United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 11-2019**
	)	**Issued: May 3, 2012**
INTERNAL REVENUE SERVICE, Richmond, VA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2011 appellant filed a timely appeal from the April 19, 2011 nonmerit decision of the Office of Workers' Compensation Programs' (OWCP) denying her request for merit review. The Board also has jurisdiction over OWCP's March 14, 2011 decision denying her claim.[1] Pursuant to the Federal Employees Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury on October 18, 2010 as a result of her employment; and (2) whether OWCP

[1] Under the Board's rules of procedure, in computing the date of filing of an appeal, the 180 days begins to run on the date following the date of OWCP's decision. 20 C.F.R. § 501.3(f)(2). The time began to run for the March 14, 2011 decision on March 15, 2011 from which 180 days fell on Sunday, September 11, 2011. Appellant had until the close of the next business day, September 12, 2011 to timely submit her appeal. Her appeal was filed September 8, 2011, so it was timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 27, 2010 appellant, then a 51-year-old remittance perfection clerk, filed a traumatic injury claim alleging that on October 18, 2010 she was in the performance of duty lifting and carrying boxes on a skid when she felt pain on the left lower side of her back. She stated that, while the pain eased after a few minutes, her entire lower back hurt by the end of the day. The employing establishment indicated that appellant stopped work on October 10, 2010 and returned on October 25, 2010.

In support of her claim, appellant submitted copies of temporary offer of light/limited duty she accepted dated October 28 and December 2, 2010; a November 12, 2010 Rx Guardian Results report; and multiple notes, form reports and authorization requests forms from Dr. Andrew J. Limle, a chiropractor. In an October 20, 2010 report, Dr. Limle noted that he had been treating appellant for an automobile accident injury involving the left L5-S1 intervertebral disc, for which she had reached maximum medical improvement was at a supportive level of care. He noted the history of the October 18, 2010 work injury and his examination findings. Dr. Limle opined that the work-related injury resulted in a lumbosacral sprain to the lumbar region in both areas and substantially aggravated the lumbar degenerative conditions and disc injuries noted on her previous magnetic resonance imaging (MRI) scan. He recommended chiropractic manipulations to the lumbar spine and the possibility of getting a new MRI scan. In a November 10, 2010 attending physician's report, Dr. Limle indicated that appellant had preexisting lumbar disc herniations at L5-S1 and opined with a checkmark "yes" that the work injury of lifting boxes resulted in a lumbosacral sprain. He continued to submit progress reports on appellant's condition.

In a February 10, 2011 letter, OWCP informed appellant that additional evidence was needed to establish her claim. It gave her 30 days to submit a narrative medical report from a physician explaining how the October 18, 2010 incident caused or contributed to her condition. OWCP advised appellant that a chiropractor was only considered a qualified physician under FECA if there is a diagnosed spinal subluxation demonstrated by x-ray.

In response, appellant submitted duplicative copies of evidence previously of record along with January 8 and February 8, 2011 duty status reports from Dr. Limle diagnosing lower back pain.

By decision dated March 14, 2011, OWCP denied the claim finding that the medical evidence was insufficient to establish that the accepted work events caused a diagnosed medical condition. It specifically found that appellant's chiropractor, Dr. Limle, was not considered a physician under FECA.

On March 23, 2011 appellant requested reconsideration. She indicated that additional medical documentation showing subluxation to the L5 and the sacroiliac joint was included. No additional evidence was received.

By decision dated April 19, 2011, OWCP denied appellant's reconsideration request finding that the request was insufficient to warrant a merit review of the claim. It noted that no new evidence was received.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury[3] was sustained in the performance of duty, as alleged and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a fact of injury has been established. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

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.[6]

ANALYSIS -- ISSUE 1

The evidence supports that the incident of October 18, 2010, lifting and carrying boxes, occurred as alleged. However, appellant has not established her traumatic injury claim because

[3] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[4] *See also E.K.*, Docket No. 09-1827 (issued April 21, 2010); *see Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Id. see Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Id. see Gary J. Watling*, 52 ECAB 278 (2001).

the medical evidence does not show that this accepted employment incident caused or contributed to her back condition.

Appellant submitted several reports from Dr. Limle, including an October 20, 2010 report, where he noted an account of the October 18, 2010 work event, performed an examination and diagnosed a lumbosacral sprain to the lumbar region in both areas and an aggravation of her preexisting lumbar degenerative conditions and disc injuries as seen on a previous MRI scan. Dr. Limle concluded that these injuries were attributable to the work incident. He recommended that appellant be treated with chiropractic manipulations and possibly attain a new MRI scan to access any further damage to her preexisting lumbar conditions. Additional reports from Dr. Limle discussed appellant's progress with regard to chiropractic manipulations and diagnosed either lumbosacral sprain or lower back pain as a result of the work injury. As defined under FECA, a physician includes a chiropractor only to the extent that his reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[7] Subluxation means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[8] Dr. Limle, however, never made reference to subluxations in any of his reports or noted a review of x-rays. Thus, he is not a physician under FECA and his opinion regarding the cause of appellant's current back condition lacks evidentiary weight.[9] There is no other probative medical evidence contained in the record. As there is no probative medical evidence of record, appellant has not established that the October 18, 2010 work incident caused or aggravated a claimed injury.

Appellant contends on appeal that she sent all the evidence OWCP requested. As noted, the medical evidence is insufficient to demonstrate that the accepted October 18, 2010 employment incident was causally related to a back condition. Evidence submitted by appellant after the final decision cannot be considered by the Board. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its decision.[10]

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 and 10.607.

[7] 5 U.S.C. § 8101(2); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[8] 20 C.F.R. § 10.5(bb).

[9] *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (medical opinion, in general, can only be given by a qualified physician).

[10] 20 C.F.R. § 501.2(c)(1).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[11] OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[12] To be entitled to a merit review of OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[13] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[14]

ANALYSIS -- ISSUE 2

The Board finds that appellant's March 23, 2011 request for reconsideration did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). It did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Appellant made no legal argument or assertion of OWCP error but instead indicated that she was submitting medical documentation.

However, appellant's March 23, 2011 request for reconsideration was not accompanied by any new medical evidence. She indicated that she was including additional medical documentation showing subluxation in the spine, but no such evidence was received by OWCP prior to its April 19, 2011 decision. Thus, appellant did not submit relevant and pertinent new evidence not previously considered by OWCP.

Consequently, the evidence submitted by the claimant on reconsideration does not satisfy any of the three regulatory criteria for reopening a claim for merit review. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not establish that she sustained a traumatic injury in the performance of duty on October 18, 2010. The Board further finds that OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[11] Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

[12] 20 C.F.R. § 10.606(b)(2). *See J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

[13] *Id*. at § 10.607(a). *See S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

[14] *Id*. at § 10.608(b). *See Y.S.*, Docket No. 08-440 (issued March 16, 2009) *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

ORDER

IT IS HEREBY ORDERED THAT the April 19 and March 14, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 3, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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