

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NICY TENNESSEE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, New Orleans, LA

*Docket No. 03-794; Submitted on the Record;
Issued April 23, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that she sustained a traumatic injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied her request for review of the merits of her claim.

On May 21, 2001 appellant, then a 42-year-old nurse, filed a claim for traumatic injury alleging that she sustained a lower back injury while in the performance of duty on April 5, 2001.

In a letter dated June 4, 2001, the employing establishment controverted appellant's claim, stating that in April, appellant had met with staff to discuss her 1997 and 1998 back injuries. She was advised to file a recurrence of disability claim. The employing establishment noted that appellant initially claimed an April 2, 2001 injury but changed that date to April 5, 2001.

In support of her claim, appellant submitted a report dated April 9, 2001 from Dr. Lowell Hurwitz, Board-certified in radiology, who stated that a magnetic resonance imaging (MRI) scan taken that day revealed hypertrophy arthritic changes of the lower lumbar joints at L5-S1. He also noted appellant's history of chronic back pain for three years.

In an attending physician's report dated April 26, 2001, Dr. Salvador Murra, a neurologist, stated that appellant's lumbar radiculopathy, dizziness, leg pain and blurred vision were causally related to her employment and that her conditions "may be increased with activity." He noted her date of injury was April 2001. Dr. Murra also stated that he had examined appellant on November 9, 2000, March 21, April 19 and 26, 2001.

In a report dated April 26, 2001, Dr. Murra stated that appellant's sensory and motor studies were within normal limits and that an electromyography (EMG) test revealed no spontaneous activity. However, he noted polyphasic changes in the lumbosacral innervated

muscles effecting the L5-S1 root bilaterally. Dr. Murra diagnosed chronic lumbosacral radiculopathy at L5-S1.

In an attending physician's report dated May 22, 2001, Dr. Charles Rene, Board-certified in obstetrics and gynecology, stated that appellant sustained back pain "after pulling a patient about a month earlier." He noted that appellant's date of injury was January 3, 2001.

In a duty status report dated May 22, 2001, Dr. Murra placed appellant on total disability.

On June 15, 2001 appellant filed a wage-loss claim from May 22 to June 15, 2001.

By letter dated June 22, 2001, the Office advised appellant regarding what additional information she needed to process her claim. The Office noted that an employee is required to report injuries within 30 days of the incident. It then asked appellant to explain why she reported her injury more than 30 days after the date of the alleged incident. The Office asked appellant to also explain why she changed the date of the incident from April 2 to April 5, 2001 as the employing establishment alleged and to describe the incident causing her injury in detail as well as her immediate reaction to the injury. Further, the Office asked appellant to provide medical documentation establishing treatment for a traumatic injury on April 5, 2001 including an explanation of the causal relationship, if any, between the April 5, 2001 incident and her medical condition.

By decision dated July 23, 2001, the Office denied her claim.

In a report dated July 23, 2001, Dr. Murra stated that appellant had lumbosacral radiculopathy and "should avoid any lifting or bending or any other activities that would put stress on her back."

By undated letter received by the Office on October 22, 2001, appellant requested reconsideration.

In an undated witness statement, J. Dupree stated: "During the last week of April, I recall hearing [appellant] say she had injured herself while lifting [a patient]."

By decision dated March 14, 2002, the Office denied modification of its July 23, 2001 decision. However, the Office determined that appellant established that she did "experience the incident as claimed" based on an eyewitness statement. However, the Office noted that appellant had not submitted evidence to establish that she sustained an injury or medical condition as a result of the incident.

By letter dated March 23, 2002, appellant again requested reconsideration.

By decision dated September 25, 2002, the Office denied review of its prior decision.

The Board finds that appellant failed to establish that she sustained a traumatic injury while in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.¹

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.²

The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.³ In this case, the Office accepted that an incident occurred as alleged. The medical evidence in this case, however, is insufficient to establish causal relationship between a diagnosed condition and the April 2001 incident. For example, Dr. Rene stated that appellant injured her back a month prior to his May 22, 2001 examination; however, he noted that the date of appellant's injury was January 3, 1997. Although Dr. Murra noted several medical conditions, he did not establish a causal relationship between any of the conditions and the April 5, 2001 incident. Dr. Hurwitz' report did not include a rationalized medical opinion establishing a relationship between the revealed arthritic changes at L5-S1 and her employment. None of the evidence supports that appellant sustained an injury on April 5, 2001 causing back pain or any of the conditions as noted by Dr. Murra. Absent medical evidence to establish that her medical condition was causally related to the April 5, 2001 work-related incident, appellant failed to carry her burden of proof.

The Board further finds that the Office properly denied review of its prior decision of appellant's March 23, 2002 request for reconsideration.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease or increase the compensation awarded; or

¹ *Gary J. Watling*, 52 ECAB ____ (Docket No. 00-634, issued March 1, 2001).

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *John J. Carlone*, 41 ECAB 354 (1989).

(2) award compensation previously refused or discontinued.”⁴

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office or by constituting relevant and pertinent new evidence not previously considered by the Office.⁵

Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.⁶ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁷ Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁸

Appellant’s March 23, 2002 request for reconsideration addressed the fact that she notified her team leader and other staff about her injury. However, the Office in its March 23, 2002 decision found that the incident occurred as appellant alleged and thus this report is not relevant to the issue of whether she sustained a work-related injury on that date. Appellant further noted that she received medical treatment at that time but was advised that paperwork was not necessary due to her prior back injuries. The Board notes that appellant presented no medical evidence to support the second component of her burden of proof, namely that she sustained an injury as a result of the April 5, 2001 incident. Consequently, appellant did not present any relevant and pertinent new evidence not previously considered by the Office. Further, appellant did not show that the Office erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by the Office.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ 20 C.F.R. § 10.608(b).

⁷ *David J. McDonald*, 50 ECAB 185 (1998).

⁸ *Id.*

The decisions of the Office of Workers' Compensation Programs dated September 25 and March 14, 2002 are affirmed.

Dated, Washington, DC
April 23, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member