United States Department of Labor
Employees' Compensation Appeals Board

K.T., Appellant	)	
and	)	**Docket No. 07-247**
	)	**Issued: April 5, 2007**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 6, 2006 appellant filed a timely appeal of a March 15, 2006 decision of the Office of Workers' Compensation Programs denying reconsideration and a November 15, 2005 merit decision. 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 an injury in the performance of duty on January 12, 2005; and (2) whether the Office properly refused to reopen the claim for merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 14, 2005 appellant, then a 42-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury to his right ankle in the performance of duty on January 12, 2005. He stated on the claim form that he was hit with a forklift on his right ankle. Appellant stopped working on January 15, 2005. The claim form contains a statement

from a supervisor, Lefay Woody, that the forklift operator stated that he did not hit appellant on the foot or the right side. According to the supervisor, the forklift operator indicated that the forklift had brushed appellant on his left side.

In an undated statement received by the Office on February 8, 2005, Ms. Woody stated that appellant claimed the forklift operator made a sharp right turn and hit him in the right ankle. According to the forklift operator, Mr. Smith, the forklift was not moving and appellant had backed into the forklift on the left side of his body. Ms. Woody stated that the supervisor at that time, Ms. Cherry, reported that appellant claimed it was the front bars of the forklift that struck him. In addition, Ms. Cherry reported that appellant continued to work his shift, refused medical attention and refused to show the supervisor his injury. Ms. Woody stated that appellant informed Ms. Cherry that his foot was fine because he was wearing high top boots. She also indicated that appellant told her on January 14, 2005 that he was taking medications for the right leg prior to the alleged incident. A January 25, 2005 letter from the employing establishment also asserted that Mr. Smith reported that he did not run over appellant's foot and only the left side was brushed by the forklift.

In a note dated January 18, 2005, Dr. Sosale Jayaram indicated that appellant was seen on that date and was incapacitated due to right ankle trauma. A February 18, 2005 note from Dr. Jayaram stated that appellant claimed he received a blow to the right ankle on January 12, 2005. He stated that this aggravated appellant's arthritic right knee and hip and he needed surgery. On March 15, 2005 Dr. Jayaram indicated that appellant was scheduled for knee surgery.

In a letter dated March 16, 2005, an employing establishment compensation specialist stated that Dr. Jayaram reported in a telephone call that he had treated appellant for an ankle problem since November 11, 2004. The compensation specialist report that appellant had a prior claim for a right ankle sprain/strain.

Dr. Jayaram stated in an April 11, 2005 report that appellant was totally disabled since January 18, 2005 due to osteoarthritis of the knees and hips. In a July 6, 2005 report, he reported that appellant had "severely sprained his right knee and ankle while he was at work." Dr. Jayaram stated that the sprain had adversely affected an arthritic right hip and appellant needed hip replacement and possible knee replacement. He concluded that, because knee and hip pains had worsened since the job accident, the treatment should be covered under workers' compensation.

By decision dated November 15, 2005, the Office denied the claim for compensation. The Office found that evidence was insufficient to establish the incident as alleged, nor was the medical evidence sufficient to establish an injury in the performance of duty.

Appellant requested reconsideration by letter dated December 15, 2005. He stated that he was hit by a forklift on the right side of his ankle. Appellant noted that, the driver, Mr. Smith retired a few months after the incident. He indicated that he did have a preexisting osteoarthritis resulting from a prior injury. Appellant submitted a report dated December 13, 2005 from Dr. Jayaram, who stated that appellant sprained his right knee and ankle at work on January 12, 2005.

In a decision dated March 15, 2006, the Office found that the evidence was of a repetitious nature and was not sufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that he or she sustained an injury while in the performance of duty.[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. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[3] In traumatic injury claims, a rationalized medical opinion supporting causal relationship is required.[4]

Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the identified employment factor. The opinion of the physician must be based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[5]

ANALYSIS -- ISSUE 1

The Office did not accept the factual component of fact of injury in this case. The evidence of record does indicate that there was an employment incident on January 12, 2005 involving a forklift. It is not sufficient, however, to establish an incident in the manner alleged by appellant. In this regard appellant did not submit a detailed factual statement of the circumstances surrounding the incident. On the claim form, he stated only that he was hit by a forklift on his right ankle. A supervisor briefly indicated that appellant claimed that the forklift was moving and made a sharp turn and struck him on the right side. Appellant did not provide details regarding the alleged incident: how fast the forklift was moving, where he was standing, etc.

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

[3] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[4] *Id.*

[5] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

Moreover, the employing establishment asserted that the forklift operator reported the forklift was not moving and appellant had backed into it with minimal contact on his left side, not the right side.

In view of the absence of a detailed statement from appellant regarding the incident and contrary evidence regarding the alleged manner of the incident, the Board finds that appellant did not establish an incident on January 12, 2005 as alleged.[6] He, therefore, did not meet his burden of proof to establish an injury in the performance of duty. The Board will not address the medical evidence in detail, other than to note that even if the factual component was met, there must be rationalized medical opinion on causal relationship. None of the medical reports of record prior to the November 15, 2005 decision provide an accurate history and a rationalized medical opinion on causal relationship between a diagnosed condition and the employment incident.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[7] the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(1) shows that [the Office] erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by [the Office]; or (3) constitutes relevant and pertinent evidence not previously considered by [the Office.]"[8] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[9]

ANALYSIS -- ISSUE 2

The denial of the claim was based on the failure to establish an incident on January 12, 2005 as alleged. Appellant's request for reconsideration did not submit and new and relevant evidence on this issue. He again briefly stated that the forklift stuck him on the right ankle, without providing any new and relevant detail regarding the incident. The evidence submitted was a December 13, 2005 medical report from Dr. Jayaram, who did not provide any new and relevant factual information. The Board also notes the report does not constitute new and relevant medical evidence, as it was similar to the July 6, 2005 report.[10]

[6] *See Tracey P. Spillane*, 54 ECAB 608 (2003).

[7] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

[8] 20 C.F.R. § 10.606(b)(2).

[9] *Id*. at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[10] Dr. Jayaram added the date of the incident without additional detail or explanation. A medical issue is not presented until an employment incident as alleged is established.

Appellant 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 submit relevant and pertinent evidence not previously considered by the Office. He did not meet the requirements of section 10.606(b)(2) and, therefore, the Office properly refused to reopen the claim for merit review.

CONCLUSION

Appellant did not meet his burden of proof to establish an injury in the performance of duty on January 12, 2005. On reconsideration, appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2) and, therefore, the Office properly denied merit review pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 15, 2006 and November 15, 2005 are affirmed.

Issued: April 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board