United States Department of Labor
Employees' Compensation Appeals Board

DIANA L. WORKMAN, Appellant	)	
and	)	**Docket No. 04-1469**
	)	**Issued: October 26, 2004**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Muncie, IN, Employer	)	

Appearances:
Diana L. Workman, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On May 12, 2004 appellant filed a timely appeal of the September 9, 2003 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Appellant also timely appealed the Office's May 12, 2003 merit decision, which denied her claim for an employment-related traumatic injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.[1]

ISSUES

The issues are: (1) whether appellant established that she sustained a back injury in the performance of duty on February 6, 2003; and (2) whether the Office properly denied appellant's request for a review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] The record on appeal includes evidence that was received after the issuance of the Office's September 9, 2003 decision. The Board's review is limited to the evidence in the case record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On March 5, 2003 appellant, a 49-year-old mail processing clerk, filed a traumatic injury claim alleging that she injured her back while in the performance of duty on February 6, 2003. She stopped working on February 8, 2003. Appellant explained that she injured herself on the evening of February 6, 2003 while lifting a heavy, extra large tray of mail. She went to the medical center the following day and when she reported to work on February 7, 2003 she spoke with Cheryl Carter about lifting the tray of mail. Appellant stated that she and Ms. Carter thought it was just a muscle strain at the time. When appellant's condition did not improve she sought further medical advice and obtained a magnetic resonance imaging (MRI) scan, which revealed herniated discs. At that point appellant realized that she needed to file a workers' compensation claim.

Dr. Matthew B. Roush, a Board-certified family practitioner, examined appellant on February 17, 2003 and diagnosed right thoracic strain. He advised that appellant would be able to resume regular work in two weeks, but in the interim she should not bend, stoop or twist and she should avoid lifting more than five pounds. Appellant also submitted a March 5, 2003 disability slip from Dr. Robert A. Lillo, a Board-certified physiatrist, who extended Dr. Roush's earlier restrictions for another six to eight weeks.

On April 2, 2003 the Office advised appellant of the need for additional factual and medical evidence. The Office afforded appellant 30 days within which to submit the requested factual and medical information.

The Office received appellant's April 15, 2003 statement in which she described the circumstances of her February 6, 2003 incident. The Office also received treatment records from Drs. Roush and Lillo covering the period February 17 to April 9, 2003.

Dr. Roush first examined appellant on February 17, 2003 and reported a history of thoracic back pain that started 10 days earlier when appellant bent over at work and felt something pull. When she rotated her back appellant reportedly felt a kink in her back. X-rays of the thoracic spine revealed compression fractures at T7 through T9 that appeared to be old. Dr. Roush also noted an osteophyte formation and sclerosis consistent with degenerative arthritis. He diagnosed iliocostalis strain and compression fracture of the spine. Dr. Roush recommended an MRI scan to ascertain whether the compression fractures were old or new. He also provided work restrictions.

In a February 21, 2003 report, Dr. Roush noted a history of a compression fracture at T7 and T8 as confirmed by an MRI scan. He also noted evidence of a small herniation protrusion at T7-8. Appellant was reportedly still experiencing significant pain with tenderness and radiating pain to the ribs and anterior aspect of the chest wall. Dr. Roush diagnosed right T8 disc herniation in a patient with an old compression fracture at T8, and additional fractures at T7 and T9. He also noted that he referred appellant to Dr. Lillo for possible epidural injections.

In a March 5, 2003 report, Dr. Lillo noted complaints of mid-back pain that began on February 6, 2003. He reported that the pain was related to lifting a heavy crate on the job. A March 5, 2003 x-ray of the thoracic spine revealed some wedging of the mid to lower thoracic

vertebra, which Dr. Lillo indicated probably represented Scheuermann's disease (kyphosis). Dr. Lillo also noted that an MRI scan showed an apparent disc protrusion at T7-8. He diagnosed T7-8 disc protrusion with some radicular pain. Dr. Lillo recommended physical therapy and imposed work restrictions of no lifting over five pounds, no repetitive bending or stooping and no twisting. On March 19, 2003 Dr. Lillo diagnosed thoracic syndrome. He noted that appellant was slightly better and was awaiting approval for therapy.

