In a May 3, 2010 record, Dr. Lynch failed to describe the employment incident. He only noted that appellant complained of back pain that had bothered her for some time. The Board has held generally that pain is a symptom, not a firm medical diagnosis.[12] Furthermore, Dr. Lynch did not provide any opinion regarding the cause of appellant's back pain or explain how it resulted from the May 3, 2010 employment incident. Dr. Mewborn's May 4, 2010 work excuse slip also failed to provide a medical diagnosis or medical opinion regarding causal relationship. These reports fail to meet appellant's burden of proof.

The only evidence containing a medical diagnosis was of a herniation in a May 10, 2010 medical form signed by a nurse practitioner. Section 8101(2) of the Act provides, however, that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.[13] As a nurse practitioner is not a physician as defined under the Act, appellant's diagnosis of herniation does not constitute competent medical opinion.[14] The Office, therefore, properly found that the medical evidence failed to establish that appellant sustained an injury in the performance of duty.

Appellant also submitted a May 10, 2010 medical form without a physician's signature or other proper identification, which stated that she complained of lower back pain radiating down her left leg. The Board has held that a medical report with no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8102(2) or without proper

[10] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[11] *B.B.*, 59 ECAB 234 (2007); *Victor J. Woodhams*, *supra* note 10; *D.S.*, Docket No. 09-860 (issued November 2, 2009).

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

[13] 5 U.S.C. § 8101(2).

[14] *I.D.*, 59 ECAB 648 (2008); *Vicky L. Hannis*, 48 ECAB 538 (1997).

identification of who provided the signature does not constitute probative medical evidence.[15] This medical form did not contain any information from which it could be inferred that a physician completed the form and signed the paper. Thus, it is of no probative value to establish that appellant sustained any injury on May 3, 2010.

On appeal, appellant contends that she submitted sufficient evidence to support her claim. She points out that the magnetic resonance imaging (MRI) scan demonstrated her back condition, which she sustained at work, and that she did not have any back problems prior to the May 3, 2010 employment incident. The record, however, is void of any MRI results. In the absence of probative medical opinion from a physician, appellant's lay opinion is not relevant to the medical issue in this case.[16]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether to review an award for or against compensation.[17] The Office's regulations provide that the Office may review an award for or against compensation at anytime on its own motion or upon application. The employee shall exercise her right through a request to the district Office.[18]

To require the Office to reopen a case for merit review pursuant to the Act, the claimant must provide evidence or an argument that: (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) constitutes relevant and pertinent new evidence not previously considered by the Office.[19]

A request for reconsideration must also be submitted within one year of the date of the Office decision for which review is sought.[20] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If the Office chooses to grant reconsideration, it reopens and reviews the case on its merits.[21] If the request is timely but

[15] *D.D.*, 57 ECAB 734 (2006); *Richard J. Charot*, 43 ECAB 357 (1991); *E.K.*, Docket No. 09-1827 (issued April 21, 2010).

[16] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[17] 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

[18] 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

[19] *Id*. at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[20] *Id*. at § 10.607(a).

[21] *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

fails to meet at least one of the requirements for reconsideration, the Office will deny the request for reconsideration without reopening the case for review on the merits.[22]

ANALYSIS -- ISSUE 2

In a decision dated June 14, 2010, the Office denied appellant's claim on the grounds of insufficient medical evidence establishing that any diagnosed condition resulted from the May 3, 2010 employment incident. On July 15, 2010 appellant filed a timely request for reconsideration. By decision dated July 22, 2010, the Office denied her request for reconsideration.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring the Office to reopen the case for review of the merits of the claim. In her July 15, 2010 application for reconsideration, appellant did not show that the Office erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant resubmitted the September 16, 2009 to May 3, 2010 handwritten medical notes, which were merely duplicative evidence already considered by the Office and does not constitute a basis for reopening a case.[23] She provided a July 15, 2010 work capacity form by Dr. Mewborn limiting her workday to six hours with restrictions. The underlying issue in this case was whether appellant sustained any back injury causally related to the May 3, 2010 employment incident. That is a medical issue which must be addressed by relevant medical evidence.[24] A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case, actually addressing the issue of whether she sustained an injury causally related to the accepted employment incident.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). 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 relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, the Office properly denied merit review.

CONCLUSION

The Board finds that appellant did not establish that her left shoulder condition was causally related to the May 3, 2010 employment incident.[25] The Board also finds that the Office properly denied appellant's request for reconsideration.

[22] *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[23] *See D.K.*, 59 ECAB 141 (2007); *E.M.*, Docket No. 09-39 (issued March 3, 2009).

[24] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[25] The Board notes that appellant submitted additional evidence following the July 22, 2010 decision nonmerit decision. Since the Board's jurisdiction is limited to evidence that was before the Office at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ORDER

IT IS HEREBY ORDERED THAT the July 22 and June 14, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 5, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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