United States Department of Labor
Employees' Compensation Appeals Board

JUDY HERRINGTON, Appellant	)	
and	)	**Docket No. 06-15**
	)	**Issued: February 15, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Clovis, NM, Employer	)	

Appearances:
Judy Herrington, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 28, 2005 appellant filed a timely appeal from merit decisions dated March 14 and May 5, 2005 of the Office of Workers' Compensation Programs denying her claim that she sustained a work-related injury on November 1, 2004, and an August 31, 2005 decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit decision and the nonmerit decision in this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury causally related to her employment; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits.

FACTUAL HISTORY

On November 17, 2004 appellant, then a 51-year-old rural carrier, filed a claim for a traumatic injury, alleging that on November 1, 2004 she sustained low back pain and stiffness from regular lifting and bending. Appellant returned to regular duty on November 2, 2004.

In a report dated November 15, 2004, Dr. C.M. McDowell, an emergency room physician, placed appellant off work until examined by her treating physician. On November 18, 2004 a thoracic spine magnetic resonance imaging (MRI) scan revealed a probable T9 hemangioma, an abnormality at T7 and some activity at T6. A November 18, 2004 lumbar spine MRI scan revealed a left lateral disc protrusion at L1-2, a normal L2-3 disc with an intact annulus, a possible desiccation at L3-4 with mild broad-based bulge of the annulus, an annular rent at L4-5, and a narrowed L5-S1 disc but no stenosis.

In treatment notes dated November 20, 2004 and January 13, 2005, Dr. Jon Shrader, a treating osteopath, stated that appellant had hematuria and low back pain. In a report dated November 29, 2004, Dr. Michael A. Rowley, a Board-certified radiologist, provided a history of herniated disc due to "lifting injury" and noted that whole body scan was normal. On December 2, 2004 Dr. Shrader stated that appellant had joint and hip pain. On December 7, 2004 two left hip x-rays were read as normal. On December 9 and 23, 2004 Dr. Shrader stated that appellant had low back pain.

By letter dated February 4, 2005, the Office advised appellant that the medical and diagnostic reports failed to support her claim that she experienced the work-related incident as alleged or that a medical condition was caused by the incident. The Office advised appellant regarding the evidence needed to support her claim, including a report from her physician explaining why the diagnosed condition was caused or aggravated by the work-related incident.

In a duty status report dated February 14, 2005, Dr. Shrader checked a box "yes" noting that appellant's history of a work-related injury was consistent with his diagnosis of herniated nucleus pulposus. He placed appellant on total disability until evaluated by a pain management specialist. On February 23, 2005 appellant filed a claim for lost wages from February 5 to March 11, 2005.

By decision dated March 14, 2005, the Office denied appellant's claim finding that she failed to establish fact of injury. The Office found that the medical evidence did not provide an opinion as to the cause of appellant's condition.

On April 13, 2005 appellant requested reconsideration, who stated that she pulled a muscle when she was moving a tray of mail weighing about 25 to 30 pounds from the back to the front of her vehicle. She finished her route but the pain continued. Appellant took sick leave the next day, and sought treatment from a chiropractor, who took x-rays and treated her condition. She returned to work but had no relief from pain. On November 15, 2004 she felt pain when she began casing mail but finished her route at which time the pain was unbearable. She reported her condition to her supervisor and sought medical treatment at a clinic where she was referred to Dr. Shrader. Appellant noted that she had experienced intermittent back pain for several years with no need for treatment. On January 21, 2003 she pulled a muscle in her back and was off work for several days. Appellant further noted that Dr. Johnny A. Qubty, a pain management specialist, referred her to Dr. Shrader who provided five injections and prescribed five weeks of physical therapy.

With her request for reconsideration, appellant submitted a January 13, 2005 report written on a prescription pad from Dr. Shrader who noted treating appellant for back pain. He

provided a date of injury of November 1, 2004.[1] He submitted a similar report on April 13, 2005. In an attending physician's report dated March 21, 2005, Dr. Shrader stated that appellant sustained low back pain after lifting and standing. He also noted by checking a box "yes" that appellant's low back pain and herniated nucleus pulposus were causally related to employment. In a treatment note dated March 21, 2005, Dr. Shrader stated that appellant had low back pain. In a report dated March 21, 2005, Dr. Qubty stated that he treated appellant on March 9, 2005 for lumbalgia (sic) with L3-S1 bulging, an L4-5 tear and pain at L5 and that he administered a lumbar epidural steroid injection on March 10, 2005 that provided pain relief.

In a decision dated May 5, 2005, the Office denied modification of the March 14, 2005 decision. The Office noted that Dr. Shrader diagnosed a herniated disc pulposus but did not establish a causal relationship between the condition and her employment. The Office further noted that Dr. Qubty's report did not explain how the diagnosed condition was caused by employment.

On July 7, 2005 appellant requested reconsideration. In a report dated July 7, 2005, Dr. Shrader stated that an MRI scan revealed a protrusion at L2-3 causing pain which began at work. On June 22, 2005 Dr. Matt Willis, a neurologist, stated that he treated appellant that day for left leg and buttocks pain sustained on November 24, 2004 when she lifted a mailbag at work. On that same date, a physician's assistant noted findings on a physical examination.