Dr. Lillo also provided an April 9, 2003 report wherein he noted that appellant was not much better. Her prescribed medication reportedly did not provide much relief. Dr. Lillo also noted that appellant had not been to therapy because it had not yet been approved. He reported subjective evidence of mid-thoracic pain with no real radicular pain. Dr. Lillo diagnosed thoracic pain syndrome with some disc protrusion at T7-8. And he advised appellant to continue working restricted duty and to proceed with physical therapy.

In a decision dated May 12, 2003, the Office denied appellant's claim on the basis that she failed to establish that the claimed medical condition was related to the accepted incident of February 6, 2003.

On July 10, 2003 appellant requested reconsideration. In a February 21, 2003 addendum, Dr. Roush indicated that appellant had a right T8 disc herniation, an old compression fracture at T8, and new compression fractures at T7 and T9. He further stated that the T8 disc herniation and the new fractures at T7 and T9 were consistent with the history of injury reported and were employment related.

In a decision dated September 9, 2003, the Office denied appellant's request for reconsideration. The Office stated that appellant's request neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

In order to determine whether an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.[2] The second component is whether the employment incident caused a personal injury.[3] An employee may establish that an injury occurred in the performance of duty as alleged but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to

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

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

the injury.[4] Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.[5]

ANALYSIS -- ISSUE 1

The evidence of record fails to establish that appellant's claimed thoracic condition is causally related to the February 6, 2003 employment incident. Although appellant attributed her thoracic condition to lifting a heavy, extra large tray of mail on February 6, 2003, the treatment records from Drs. Roush and Lillo covering the period February 17 to April 9, 2003 do not demonstrate a causal relationship between the diagnosed conditions and her accepted employment exposure. Drs. Lillo and Roush both reported an onset of mid-back pain on or about February 6, 2003, but neither doctor specifically attributed appellant's thoracic pain syndrome, disc protrusion at T7-8, and compression fractures at T7 and T9 to the February 6, 2003 lifting incident. The record, at the time the Office issued its May 12, 2003 merit decision, did not include a rationalized medical opinion specifically diagnosing a condition attributable to appellant's February 6, 2003 employment incident. As such, appellant failed to meet her burden of demonstrating that her claimed thoracic condition was causally related to the February 6, 2003 employment incident. Accordingly, the Office properly denied appellant's claim.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.[6] Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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.[7] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[8]

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[4] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[5] *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of causal relationship must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and claimant's specific employment factors. *Id.*

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b)(2) (1999).

[8] 20 C.F.R. § 10.608(b) (1999).

ANALYSIS -- ISSUE 2

Appellant's July 10, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[9]

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted Dr. Roush's February 21, 2003 addendum. While Dr. Roush's earlier reports did not specifically attribute appellant's thoracic condition to the employment incident, his February 21, 2003 addendum clearly attributed appellant's T8 disc herniation and the new compression fractures at T7 and T9 to her employment incident. This report constitutes relevant and pertinent new evidence; however, the Office found Dr. Roush's February 21, 2003 addendum lacking in substance because he did not explain how the diagnosed conditions were employment related. Section 10.606(b)(2)(iii) requires the submission of relevant and pertinent new evidence only.[10] Merit review under this section is not premised on the submission of evidence sufficient to discharge appellant's burden of proof on the issue of causal relationship. Thus, while in the Office's estimation Dr. Roush may not have provided sufficient explanation for his opinion on causal relationship, this perceived shortcoming does not, of itself, preclude merit review of the claim. If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[11] The Board finds that Dr. Roush's February 21, 2003 addendum report is sufficient to warrant reopening appellant's claim for merit review. Therefore, the Office improperly denied appellant's July 10, 2003 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to establish that she sustained a thoracic injury in the performance of duty on February 6, 2003. The Board further finds that the Office improperly denied appellant's July 10, 2003 request for reconsideration.

[9] 20 C.F.R. § 10.606(b)(2)(i) and (ii) (1999).

[10] 20 C.F.R. § 10.606(b)(2)(iii) (1999).

[11] *Paul Kovash*, 49 ECAB 350, 354 (1998).

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2003 decision of the Office of Workers' Compensation Programs is affirmed and the September 9, 2003 decision denying reconsideration is set aside. The case is remanded for further proceedings consistent with this decision.

Issued: October 26, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member