United States Department of Labor
Employees' Compensation Appeals Board

RAY McKINNEY, Appellant	)	
and	)	**Docket No. 06-765**
	)	**Issued: June 22, 2006**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Arlington, VA, Employer	)	

Appearances:
Ray McKinney, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 13, 2006 appellant filed a timely appeal from an August 16, 2005 merit decision of the Office of Workers' Compensation Programs which denied his claim, and a November 23, 2005 decision which denied his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c), 501.3, the Board has jurisdiction over both decisions.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an employment-related injury on February 17, 2005; and (2) whether the Office properly refused his request for a hearing. On appeal appellant contends that medical reports from a nurse practitioner should be considered competent medical evidence.

FACTUAL HISTORY

On March 14, 2005 appellant, then a 52-year-old administrator of coal mine safety, submitted a traumatic injury claim alleging that on February 17, 2005 he injured his left shoulder and neck carrying luggage while in travel status at the Mining Academy in Beckley, West

Virginia. He stated that this caused pain and numbness in his left arm. Appellant did not stop work.

By letter dated June 21, 2005, the Office informed appellant of the evidence needed to support his claim. This was to include a detailed narrative medical report from his physician with a history of injury, a diagnosis, treatment received, and an opinion regarding prognosis and period of disability. The physician's report was to provide an explanation regarding the cause of the condition. The Office noted that this evidence was crucial in consideration of the claim.

Appellant submitted a form report dated March 28, 2005 in which Pam. S. Sheffield, a nurse practitioner, noted a chief complaint of left neck pain that occurred when appellant lifted a laptop computer on February 17, 2005 with pain and tingling in the shoulder and arm. She noted limited range of motion of the left shoulder and diagnosed neck and left shoulder pain. X-ray and nerve conduction studies were recommended. In a March 29, 2005 report, Dr. Gregory Tiu, a Board-certified radiologist, noted that a left shoulder x-ray demonstrated no bony abnormality. A complete cervical spine series demonstrated degenerative disc disease at C6-7 accompanied by moderate encroachment on the left, secondary to bony spurs, and a moderate-sized osteophytosis at C2-3. In an undated statement, appellant described the injury as a sharp pain in his neck and shoulder which occurred when he was lifting a laptop carrying case. He did not immediately seek medical care because he had a very demanding work schedule but, as the condition worsened, he saw Ms. Sheffield on March 28, 2005.

By decision dated August 16, 2005, the Office found that the February 17, 2005 lifting incident occurred as described but denied the claim on the grounds that there was insufficient medical evidence to establish that appellant sustained an injury due to this incident.[1] The Office noted that he did not submit a medical report from a physician that addressed the causal relationship between the accepted incident and his medical condition. On October 21, 2005 appellant requested a hearing and submitted an August 23, 2005 report from Ms. Sheffield.[2] In a November 23, 2005 decision, the Office denied his request for a hearing.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the 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 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 is 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.[3]

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[1] 5 U.S.C. §§ 8101-8193.

[2] In his request, appellant alleged that he had requested a hearing on September 8, 2005. This is not found in the record before the Board.

[3] *Gary J. Watling*, 52 ECAB 278 (2001).

Office regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[4] To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[5]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[6] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.[7] Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[8]

ANALYSIS -- ISSUE 1

The Office found, and the Board agrees, that the February 17, 2005 incident occurred as alleged. Appellant, however, failed to meet his burden of proof to establish that he sustained an injury caused by this incident as he did not submit medical evidence in support of this claim. The evidence of record merely consists of a form report dated March 28, 2005 signed by Ms. Sheffield, a nurse practitioner, and x-ray reports from Dr. Gregory Tiu dated March 29, 2005.[9]

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[4] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB ___ (Docket No. 03-1157, issued May 7, 2004).

[5] *Gary J. Watling, supra* note 3.

[6] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[7] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[8] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[9] The Board cannot consider the August 23, 2005 report as its review of the evidence is limited to that which was before the Office at the time of its decision on the merits of appellant's claim. 20 C.F.R. § 501.2(c); *see Deborah L. Beatty*, 54 ECAB 340 (2003). Appellant, however, retains the right to submit this evidence, and any other medical evidence, to the Office with a valid request for reconsideration. *See* 20 C.F.R. §§ 10.605-10.610; *James A. Castagno*, 53 ECAB 782 (2002).

While appellant contends on appeal that a nurse practitioner's opinion should be considered competent medical evidence, section 8101(2) of the Act defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.[10] Thus, lay individuals such as physician's assistants and nurse practitioners are not considered physicians under the Act,[11] and their reports are not considered competent medical evidence.[12] The terms of the Act are specific as to the method and amount of payment of compensation, and neither the Office nor the Board has the authority to enlarge the terms of the Act or to make an award of benefits under any terms other than those specified in the statute.[13] The March 28, 2005 report of Ms. Sheffield, therefore, cannot be considered competent medical evidence as she is not a physician as defined by the Act.[14] Dr. Tiu, a radiologist, merely provided diagnostic x-ray results. He did not provide any opinion regarding the cause of the noted cervical degenerative disease. Appellant failed to submit any rationalized medical evidence supporting that he sustained an injury on February 17, 2005. He failed to meet his burden of proof and the Office properly denied his claim on August 16, 2005.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[15] The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[16] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[17]

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[10] 5 U.S.C. § 8101(2); *see George H. Clark*, 56 ECAB ___ (Docket No. 04-1572, issued November 30, 2004); *Sheila A. Johnson*, 46 ECAB 323 (1994).

[11] *See Janet L. Terry*, 53 ECAB 570 (2002).

[12] *Id.; see Sean O'Connell*, 56 ECAB ___ (Docket No. 04-1746, issued December 20, 2004).

[13] *Alvin Collins*, 54 ECAB 752 (2003); *see generally Barbara L. Riggs*, 50 ECAB 133 (1998).

[14] *Supra* note 10.

[15] *Claudio Vazquez*, 52 ECAB 496 (2001).

[16] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[17] *Claudio Vazquez, supra* note 15.

ANALYSIS -- ISSUE 2

The Office denied appellant's request for a hearing on the grounds that it was untimely filed. In a November 23, 2005 decision, the Office found that appellant was not, as a matter of right, entitled to a record review as his request, dated October 21, 2005, had not been made within 30 days of the August 16, 2005 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue in the instant case could be addressed through a reconsideration application. As appellant's request was dated October 21, 2005, more than 30 days after the date of the August 16, 2005 decision, the Office properly determined that he was not entitled to a review of the written record as a matter of right as his request was untimely filed.

The Office also has the discretionary power to grant a request for a written record review when a claimant is not entitled to such a matter of right. In the November 23, 2005 decision, the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[18] In the present case, the Office did not abuse its discretion by denying appellant's request for a review of the written record.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an employment-related injury on February 17, 2005 and that the Office did not abuse its discretion in denying his request for a hearing.

[18] *Id.; see also Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 23 and August 16, 2005 be affirmed.

Issued: June 22, 2006
Washington, DC

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

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