United States Department of Labor
Employees' Compensation Appeals Board

CHARLES J. BARRY, Appellant	)	
and	)	**Docket No. 05-312**
	)	**Issued: May 3, 2005**
DEPARTMENT OF THE AIR FORCE, OFFUTT AIR FORCE BASE, Omaha, NE, Employer	)	

Appearances:
Charles J. Barry, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 16, 2004 appellant filed a timely appeal from a nonmerit Office of Workers' Compensation Programs' decision dated August 17, 2004, which denied his request for reconsideration. Appellant also timely appealed the Office's November 21, 2003 merit decision denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues on appeal are: (1) whether appellant met his burden of proof in establishing that he sustained a traumatic injury in the performance of duty on August 14, 2002; and (2) whether the Office properly denied appellant's request for a merit review under 5 U.S.C. § 8128.

FACTUAL HISTORY

On July 2, 2003 appellant, then a 55-year-old construction inspector, filed a traumatic injury claim (Form CA-1) alleging that on August 14, 2002 he slipped and fell on poly vinyl sheeting and twisted his back muscle in the performance of duty. Appellant did not stop work.[1]

By letter dated July 28, 2003, the Office advised appellant that additional factual and medical evidence was needed. Appellant was requested to describe in detail how the injury occurred and to provide dates of examination and treatment, a history of injury given by him to a physician, a detailed description of any findings, symptoms or test results, a diagnosis and course of treatment followed and a physician's opinion supported by a medical explanation as to how the reported work incident caused the claimed injury.

In response, appellant submitted an August 12, 2003 statement describing his injury, which he alleged occurred while conducting an inspection. Appellant described the immediate effects of his injury, which included severe pain in the lower back, right hip and right leg areas. He also alleged that he reported the injury as soon as it happened to the employing establishment and subsequently went home and treated himself to a hot shower, medication and a heating pad. Appellant also alleged that he went to his own personal physician on August 15, 2002 as he had a previously scheduled appointment. He also noted that he did not have "any similar disabilities or symptoms before this injury."

In an August 15, 2003 report, Dr. Roy Holeyfield, Board-certified in internal medicine, indicated that appellant was working when he slipped and landed on his backside, injuring the right lower back. He advised that appellant related that the pain was immediate with severe pains radiating across from the right perispinous area just above the sacrum all the way across the top of the sacrum and down the right leg. Dr. Holeyfield noted appellant's history of treatment, including that appellant indicated that he continued to have chronic pain, despite therapeutic nerve blocks. He also determined that appellant had leg pains in the past and was being treated for fibromyalgia by his primary family practitioner although he had not had any serious low back pain. He related that appellant explained that, despite lumbar disc problems prior to the accident of August 14, 2002, he never had the low back pain and radiculopathy, or difficulty walking but following that incident, he frequently has difficulty walking more than 40 or 50 feet without having significant pain. Dr. Holeyfield diagnosed low back pain and radiculopathy secondary to lumbar disc disease and opined that since the patient did not have low back pain and radiculopathy prior to the fall on August 14, 2002 that the current symptoms that he is experiencing were caused by the incident of August 14, 2002.

By decision dated September 3, 2003, the Office denied appellant's claim on the grounds that he did not establish an injury as alleged. The Office found that the evidence was sufficient to show that the claimed event occurred as alleged. However, the Office found that there was no medical evidence supporting that the accepted employment incident caused a diagnosed condition.

[1] He retired on disability in July 2003.

By letter dated September 22, 2003, appellant requested reconsideration.

In support of his claim, he included a package of material, which was comprised of treatment notes dating from March 1 to November 26, 2002 from Dr. James T. Biskup, a Board-certified family practitioner. In his March 1, 2002 treatment note, Dr. Biskup indicated that appellant had a history of fibromyalgia, chronic pain syndrome, persistent low back pain, bilateral knee pain and erectile dysfunction. The treatment notes subsequent to August 14, 2002 contained a discussion on August 15, 2002 of appellant being depressed and diagnoses of trochanteric bursitis, chronic and acute pain, persistent low back pain and stiffness, fibromyalgia, as well as concerns with depression. None of the treatment notes discussed a fall at work. In a January 6, 2003 report, Dr. Biskup advised that appellant was receiving treatment for chronic pain syndrome associated with severe fibromyalgia as well as osteoarthritis. He also indicated that appellant had degenerative disc disease with three compressed discs in the lower back resulting in chronic low back pain and stiffness. Dr. Biskup noted that appellant also had some elements of depression, irritability and agitation which required medication.

A July 30, 2003 magnetic resonance image (MRI) scan read by Dr. Michael T. Morrison, a Board-certified orthopedic surgeon, revealed mild spinal stenosis at L3-4, which he advised was new when compared to a December 2000 examination. He explained that this was predominantly due to ligamentum flavum or facet hypertrophy. Dr. Morrison also noted a mild- to moderate-sized central disc protrusion with a tear in the annulus fibrosis at L5-S1 and advised this was unchanged since the previous examination.

