

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish an injury in the performance of duty on March 17, 2011, as alleged; and (2) whether OWCP properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that OWCP did not review all the information sent with her reconsideration request, and that her request for reconsideration should have been reviewed on the merits.

FACTUAL HISTORY

On November 19, 2011 appellant, then a 54-year-old mail carrier, filed a traumatic injury claim alleging that on March 17, 2011 while checking to see if there was outgoing mail at an address, she tripped when her toe caught in a crack and she fell and landed on her back and sustained an injury to her back and toe. In support of her claim, she submitted a note dated November 17, 2011 from Dr. Fawad H. Rizvi, appellant's treating osteopath, wherein he indicated that appellant was seen in his office on that date and that she was on bed rest and unable to return to work until further evaluation on December 8, 2011. In another form completed on the same date, Dr. Rizvi indicated that appellant would need to be off work from November 18 to December 16, 2011.

By letter dated November 23, 2011, OWCP asked appellant to submit further information, including additional detail about the incident and medical evidence, in support of her claim. On December 9, 2011 appellant submitted a letter indicating that she tripped on a crack and fell forward and, after taking three or four large steps, fell on the ground hard. She stated that, although she knew she was hurt, she finished the day rather than "go in take the wrath of management." Appellant stated that she was already seeing Dr. Rizvi but that, as a result of the fall, she had new pain going down her lower back and neck pain. She discussed her pain, new symptoms and her medical treatment.

By letter dated November 23, 2011, OWCP informed appellant of deficiencies in her claim and gave her 30 days to file a response. In response, it received multiple reports from Dr. Rizvi, whose first report, dated March 15, 2011, revealed that appellant noted a one-year history of aching in her low back associated with numbness and tingling in her buttocks that was not associated with any inciting factor. Appellant noted a component of right lateral thigh and hip pain which comes with back pain. At that time, Dr. Rizvi assessed her with low back pain; radiculopathy-thoracic/lumbar and knee pain. He noted that appellant's magnetic resonance imaging (MRI) scan revealed an L5-S1 left paracentral and lateral disc osteophyte complex causing moderate foraminal stenosis due to protrusion. Dr. Rizvi indicated that she had a history and imaging consistent with lumbar spinal stenosis and a possible component of radicular syndrome that has been partially managed on medications but persisting and progressing over the last year. The record contains additional reports by him dated March 29 to December 8, 2011. In these reports, Dr. Rizvi noted that appellant had a history of chronic right-sided low back pain, worse since a fall. He assessed her with low back pain, radiculopathy -- thoracic/lumbar, knee pain and spondylosis, lumbosacral. Dr. Rizvi discussed appellant's treatment with medication, lumbar medial branch blocks and a facet rhizotomy. Although he noted some progress, by his

November 17, 2011 report, he indicated that her lumbar pain was progressing and the frequency of upper extremity pain was increasing as well.

Results of diagnostic tests were also submitted. These included a May 6, 2010 prefall MRI scan that was interpreted by Dr. Joon Kim, a Board-certified radiologist, as showing L4-5 small central disc osteophyte complex and L5-S1 left paracentral and lateral disc osteophyte complex. A November 24, 2011 x-ray was interpreted by Dr. Carolina Henein, an osteopath, as showing spondylosis of the lumbar spine. Dr. Henein noted circumferential disc bulge effacing the anterior thecal sac with moderate bilateral neural foramina narrowing and a small annular fissure at L4-5. She further noted a left paracentral and far lateral broad-based disc bulge effacing the anterior and left lateral thecal sac with mass effect on the exiting left nerve root and moderate left neural foramina narrowing and mild right neural foramina narrowing at L5-S1. In December 11 and 22, 2011 notes, Dr. Arturo Paz, a Board-certified neurosurgeon, indicated that appellant had a computerized tomography (CT) scan of her lumbar spine and that she had air in the intervertebral disc space at L5-S1, marked degenerative changes, marked decrease of the space and foramen encroachment. He noted that she was going to be scheduled for surgery which will be decompression, laminectomy and fusion with instrumentation at L5-S1. The record also contains a copy of the December 22, 2011 CT scan.

By decision of January 5, 2012,³ OWCP denied appellant's claim as the medical evidence did not demonstrate that the claimed condition was related to the established work-related event.

