United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 06-834**
	)	**Issued: September 11, 2006**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Washington, DC, Employer	)	

Appearances:
Bernard Englander, Esq., for the appellant
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 February 28, 2006 appellant, through her attorney, filed a timely appeal from a March 1, 2005 merit decision of the Office of Workers' Compensation Programs' in which a hearing representative affirmed the denial of her claim for a traumatic injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she sustained an injury on April 7, 2004 in the performance of duty; and (2) whether the Office properly denied appellant's request for subpoenas.

FACTUAL HISTORY

On April 20, 2004 appellant, then a 57-year-old nursing assistant, filed a claim for a traumatic injury occurring on April 7, 2004 when a patient twisted her injured hand. She stopped work on that date and returned to work on April 13, 2004. Appellant's supervisor indicated on

the claim form that she believed the injury was preexisting and that appellant was a "temporary employee who knew she was being terminated."

By letter dated April 27, 2004, the Office requested additional factual and medical information from appellant regarding her claim. However, she did not respond within the allotted 30 days. In a decision dated June 3, 2004, the Office denied her claim on the grounds that she did not establish that she sustained an injury as alleged. The Office found that appellant had established the occurrence of the described employment incident but submitted no medical evidence in support of her claim.

On July 1, 2004 appellant, through her attorney, requested an oral hearing. She submitted a medical report dated September 27, 2004 from Dr. Sameer B. Shammas, a Board-certified orthopedic surgeon. He diagnosed "a stress injury to the MCP [metacarpophalangeal] joint of her left thumb rupturing the ulnar collateral ligament with the mechanism of injury as she described twisting the joint, hyperextending it and rupturing the ligament." He noted that appellant was moving a patient at the employing establishment at the time of her injury, that she was "now 10 months post injury" and that she required surgery.

In a report dated September 29, 2004, Dr. Melinda M. Gardner, a Board-certified orthopedic surgeon, evaluated appellant for an injury to the MCP joint of her left hand, which occurred in December 2003 when a "patient fell on her hand." She diagnosed an ulnar collateral ligament strain of the left thumb with some elements of reflex sympathetic dystrophy (RSD). Dr. Gardner recommended repair of the collateral ligament.

In a letter to appellant's counsel dated October 18, 2004, Dr. Gardner diagnosed an unstable MCP joint of the left thumb and symptoms of RSD. She recommended an ulnar collateral ligament nerve repair.

By letter dated November 28, 2004, appellant's representative requested that the hearing representative issue subpoenas for a patient, supervisor and physician at the employing establishment.

In a form report dated April 8, 2004, received by the Office on December 6, 2004, Dr. Shammas noted the history of injury as a severe hyperextensive injury to the MCP joint of the thumb and checked "yes" that the condition was caused or aggravated by the employment activity. He found that she was disabled from April 8 to 12, 2004 and could return to her usual employment on April 13, 2004. In a form report dated April 11, 2004, Dr. Bahram Redjaee, a Board-certified internist, diagnosed a ligament injury to the left thumb sustained at work and checked "yes" that the condition was caused or aggravated by the described employment activity.[1] Both physicians indicated on the forms that the date of injury was December 3, 2003.[2]

[1] The physician's report is nearly illegible.

[2] Appellant additionally submitted evidence predating the April 7, 2004 employment incident relevant to a prior left thumb injury.

At the hearing, held on December 6, 2004, the hearing representative noted that appellant had filed a claim for a December 3, 2003 injury to her thumb, assigned file number 252040255. Appellant described the December 3, 2003 injury as occurring when a patient rolled back on her extended thumb. She continued to work but the thumb remained painful and swollen. Appellant began working with restrictions. On April 7, 2004 a patient twisted her injured thumb while she was attempting to draw blood from his finger. Appellant indicated that her temporary appointment with the employing establishment had ended. The hearing representative noted that the majority of the medical evidence submitted related to her December 3, 2003 traumatic injury claim. She held the record open for 30 days for the submission of additional evidence. Appellant submitted no further evidence; however, by letter dated January 21, 2005, her counsel requested a copy of the record for file number 252040255.

In a decision dated March 1, 2005, the hearing representative affirmed the Office's June 3, 2004 decision. She noted that none of the medical evidence provided a history of the April 2004 employment incident and further denied the request for subpoenas as untimely under 20 C.F.R. § 10.619.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[3] 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; that an injury was sustained while 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

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.[6] 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.[7] An employee may establish that the employment

[3] 5 U.S.C. §§ 8101-8193.

[4] *Caroline Thomas*, 51 ECAB 451 (2000); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[6] *Delphyne L. Glover*, 51 ECAB 146 (1999).

