United States Department of Labor
Employees' Compensation Appeals Board

E.P., Appellant **and** **DEPARTMENT OF HOMELAND SECURITY, FEDERAL EMERGENCY MANAGEMENT AGENCY, Berryville, VA, Employer**	)	**Docket No. 07-372** **Issued: April 19, 2007**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 22, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 19, 2005 merit decision, denying her traumatic injury claim and January 24 and October 23, 2006 nonmerit decisions denying her requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether appellant sustained a traumatic injury on September 21, 2005 causally related to factors of her federal employment; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 22, 2005 appellant, a 59-year-old disaster worker, filed a traumatic injury claim (Form CA-1) alleging that on September 21, 2005 she became ill from eating food at a recovery center that was not properly prepared. Because they were required to work 12-hour days, she stated that food was brought in for the staff. Appellant indicated that she became extremely ill about 7:00 p.m.; that her condition worsened during the night; and that she was sent to the hospital by her manager the following day. A total of five staff members allegedly became ill.

In support of her claim, appellant submitted a witness statement dated October 22, 2005 from Deborah Overland, a coworker, who transported appellant to a hospital at the request of her manager. Ms. Overland was informed by the manager that three or four other workers at the recovery center became ill at the same time. She reported that appellant was pale, told her that she had a temperature of 103 degrees and complained of having pain in her bones, chills, vomiting and diarrhea.

Appellant submitted September 22, 2005 emergency room records, bearing illegible signatures, from Breckenridge Hospital. A physician's report reflected a history of "fever, headache" and a diagnosis of shigella sonnei. In response to the form question as to whether the physician believed appellant's condition was caused or aggravated by her employment, the individual completing the form stated: "possible due to the nature of shigella." Other records submitted included a triage report, laboratory results, financial statements and follow-up instructions. A physician's note, signed by "Raudis," reflected that appellant had one episode of diarrhea.

On November 18, 2005 the Office notified appellant that the evidence submitted was insufficient to establish her claim. The Office advised her to provide within 30 days additional documentation, including a physician's report containing a specific diagnosis and an opinion supported by a medical explanation as to how the reported work incident caused or aggravated the claimed injury.

By decision dated December 19, 2005, the Office denied appellant's claim on the grounds that the evidence failed to establish that appellant had sustained an injury in the performance of duty. The Office found that the evidence was insufficient to establish that the claimed events occurred as alleged and failed to provide a diagnosis that could be connected to the claimed condition.

Appellant submitted an undated statement responding to issues raised by the Office. She indicated that she was unable to provide a physician's narrative addressing the cause of her condition and stated that neither the emergency room physician, nor any other physician, could say that her illness was due to any one food or exposure. Appellant noted that, following Hurricane Katrina, she was sent to Austin, Texas, to address the needs of evacuees. Some "good-hearted people" took food into the work site, to feed the personnel who worked 12 hours per day, seven days per week. Contending that it was likely that she came into contact with contaminated foods or a contaminated utensil while at work, "no one could say with certainty."

Appellant alleged that five others who shared food and food services became ill as well, all within hours of each other.

Appellant submitted a December 28, 2005 statement from Dale Thomas, a coworker, who indicated that, three to four hours after his lunch break, he became nauseous, ran a high fever, felt achy and experienced diarrhea and vomiting.[1] His manager informed him that three or four other workers who also became ill, believed their condition was caused by food eaten at the work site. Mr. Thomas expressed his belief that those workers affected "could only have been infected at work."

Appellant submitted physician's notes dated September 26, 2005, bearing an illegible signature, from Breckenridge Hospital. The notes included laboratory findings reflecting shigella sonnei and E-coli. On December 30, 2005 appellant indicated that the immediate effects of her injury were fever, vomiting, diarrhea, headache and body aches. She also provided copies of medical reports previously submitted. On December 30, 2005 appellant requested reconsideration of the Office's December 19, 2005 decision.

By decision dated January 24, 2006, the Office denied appellant's request for reconsideration, finding that appellant had failed to raise substantive legal questions or submit new and relevant evidence sufficient to warrant a merit review. The Office determined that the evidence submitted in support of her request was cumulative and irrelevant.

On September 15, 2006 appellant again requested reconsideration. In support of her request, she submitted a statement dated February 28, 2006 from Cristina Alkoheen, a coworker, who confirmed that appellant became ill on September 21, 2005. Ms. Alkoheen indicated that she also developed diarrhea and sweats, "as time went on, [they] all eventually got sick." She expressed her belief that the affected workers were all "food poisoned." In a September 9, 2006 statement, appellant reiterated her belief that her condition was caused by the food brought into the work facility. In a statement dated September 14, 2006, she contended that she was injured on the job, in that she was working and eating at the job site when she became ill. Appellant also submitted duplicates of medical reports previously provided.

On October 23, 2006 the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing that he or she sustained an injury while in the performance of duty.[3] 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.

[1] Mr. Thomas did not identify the date he allegedly became ill.

[2] 5 U.S.C. §§ 8101-8193.

