United States Department of Labor
Employees' Compensation Appeals Board

I.P., Appellant	)	
and	)	**Docket No. 07-946**
	)	**Issued: August 9, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Knoxville, TN, Employer	)	

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

JURISDICTION

On February 21, 2007 appellant filed a timely appeal from a January 3, 2007 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and a February 6, 2007 nonmerit decision denying his request for reconsideration. Under 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 met his burden of proof in establishing that he sustained an injury on November 9, 2006, as alleged; and (2) whether the Office properly denied his request for merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 13, 2006 appellant, then a 48-year-old technical carrier, filed a traumatic injury claim for November 9, 2006. He stated that he slipped and fell on some steps while in the performance of duty. Appellant stated that he injured his hand, head, neck and back as a result of the fall. He sought medical attention from Dr. Gary O'Shaughnessy, an osteopath, at the Lensgraft Clinic and VAX-D Back Pain Institute on November 9, 2006. In a November 16,

2006 report, Dr. O'Shaughnessy's nurse noted the history of injury and provided objective findings of decreased range of motion in all planes of the cervical spine, positive orthopedic findings of left soto balls, linders test, double leg raise test, kempts test and positive left shoulder depression. Diagnosis codes were provided along with a recommendation that appellant undergo physical therapy daily for 12 days.[1] Medical notes of November 9, 2006 were provided along with a November 13, 2006 return to work slip which advised that appellant had injured his neck and upper trapezius muscles and could return to work on November 16, 2006.[2]

On November 22, 2006 the Office advised appellant that the evidence was insufficient to establish that he sustained an injury or medical condition arising from the performance of his duties on November 9, 2006. Appellant was directed to provide a detailed narrative report from his physician that would include a history of the injury, a detailed description of findings, results of all x-ray and laboratory tests, diagnosis and clinical course of treatment. The Office requested that the physician also provide a medical opinion with rationale as to whether the diagnosed condition was caused or aggravated by the employment. In response, appellant resubmitted medical notes which indicated that the medical codes referred to cervico-cranial syndrome, thoracic nerve root disorder, cervical root lesion and muscle weakness. A November 16, 2006 return to work order advised that appellant was unable to work until November 30, 2006.

By decision dated January 3, 2007, the Office denied appellant's claim on the grounds that he did not establish fact of injury. It found that appellant had established the occurrence of the November 9, 2006 employment incident but failed to submit sufficient medical evidence addressing causal relation.

In a letter dated January 28, 2007, appellant requested reconsideration. On February 6, 2007 the Office received both new and previously submitted medical notes from Dr. O'Shaughnessy's office and physical therapy notes of his progress along with a November 13, 2006 memorandum from the employing establishment regarding employee benefits and responsibilities in traumatic injury claims.

By decision dated February 6, 2007, the Office denied appellant's request for reconsideration finding that the evidence submitted in support of the request did not warrant a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing that he or she sustained an injury while in the performance of duty.[4] In

[1] The Office authorized 12 days of electrical stimulation therapy, electrical stimulation, ultrasound therapy and chiropractic manipulation for the period November 27 to December 27, 2006.

[2] Some of the signatures on these records are illegible.

[3] 5 U.S.C. §§ 8101-8193.

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

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.[5]

The Office's procedures recognize that a claim may be accepted without a medical report when the condition is a minor one which can be identified on visual inspection.[6] In clear-cut traumatic injury claims, such as a fall resulting in a broken arm, a physician's affirmative statement is sufficient and no rationalized opinion on causal relationship is needed. In all other traumatic injury claims, a rationalized medical opinion supporting causal relationship is required.[7]

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.[8]

ANALYSIS -- ISSUE 1

Appellant alleged that on November 9, 2006 he sustained several injuries (hand, head, neck and back) as a result of a slip and fall down stairs during the performance of his federal duties. The Office accepted that the employment incident of November 9, 2006 occurred as alleged. Appellant must, however, submit probative medical evidence on the issue of causal relationship between a diagnosed condition and the employment incident. The claimed injuries are not the type of injury that can be identified on visual inspection or a clear-cut injury requiring only an affirmative statement. Appellant must submit rationalized medical evidence in support of his claim.

The evidence of record does not provide a rationalized medical opinion supporting causal relationship between a diagnosed condition and the accepted employment incident. The medical records before the Board appear to be from Dr. O'Shaughnessy's nurse or a physical therapist and not from a physician. The Board has held that medical opinion, in general, can only be

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

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship,* Chapter 2.805.3(d) (June 1995).

[7] *Id.*

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

given by a qualified physician.[9] Thus, to the extent that these medical records were issued by a nurse or physical therapist, the reports are not from a physician and are of no probative value. To the extent that Dr. O'Shaughnessy may have issued these records, they are insufficient to establish the claim as they do not provide a specific opinion on causal relationship between any of the diagnosed condition and the November 9, 2006 employment incident. Consequently, appellant has not submitted medical evidence containing a physician's reasoned opinion regarding whether he has a diagnosed condition caused or aggravated by the accepted employment incident.[10]

The Board finds that appellant did not meet his burden of proof to establish his claim.

LEGAL PRECEDENT -- ISSUE 2

The Act[11] provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[12]

The application for reconsideration must set forth arguments and contain 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 new evidence not previously considered by the Office.[13]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.[14] Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[15]

---

[9] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See David P. Sawchuk*, 57 ECAB ___ (Docket No. 05-1635, issued January 13, 2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the Act).

[10] Although the record indicates that the Office may have authorized a limited period of medical treatment or therapy, this does not establish that the Office accepted that appellant sustained an employment injury. *See Gary L. Whitmore*, 43 ECAB 441 (1992); *James F. Aue*, 25 ECAB 151 (1974).

[11] 5 U.S.C. § 8101 *et seq*.

[12] 20 C.F.R. § 10.605.

[13] 20 C.F.R. § 10.606.

[14] *Donna L. Shahin*, 55 ECAB 192 (2003).

[15] 20 C.F.R. § 10.608.

ANALYSIS -- ISSUE 2

In his request for reconsideration, appellant did not allege or demonstrate 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 Board finds that appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[16]

With respect to the third requirement under section 10.606(b)(2), the underlying issue is medical in nature. However, appellant did not submit any relevant and pertinent new evidence regarding the pertinent issue of causal relationship. To the extent that additional new medical notes were issued by a physician, these documents do not address how any diagnosed conditions were caused or contributed to by the November 9, 2006 employment incident. Records from physical therapists are not relevant because, as noted, a physical therapist is not a physician under the Act[17] and the underlying deficiency in the claim is the absence of medical evidence addressing causal relationship. As only a physician can competently address the issue, reports from physical therapists and other nonphysicians are irrelevant to the deficiency in the claim. Also irrelevant is the memorandum from the employing establishment as it has no bearing on the pertinent issue of causal relationship.

Because appellant's January 28, 2007 request for reconsideration does not show that the Office erroneously applied or interpreted a specific point of law, does not advance a relevant legal argument not previously considered by the Office and provides no relevant and pertinent new evidence not previously considered by the Office, the Board finds that the Office properly denied a reopening of appellant's case for a review on its merits. The Board will affirm the Office's February 6, 2007 decision denying appellant's request.

CONCLUSION

The Board finds that appellant did not submit sufficient medical evidence to meet his burden of proof in establishing an injury in the performance of duty on November 9, 2006 and that the Office properly denied appellant's request for merit review.

[16] 20 C.F.R. § 10.606(b)(2).

[17] *See supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 6 and January 3, 2007 are affirmed.

Issued: August 9, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board