United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 07-693**
	)	**Issued: June 13, 2007**
U.S. POSTAL SERVICE, REMOTE ENCODING CENTER, Wichita, KS, 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 January 17, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated August 28, 2006 denying modification of the denial of her traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits. The Board also has jurisdiction to review the Office's May 18, 2006 nonmerit decision denying her request for an oral hearing and a December 5, 2006 nonmerit decision denying reconsideration.

ISSUES

The issues are: (1) whether appellant established that she sustained an injury causally related to her accepted December 21, 2005 incident; (2) whether the Office properly denied appellant's request for an oral hearing before an Office hearing representative; and (3) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 22, 2005 appellant, then a 59-year-old group leader, filed a traumatic injury claim alleging that due to an odor from a gas leak on December 21, 2005 she experienced a headache, nausea and felt hot.

The employing establishment submitted a December 21, 2005 incident report regarding the gas odor in the building on that date. The investigation found no hazardous conditions and noted that the concentration of the gas "odor may have been sufficient to cause some irritant reactions (particularly for sensitive individuals)." The report indicated that no carbon monoxide was detected during multiple building walkthroughs.

Appellant submitted a December 21, 2005 discharge summary noting that she had been seen by Dr. David C. White and advised to see her physician as needed. Dr. White noted that appellant should return to the emergency room if her headache worsened or she had confusion or nausea/vomiting.

In a letter dated January 4, 2006, the Office notified appellant that the evidence submitted was insufficient to support her claim. The Office instructed her to provide additional factual and medical evidence, including a comprehensive medical report from her treating physician describing her symptoms, results of examinations, tests, diagnosis, the treatment provided and the doctor's opinion with medical rationale on the cause of her condition.

Appellant submitted additional factual and medical evidence, including December 21, 2005 hospital records and a February 1, 2006 report by Dr. Patrick G. Wolf, a treating Board-certified internist. The hospital reports noted appellant's carbon monoxide blood gas levels were within a normal range. On an emergency department patient report, Dr. White listed nausea under notes and reported the mechanism of injury as carbon monoxide exposure. In a December 21, 2005 emergency physician record, he noted carbon monoxide poisoning under clinical impression. Dr. Wolf stated that appellant suffered from a history of thrombosis. Appellant called his office on December 21, 2005 regarding her headache and dizziness and she informed his "staff that a possible gas leak might have triggered her symptoms." She was advised, based on her medical history, that she should be transported to the hospital.

By decision dated February 8, 2006, the Office denied appellant's claim for compensation. The Office found that the December 21, 2005 incident occurred, but that the medical evidence did not establish that the event caused an injury.

On April 19, 2006 the Office received appellant's request for an oral hearing. Appellant dated the request March 2, 2006. The postmark on the envelope was dated April 14, 2006.

By decision dated May 18, 2006, the Office denied appellant's request for an oral hearing. The Office found that her request was postmarked April 14, 2006 which was more than 30 days after issuance of the February 8, 2006 decision and that she was not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in

nature and could be addressed through the reconsideration process by submitting additional evidence.

On June 28, 2006 appellant requested reconsideration and submitted a February 1, 2006 report by Dr. Wolf in support of her request.

By decision dated August 28, 2006, the Office denied appellant's modification of the February 8, 2006 decision.

On November 7, 2006 appellant filed a request for reconsideration. She contended that the smell from the gas leak contributed to the illness of a number of employees, including her. Appellant contended that the Office should pay for the tests she underwent to determine the extent of her injury as neither her physician nor the paramedics could reasonably know what the extent of her exposure.

By decision dated December 5, 2006, the Office denied appellant's reconsideration request on the grounds that she neither raised substantive legal questions nor submitted new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of 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; and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[2]

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office must first determine whether fact of injury has been established. Fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the incident caused a personal injury and, generally, this can be established only by medical evidence.[3]

When determining whether the implicated employment factors caused the claimant's diagnosed condition, the Office generally relies on the rationalized medical opinion of a physician.[4] To be rationalized, the opinion must be based on a complete factual and medical background of the claimant[5] and must be one of reasonable medical certainty,[6] explaining the

[1] 5 U.S.C. §§ 8101-8193.

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

[3] *Ellen L. Noble*, 55 ECAB 530 (2004).

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

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

nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant was exposed to odors from a gas leak on December 21, 2005 while in the performance of duty. The Board finds that the claimed exposure occurred as alleged. However, the medical evidence is insufficient to establish that the employment incident caused an injury. The medical evidence of record does not establish that appellant's exposure to odors from a gas leak at work caused a personal injury on December 21, 2005. The medical evidence contains no firm diagnosis, no rationale and no explanation of the mechanism of injury regarding the incident on December 21, 2005.