By decision dated August 31, 2005, the Office denied appellant's request for reconsideration without conducting further merit review.

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, 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.[3] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

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. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at

[1] Dr. Shrader noted November 1, 2005 but appears to have intended November 1, 2004.

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345, 352 (1989); *Delores C. Ellyett*, 41 ECAB 992 (1990).

the time, place and in the manner alleged.[5] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[6]

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between the disability or the medical condition and employment.[7] To establish causal relationship, appellant must submit a physician's report that reviews and considers employment factors identified by appellant as causing the disability or medical condition as well as findings upon examination of appellant and medical history, state whether the employment injury caused or aggravated appellant's diagnosed condition or conditions and present medical rationale in support of his or her opinion.[8]

ANALYSIS -- ISSUE 1

The record reflects that appellant was engaged in lifting and bending on November 1, 2004. There is no dispute that she engaged in lifting and bending as part of her work. However, the Board finds that she failed to establish that an injury occurred as a result of these work activities. The medical evidence does not establish that the November 1, 2004 incident caused an injury.

Dr. Shrader submitted various reports. However, these reports are of diminished probative value because he did not address the cause of appellant's condition or provide any medical rationale,[9] to explain how the specific employment factors on November 1, 2004 caused or aggravated appellant's diagnosed conditions. In his February 14 and April 13, 2005 duty status reports, Dr. Shrader indicated by checking a box "yes" that appellant's herniated disc pulposus was causally related to the work-related incident. In a March 21, 2005 attending physician's report, Dr. Shrader also checked a box "yes" that appellant's low back pain and herniated disc pulposus were causally related to the November 1, 2004 incident. However, when a physician's opinion supporting causal relationship consists only of checking "yes" to a form question, it is of diminished probative value and is insufficient to establish causal relationship.[10] In these reports, Dr. Shrader did not provide medical reasoning to explain his opinion in support of causal relationship.

Dr. Rowley's November 29, 2004 report noted a "lifting injury" but, to the extent that this may be construed as support for an injury at work, the physician included no rationalized medical opinion explaining how lifting or bending at work caused or aggravated the diagnosed condition. Dr. Qubty's March 21, 2005 report contains no medical opinion establishing a causal

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

[6] *Id*.

[7] *Donald W. Long*, 41 ECAB 142 (1989).

[8] *Id*.

[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).

[10] *Gary J. Watling*, 52 ECAB 278 (2000).

relationship between the treated conditions and her employment. Other medical reports of record also do not specifically address whether appellant's employment on November 1, 2004 caused or aggravated a specific medical condition.

As appellant presented no medical evidence to establish that an injury occurred as a result of her work-related incident, the Office properly denied her claim.

LEGAL PRECEDENT -- ISSUE 2

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 --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[11]

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 submitting relevant and pertinent new evidence not previously considered by the Office. 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. 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.[12]

ANALYSIS -- ISSUE 2

With the July 22, 2005 reconsideration request, appellant did not show that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. The underlying issue is medical in nature. Appellant must submit relevant new medical evidence under this standard to require the Office to reopen the claim for a merit review. She submitted a July 7, 2005 report from Dr. Shrader regarding her L2-3 protrusion which caused pain, but this does not constitute new and relevant evidence. Appellant had previously submitted multiple reports from Dr. Shrader addressing her low back pain and Dr. Shrader's July 7, 2005 report also addressed causal relationship in a manner that is repetitive of previously submitted reports. He gave conclusory support for causal relationship, since the July 7, 2005 report supports causal relationship without any explanation.[13] Dr. Willis'

[11] 5 U.S.C. § 8128(a).

[12] *Eugene F. Butler*, 36 ECAB 393 (1984).

[13] Submitting evidence that is repetitious or duplicative of evidence already in the case record does not constitute a basis for reopening the claim. *Brent A. Barnes*, 56 ECAB ___ (Docket No. 04-2025, issued February 15, 2005).

June 22, 2005 report is not relevant as it appears to be relating a history as reported by appellant. To the extent that it might be construed as supporting causal relationship between a medical condition and appellant's employment, it does not relate any injury to the November 1, 2004 incident claimed by appellant. Instead, it relates appellant's complaints to an incident occurring on November 24, 2004. The physician's assistant report dated June 22, 2005 is not competent medical evidence as a physician's assistant is not a physician as defined by the Act.[14]

The Board finds that the July 22, 2005 reconsideration request did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or provide relevant and pertinent new evidence not previously considered by the Office. The Board accordingly finds that the Office properly denied the reconsideration request without merit review of the claim.

CONCLUSION

The Board finds that appellant did not meet her burden of establishing that she sustained an injury causally related to her employment. Further, the Board finds that the Office properly denied appellant's request for merit review.

ORDER

IT IS HEREBY ORDERED THAT the August 31, May 5 and March 14, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 15, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[14] 5 U.S.C. § 8101(2); *Ricky S. Storms*, 52 ECAB 349, 353 (2001).