

**United States Department of Labor
Employees' Compensation Appeals Board**

ROBERT L. JOHNSON, Appellant)
and) Docket No. 05-108
DEPARTMENT OF DEFENSE, PENTAGON,) Issued: March 28, 2005
Washington, DC, Employer)

)

Appearances:
Robert L. Johnson, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 12, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 20, 2004 which denied his claim for a neck injury. Appellant also appealed a July 29, 2004 decision which denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether appellant has met his burden of proof in establishing that he sustained a neck injury in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On April 6, 2004 appellant, then a 33-year-old police officer, filed a claim alleging that, on February 23, 2004, he sustained a neck injury after landing on his upper neck while participating in baton practice exercises. Appellant did not stop work.

By letter dated April 19, 2004, the Office asked appellant to submit additional information, including a comprehensive medical report from his treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to his claimed neck injury.

Appellant submitted treatment notes from the Federal Law Enforcement Training Center (FLETC) health unit where he was treated from February 23 to March 2, 2004. On February 23 and February 24, 2004 the nurse practitioner noted findings upon physical examination of no numbness or tingling in the extremities, stiffness in the neck, full range of motion in all extremities, and full range of motion in the neck. On February 27, 2004 the nurse noted pain at night and an inability to sleep due to tightness in the neck. A diagnosis of neck strain was provided. On March 1, 2002 appellant related a history of the claimed injury. The nurse noted a normal physical examination and diagnosed a strain. Also submitted was a treatment note from Dr. Timothy E. Yarboro, a Board-certified family practitioner, dated May 13, 2004, who noted that appellant was evaluated on April 16, 2004 for a work-related injury that occurred during training exercises. He recommended a cervical spine magnetic resonance imaging (MRI) scan.

In a decision dated May 20, 2004, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his condition was caused by factors of his employment.

On July 3, 2004 appellant requested reconsideration and submitted. Reports dated February 23 to March 2, 2004 from the health unit which were apparently signed by a "Dr. Miller."¹ On February 23 and February 24, 2004 Dr. Miller noted that appellant was treated for neck pain and denied symptoms of numbness or tingling in the extremities. He indicated that appellant was still experiencing neck pain but was released back to his activities. On February 27, 2004 the physician noted that appellant was experiencing pain at night and an inability to sleep due to the tightness and was prescribed with an oral analgesic. The March 2, 2004 note advised that a CA-1 form was completed and forwarded to the Office for processing. On April 29, 2004 Dr. Miller noted symptoms of neck tightness which was worse at night. He recommended oral analgesics for pain management.

In a decision dated July 29, 2004, the Office denied appellant's reconsideration request on the grounds that his letter neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act 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 the Act, that the claim was filed within the applicable time limitation 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. These are the essential

¹ A more complete identification of "Dr. Miller" does not appear in the record.

elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²

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.³ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁴

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 claimant.⁵ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁶

ANALYSIS -- ISSUE 1

The Board notes that on February 23, 2004 the claimed incident occurred when appellant fell while participating in baton exercises. The Board finds however, that the medical evidence is insufficient to establish that appellant sustained a neck strain causally related to the February 23, 2004 incident.

The contemporaneous medical records of February 23, 24 and 27 and March 2, 2004 were signed by a nurse practitioner. The Board has held that records signed by a nurse are not considered medical evidence as a nurse is not defined as a physician under the Act.⁷ Therefore,

² *Gary J. Watling*, 52 ECAB 357 (2001).

³ *Michael E. Smith*, 50 ECAB 313 (1999).

⁴ *Id.*

⁵ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁶ *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

⁷ See 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

these reports are insufficient to meet appellant's burden of proof. Also submitted was a letter from Dr. Yarboro dated May 13, 2004, who noted that appellant was evaluated on April 16, 2004 for a work-related injury that occurred during training exercises and recommended a cervical spine MRI scan. However, Dr. Yarboro did not specifically reference an injury causing event on February 23, 2004 nor did he provide a rationalized opinion regarding the causal relationship between appellant's neck and cervical condition and the accepted incident of that day.⁸ He did not explain how the manner in which appellant landed after falling caused or aggravated an injury to the cervical spine. Therefore, this report is insufficient to meet appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.⁹

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,¹⁰ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹¹ which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
- “(ii) Advances a relevant legal argument not previously considered by the [Office]; or
- “(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹²

⁸ See *Jimmie H. Duckett*, *supra* note 6.

⁹ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b).

¹² 20 C.F.R. § 10.608(b).

ANALYSIS -- ISSUE 2

Appellant's July 3, 2004 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.

Appellant's request for reconsideration advised that he was treated in a medical clinic by a nurse practitioner for his neck injury and was diagnosed with whiplash. He noted that he was also treated by Dr. Yarboro who recommended an MRI scan. However, appellant's letter did not show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant, submitted treatment notes signed by a "Dr. Miller," which noted that appellant was treated for neck pain and denied symptoms of numbness or tingling in the extremities. On February 27 and April 29, 2004 Dr. Miller advised that appellant was experiencing neck pain at night and an inability to sleep due to tightness of his neck and was prescribed Flexeril. However, even assuming that Dr. Miller is a physician under the Act,¹³ these reports are not relevant because they do not address the relevant issue of whether the February 23, 2004 incident caused or aggravated a medical condition. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office."¹⁴ Therefore, appellant did not submit relevant evidence not previously considered by the Office.

The Board finds that the Office properly determined that appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied his July 3, 2004 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a neck strain causally related to his February 23, 2004 employment incident and that the Office properly denied appellant's request for reconsideration without conducting a merit review.

¹³ See *supra* note 7.

¹⁴ 20 C.F.R. § 10.606(b).

ORDER

IT IS HEREBY ORDERED THAT the July 29 and May 20, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 28, 2005
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member