The record contains December 21, 2005 emergency room reports by Dr. White and a February 1, 2006 report by Dr. Wolf. Dr. White noted carbon monoxide poisoning under clinical impression. His clinical assessment of carbon monoxide poisoning is not supported by the diagnostic tests. The blood gas test taken on December 21, 2005 showed appellant's blood gas carbon monoxide levels were within a normal range. Moreover, an investigation performed that date found no hazardous conditions and no evidence of heightened carbon monoxide levels. As Dr. Wolf's report was based on an incomplete factual history it is of diminished probative value.[8]

In a February 1, 2006 report, Dr. Wolf stated that appellant had a history of blood clots and that she had been exposed to odors from a gas leak on December 21, 2005. His report contains no diagnosis of any condition as a result of the December 21, 2005 employment injury. While Dr. Wolf addressed appellant's emergency room treatment on December 21, 2005, he did not provide a specific diagnosis and failed to discuss how any medical condition was caused by the accepted employment incident.[9] The Board finds that Dr. Wolf's February 1, 2006 report is insufficient to establish appellant's claim.

There is no medical evidence of record establishing that appellant sustained a diagnosed medical condition or that explains the physiological process by which the work-related exposure caused a diagnosed condition. The Office advised appellant that it was her responsibility to provide within 30 days, among other things, a comprehensive medical report from her treating physician which described her symptoms, test results, diagnosis, treatment and the doctor's opinion, with medical reasons, on the cause of her condition. Appellant failed to submit sufficient probative medical documentation in response to the Office's request within the allotted time. Therefore, the Office properly denied her claim for benefits under the Act.

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

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

[8] *M.W.*, 57 ECAB ___ (Docket No. 06-749, issued August 15, 2006) (medical conclusions based on an inaccurate or incomplete factual history are of diminished probative value).

[9] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision.[10] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[11] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[12] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[13]

ANALYSIS -- ISSUE 2

Appellant's March 2, 2006 request for a hearing was postmarked April 14, 2006, which was more than 30 days after the Office's February 8, 2006 decision denying her clam. She is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that she could pursue her claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office's new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing. The Board will affirm the Office's May 18, 2006 decision denying appellant an oral hearing before an Office hearing representative.

LEGAL PRECEDENT -- ISSUE 3

The Act[14] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[15] The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.[16]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and 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

[10] 5 U.S.C. § 8124(b)(1). *See D.F.*, 58 ECAB ___ (Docket No. 06-1815, issued November 27, 2006).

[11] 20 C.F.R. § 10.616. *See Hubert Jones, Jr.*, 57 ECAB ___ (Docket No. 05-603, issued March 10, 2006).

[12] *Teresa M. Valle*, 57 ECAB ___ (Docket No. 06-438, issued April 19, 2006).

[13] *William E. Seare*, 47 ECAB 663 (1996).

[14] 5 U.S.C. § 8101 *et seq.*

[15] *Id*. at § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB ___ (Docket No. 06-121, issued June 6, 2006).

[16] 20 C.F.R. § 10.605.

considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[17]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[18] 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. 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.[19]

ANALYSIS -- ISSUE 3

Appellant's November 7, 2006 request for reconsideration was not accompanied by any new evidence and it did not argue that the Office erroneously applied or interpreted a specific point of law. She contends that the smell from the gas leak contributed to the illness of a number of employees, including her. Appellant argues that, due to her exposure to the gas leak at work, the Office should pay for the tests she underwent to determine the extent of her injury. It is her burden to prove the elements of her claim.[20] Appellant's argument that the Office has a duty to pay for tests to determine the extent of her injury does not show that the Office erroneously applied or interpreted a specific point of law, nor does it constitute a relevant legal argument.[21]

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her November 7, 2006 request for reconsideration.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury causally related to her accepted December 21, 2005 injury. The Board finds that the Office properly denied appellant's request for an oral hearing before an Office hearing representative. The Board also finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a)

[17] *Id*. at § 10.606. *See Susan A. Filkins*, 57 ECAB ___ (Docket No. 06-868, issued June 16, 2006).

[18] *Id*. at § 10.607(a). *See Joseph R. Santos*, 57 ECAB ___ (Docket No. 06-452, issued May 3, 2006).

[19] *Id*. at §10.608(b). *See Candace A. Karkoff*, 56 ECAB ___ (Docket No. 05-677, issued July 13, 2005).

[20] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[21] To require that the Office reopen the case for a merit review, the legal contention on reconsideration must have a reasonable color of validity. *Constance G. Mills*, 40 ECAB 317 (1988).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 5, August 28 and May 18, 2006 are affirmed.

Issued: June 13, 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