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

The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. An employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged by a preponderance of the reliable, probative and substantial evidence.[4] An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established a *prima facie* case.[5] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[6]

The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[7] As part of this burden, the claimant must present rationalized medical evidence.[8] 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 claimant's diagnosed condition and the implicated employment factors.[9] The opinion of the physician must be based on a complete factual and medical background of the claimant[10] and must be one of reasonable medical certainty[11] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12]

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a traumatic injury on September 21, 2005. Appellant noted on her CA-1 form that she became ill from eating food at a recovery center that was not properly prepared. However, she provided no detailed account of injury. Appellant presented no evidence regarding the specific mechanism of injury, as required in a claim for traumatic injury, nor did she allege that

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[4] *Charles B. Ward*, 38 ECAB 667 (1987).

[5] *See Paul Foster*, 56 ECAB ___ (Docket No. 04-1943, issued December 21, 2004). *See also Merton J. Sills*, 39 ECAB 572, 575 (1988).

[6] *Thelma S. Buffington*, 34 ECAB 104 (1982).

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

[8] *Joseph T. Gulla*, 36 ECAB 516 (1985).

[9] *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[10] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[11] *John W. Montoya*, 54 ECAB 306 (2003).

[12] *Judy C. Rogers*, 54 ECAB 693 (2003).

she experienced a specific event, incident or exposure at a definite time, place and manner.[13] She generally stated that it was "likely" that she came into contact with contaminated foods or a contaminated utensil while at work, but she admitted that "no one could say with certainty." However, appellant failed to identify any particular food or even a specific meal, which may have caused her illness.

Appellant's vague recitation of the facts does not support her allegation that a specific event occurred which caused an injury.[14] She alleged that she became ill, but could not state the specific cause of her illness. The contemporaneous medical evidence of record does not support appellant's allegation that her condition resulted from eating poorly prepared food at the work site, as alleged. September 22, 2005 emergency room records reflected a history of "fever, headache" and a diagnosis of shigella sonnei. A physician's note reflected that appellant had one episode of diarrhea. None of the medical evidence of record contains a history of injury suggesting that appellant's diagnosed condition was caused by an employment factor. Moreover, she failed to provide a narrative report from a physician explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[15] Appellant's representation that she became ill does not describe the occurrence of an injury.

In *Tracey P. Spillane*,[16] an employee filed a claim alleging that she sustained an allergic reaction at work. However, she did not clearly identify the aspect of her employment which she believed caused the claimed condition, but only made vague references to "possibly having a reaction to magazines or latex gloves." The Board held that she did not adequately specify the employment factors which caused her need for medical treatment nor did she specify details such as the extent and duration of exposure to any given employment factors. The medical record reflected that the employee did not clearly report to her physicians that she felt her claimed condition was due to a specific and identifiable employment factor. In this case, appellant's allegations are vague and do not explain with specificity how she allegedly contracted food poisoning on September 21, 2005.

Appellant expressed her belief that her condition resulted from employment-related food poisoning, which occurred on September 21, 2005. Coworkers who became ill at the work site also opined that their conditions were work related. The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[17] Neither the fact that the condition became apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[18] Causal

[13] *See Betty J. Smith*, 54 ECAB 174 (2002); *see also Tracey P. Spillane,* 54 ECAB 608 (2003).

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

[15] *Judy C. Rogers*, *supra* note 12.

[16] *See Tracey P. Spillane, supra* note 13.

[17] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[18] *Id.*

relationship must be substantiated by reasoned medical opinion evidence, which it is appellant's responsibility to submit. Therefore, appellant's belief that her condition was caused by a work-related injury is not determinative.

The Board finds that appellant has failed to establish the fact of injury: she did not submit sufficient evidence to establish that she actually experienced an employment incident at the time, place and in the manner alleged or that the alleged incident caused a diagnosed condition. As she has not met her burden of proof to establish that she sustained an injury in the performance of duty, it is not necessary to discuss the probative value of the medical reports.[19]

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act, the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation,[20] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the (Office); or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[21]

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.[22]

ANALYSIS -- ISSUE 2

Appellant's December 30, 2005 and September 15, 2006 requests for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously

[19] *Id.*

[20] 20 C.F.R. § 10.606(b).

[21] *Id.*

[22] *See Helen E. Paglinawan*, 51 ECAB 591 (2000).

considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Subsequent to the Office's December 19, 2005 decision, appellant submitted numerous copies of previously submitted documents. She also submitted personal statements and witness statements reiterating the belief that appellant's condition was caused by food poisoning at the work site. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.[23]

Appellant submitted physician's notes dated September 26, 2005, which included laboratory findings reflecting shigella sonnei and E-coli. In its December 19, 2005 decision, the Office determined that appellant had failed to establish the fact of injury. As the documents submitted by appellant do not address the issue at hand, they are irrelevant. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

As appellant has failed to meet any of the standards under section 8128(a) of the Act, which would require the Office to reopen the case for merit review, the Board finds that the Office did not abuse its discretion in denying her request for reconsideration.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a traumatic injury on September 21, 2005 causally related to her employment. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[23] *See Manuel Gill*, 52 ECAB 282 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 23 and January 24, 2006 and December 19, 2005 are affirmed.

Issued: April 19, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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