[7] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[8]

In order to satisfy his burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the employment incident caused the alleged injury.[9] 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 employee's alleged injury and the employment incident.[10] The physician's opinion must be based on a complete factual and medical history of the employee, must be of reasonable certainty and must rationally explain the relationship between the diagnosed injury and the employment incident as alleged by the employee.[11]

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained an injury to her left hand on April 7, 2004 when a patient twisted her already injured finger. She stopped work on April 7, returned to work on April 13, 2004 and worked until her temporary appointment ended in late April 2004. Appellant has established that the April 7, 2004 incident occurred at the time, place and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that she sustained an injury as a result of this incident.

The Board finds that appellant has not established that the April 7, 2004 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[12] Appellant submitted a form report from Dr. Shammas dated April 8, 2004. He diagnosed a hyperextensive injury to the MCP joint of the thumb and checked "yes" that the condition was caused or aggravated by employment. Dr. Shammas opined that she was disabled beginning April 8, 2004 and could resume regular employment on April 13, 2004. On the claim form, he listed the date of injury as December 3, 2003. In a form report dated April 11, 2004, Dr. Redjaee diagnosed a ligament injury to the left thumb sustained at work and checked "yes" that the condition was caused or aggravated by the described employment activity. He also noted the date of injury as December 3, 2003. The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.[13] As Dr. Shammas and Dr. Redjaee listed the date of injury as December 3, 2003, their form reports fail to support appellant's contention that she sustained an injury to her left thumb on April 7, 2004.

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[8] *Id.*

[9] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[10] *Gary J. Watling*, *supra* note 7.

[11] *See John W. Montoya*, 54 ECAB 306 (2003); *Shirley R. Haywood*, 48 ECAB 404 (1997).

[12] *Lois E. Culver* (*Clair L. Culver*), 53 ECAB 412 (2002).

[13] *Deborah L. Beatty*, 54 ECAB 340 (2003).

In a report dated September 27, 2004, Dr. Shammas diagnosed a ruptured ulnar collateral ligament of the left thumb caused by moving a patient at the employing establishment 10 months prior. Dr. Shammas did not address whether appellant sustained a thumb injury approximately 5 months earlier in April 2004 but instead referenced an injury which occurred about 10 months prior. His opinion, consequently, is insufficient to meet appellant's burden of proof as it is based on an incomplete history of injury.[14]

In a September 29, 2004 report, Dr. Gardner diagnosed an ulnar collateral ligament strain of the left thumb due to a December 2003 injury, which occurred when a patient fell on appellant's thumb. As Dr. Gardner failed to address the issue of whether appellant sustained an injury to her left thumb on April 7, 2004, her report is of little probative value. In order to establish her claim, appellant must submit medical evidence based on a complete and accurate factual and medical history which provides an opinion on whether the employment incident described caused or contributed to her diagnosed medical condition and supports that opinion with medical reasoning to demonstrate that the conclusion reached is sound, logical and rationale.[15]

In a letter dated October 18, 2004, Dr. Gardner diagnosed an unstable MCP joint of the left thumb with symptoms of RSD. She recommended an ulnar collateral ligament nerve repair. The Board has held, however, that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[16] As Dr. Gardner did not address the cause of the diagnosed condition, her report is of little probative value.[17]

On appeal, appellant's attorney contends that the Office erred in failing to send him the record for file number 252040255 as requested. The Board's jurisdiction, however, is limited to reviewing final decisions of the Office.[18]

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[19] The implementing regulation provides that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained

[14] *John W. Montoya, supra* note 11.

[15] *Id*.

[16] *Conrad Hightower*, 54 ECAB 796 (2003).

[17] *Id*.

[18] 20 C.F.R. § 501.2(c); *Karen L. Yaeger*, 54 ECAB 323 (2003).

[19] 5 U.S.C. § 8126(1).

by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[20] In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[21] Section 10.619(a)(1) of the implement regulation provides that a claimant may request a subpoena only as a part of the hearing process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[22] The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[23] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.[24]

ANALYSIS -- ISSUE 2

In this case, appellant's counsel requested an oral hearing on July 1, 2004. As discussed, section 10.619(a)(1) provides that a subpoena request must be submitted in writing to the hearing representative no later than 60 days following the request for a hearing.[25] In a letter dated November 28, 2004, appellant's attorney requested that the hearing representative issue subpoenas for a patient, a supervisor and a physician. The hearing representative properly found that the request for subpoenas was untimely as it was not made within 60 days of the hearing request dated July 1, 2004. Thus, the Board finds that the hearing representative properly denied the request for subpoenas.

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on April 7, 2004 in the performance of duty. The Board further finds that the Office properly denied appellant's request for subpoenas.

[20] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[21] *Id*.

[22] 20 C.F.R. § 10.619(a)(1).

[23] *See Gregorio E. Conde*, *supra* note 20.

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

[25] *Supra* note 22.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 1, 2005 is affirmed.

Issued: September 11, 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