By decision dated November 21, 2003, the Office modified its September 3, 2003 decision in part. The Office found that the medical evidence provided a diagnosed condition; however, the Office denied the claim as the medical evidence was insufficient to establish a cause and effect relationship. The Office noted that the medical history reflected that appellant had persistent low back pain and stiffness in March 2002, as well as several preexisting conditions prior to the work injury and diagnostic evidence of a central disc protrusion at L5-S1 in 2000.

Appellant requested reconsideration on July 22, 2004.

In support of his claim he submitted a witness statement from Hayes Gozia, a coworker, who confirmed that appellant slipped and fell on August 14, 2002 while working for the employing establishment.

By decision dated August 17, 2004, the Office denied a merit review of appellant's claim. The Office found, upon limited review, that the evidence submitted was irrelevant and insufficient to warrant a merit review of the prior decisions.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 timely filed within the applicable time limitation period of the Act[3] and that an injury was sustained in the performance of duty.[4] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

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. 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.[6] 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.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant was a federal employee, that he timely filed his claim for compensation benefits and that the workplace incident occurred as alleged. However, the medical evidence is insufficient to establish the second component of fact of injury, that the employment incident caused an injury.[8] The medical reports of record do not establish that the slip and fall at work caused a personal injury on August 14, 2002. The medical evidence contains no firm diagnosis, no rationale[9] and no explanation of the mechanism of injury regarding a specific employment incident on August 14, 2002. Appellant provided reports from Drs. Biskup and Holeyfield. However, neither doctor provided a specific opinion addressing whether any diagnosed condition was caused or aggravated by the slip and fall at work on August 14, 2002.

---

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *James E. Chadden Sr.*, 40 ECAB 312 (1988).

[5] *Delores C. Ellyet*, 41 ECAB 992 (1990).

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

[7] *Id.*

[8] The Office's November 21, 2003 decision states at one point that fact of injury is established. However, a full reading of the decision indicates that fact of injury has not been established as the decision clearly indicates that the Office found that the medical evidence was insufficient to establish that the accepted incident caused an injury. Consequently, the Office's erroneous characterization is harmless error.

[9] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

Dr. Biskup provided treatment notes beginning on March 1, 2002 five months prior to the fall at work and continued to treat appellant for several nonwork-related ailments including fibromyalgia, chronic pain syndrome, persistent low back pain and bilateral knee pain. In his March 1, 2002 treatment note, Dr. Biskup indicated that appellant had a history of fibromyalgia, chronic pain syndrome, persistent low back pain, bilateral knee pain and erectile dysfunction. However, the treatment notes prior to August 14, 2002 predated the incident at work and thus are of little probative value.[10] The reports subsequent to the August 14, 2002 incident at work, which included a treatment note on August 15, 2002 contained no discussion of a fall at work or indication of a fall at work. Thus, these reports are of no value with regard to medical point at issue: whether the August 14, 2002 incident caused or aggravated a particular medical condition.

In an August 15, 2003 report, Dr. Holeyfield described the incident at work reported by appellant. He also noted appellant's prior history of treatment, which included treatment for chronic pain and fibromyalgia, but none for any serious low back pain. He diagnosed low back pain and radiculopathy secondary to lumbar disc disease and opined that since the appellant did not have low back pain and radiculopathy prior to the fall on August 14, 2002 that the current symptoms that he is experiencing were caused by the incident of August 14, 2002. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.[11] Dr. Holeyfield provided no other reasoning for his opinion supporting causal relationship. For example, he did not explain why appellant's symptoms would not be solely attributable to his preexisting history of back problems. Consequently, Dr. Holeyfield's report is insufficient to establish appellant's claim.

Appellant also submitted a July 30, 2003 MRI scan read by Dr. Morrison, which revealed mild spinal stenosis at L3-4, which he advised was new when compared to a December 2000 examination. However, he did not address the crucial issue of the causal relationship between appellant's back condition and his federal employment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case under section 8128(a) of the Act,[12] section 10.608(a) of the implementing regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[13] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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

---

[10] *See Brady L. Fowler*, 44 ECAB 343, 353 (1992).

[11] *John F. Glynn*, 53 ECAB 562 (2002).

[12] 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.608(a).

Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[14] Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[15]

When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[16]

ANALYSIS -- ISSUE 2

With his July 22, 2004 request for reconsideration appellant submitted a statement from a coworker, Mr. Gozia, confirming that he fell at work on August 14, 2002. However, the Office accepted that the evidence was sufficient to show that the claimed event occurred as alleged. The issue in the present case is whether the accepted employment incident on August 14, 2002 caused a diagnosed condition, which is a medical question. Therefore, the statement from Mr. Gozia, while new, is not relevant to the issue in the present case. Appellant did not present any medical evidence.

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, he was not entitled to a merit review.[17]

As 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), the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty. The Board further finds that the Office properly denied appellant's request to have his case reopened for merit review.

---

[14] 20 C.F.R. § 10.608(b)(1) and (2).

[15] 20 C.F.R. § 10.608(b).

[16] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[17] *See James E. Norris*, 52 ECAB 93 (2000).

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2004 and November 21, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 3, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member