On January 25, 2012 appellant requested reconsideration. In support of her request, she submitted a December 20, 2011 report by Dr. Paz wherein he noted that she had an onset of low back pain in March 2011, when she claimed her back pain doubled. Dr. Paz noted that appellant had epidural shots after physical therapy and complained of increasing urinary frequency. He noted that she has been off work since November 17, 2011 and has difficulty sitting for a long time. Appellant also submitted a duplicate copy of the CT scan of December 22, 2011.

On February 1, 2012 OWCP denied reconsideration of the claim as the evidence submitted with appellant's request was insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence⁴ including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.⁵

³ The decision is mistakenly dated January 5, 2011.

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁵ *M.M.*, Docket No. 08-1510 (issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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.⁶ 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.⁷ 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.⁸ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability or condition related to the employment incident.⁹

Under FECA, when employment factors caused an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.¹⁰ When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation ceased.¹¹

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹² 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 specified employment factors or incident.¹³ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable 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.¹⁴

ANALYSIS -- ISSUE 1

Appellant alleged that she suffered a back and toe injury as a result of an employment incident that occurred on March 17, 2011 when her toe caught a crack and she tripped and fell and landed on her back. OWCP found that the incident occurred as alleged and that a medical condition had been diagnosed, but denied her claim as she failed to establish that her medical condition was causally related to the accepted employment incident.

⁶ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁷ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁸ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

¹⁰ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *James L. Hearn*, 29 ECAB 278, 287 (1978).

¹¹ *Id.*

¹² *D.A.*, Docket No. 12-540 (issued July 25, 2012).

¹³ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

¹⁴ *Id.*

Appellant submitted medical evidence that established that she had a history of back problems. In a medical report dated March 15, 2011, two days prior to the employment incident, Dr. Rizvi noted that she had a one-year history of aching in her low back and tingling in her buttocks that was not associated with any inciting factor. He assessed appellant with low back pain, radiculopathy (thoracic/lumbar) and knee pain. After the March 17, 2011 incident Dr. Rizvi wrote numerous other reports dated from March 29 to December 8, 2011. These reports indicated that appellant was treated for low back pain, radiculopathy (thoracic/lumbar), knee pain and lumbosacral spondylosis. Dr. Rizvi indicated that her pain was worse since a fall. However, he never discussed the fall. Dr. Rizvi did not explain how the fall occurred or even the date of the fall. He never directly attributed any aggravation of appellant's preexisting back condition to the March 17, 2011 employment incident. Accordingly, Dr. Rizvi's reports are not sufficient to establish a causal relationship between her back injury and the employment incident of March 17, 2011. The diagnostic reports in the record by Drs. Kim, Henein and Paz do not address causal relationship.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition worsened during a period of employment nor her belief that her condition was caused by her employment is sufficient to establish causal relationship.¹⁵ Accordingly, as she did not submit rationalized medical evidence that her medical condition was causally related to the March 17, 2011 employment incident, she failed to establish her claim.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁶ OWCP's regulations provide that the evidence or argument submitted by 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.¹⁷ To be entitled to a merit review of OWCP's 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.¹⁸ 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.¹⁹

¹⁵ *M.J.*, Docket No. 12-534 (issued July 26, 2012).

¹⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he 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).

¹⁷ 20 C.F.R. § 10.606(b)(2).

¹⁸ *Id.* at § 10.607(a).

¹⁹ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

In requesting reconsideration, appellant did not argue that OWCP erroneously interpreted a specific point of law nor did she advance a relevant legal argument not previously considered. She did submit two pieces of evidence: a copy of a CT report from December 22, 2011 and a December 20, 2011 report by Dr. Paz. The CT report from December 22, 2011 is a duplicate of a report already in the record. The Board has held that submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.²⁰ The December 20, 2011 report from Dr. Paz is a new piece of evidence. Although Dr. Paz noted that appellant had onset of low back pain in March 2011, he does not address the March 17, 2011 employment incident. Accordingly, the report of Dr. Paz does not address the relevant issue of causal relationship. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²¹

Although appellant contends on appeal that OWCP did not review all of the evidence submitted with her reconsideration request, the Board finds that this is not the case; all evidence was considered. Accordingly, she has not submitted evidence sufficient to require OWCP to reopen the case for further merit review.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she was injured in the performance of duty on March 17, 2011, as alleged. The Board further finds that OWCP properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C § 8128(a).

²⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

²¹ *D.B.*, Docket No. 10-2036 (issued March 13, 2011); *Edward Mathew Diekemper*, 31 ECAB 224, 225 (1979).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 1 and January 5, 2012 are affirmed.

Issued: November 26, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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