United States Department of Labor
Employees' Compensation Appeals Board

G.D., Appellant	)	
and	)	**Docket No. 08-879**
	)	**Issued: August 26, 2008**
U.S. POSTAL SERVICE, LINCOLN STATION, Tacoma, WA, Employer	)	

Appearances:
Howard L. Graham, Esq., for the appellant
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 February 5, 2008 appellant filed a timely appeal from a February 20, 2007 decision of the Office of Workers' Compensation Programs that denied his claim and a January 24, 2008 decision that denied his request for reconsideration. 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 met his burden of proof to establish that he sustained an employment-related back injury on September 18, 2006; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 18, 2006 appellant, then a 44-year-old clerk, alleged that he pinched a nerve in his left leg when he picked something up at work and twisted. He stopped work on September 27, 2006. Appellant submitted emergency room reports dated September 27, 2006 in

which Dr. Anita Yearley, Board-certified in emergency medicine, noted a history of increasing left leg and back pain that started the previous week at work. A magnetic resonance imaging (MRI) scan demonstrated an extruded disc fragment at L3-4 on the left and minimal protrusions of the L4-5 and L5-S1 discs without appreciable central stenosis. Dr. Yearley diagnosed lumbar radiculopathy. Reports dated September 28, 2006, signed by a physician's assistant, noted appellant's complaints, the MRI scan findings and advised that he could not work. An October 2, 2006 report noted a history of a work accident that occurred on September 18, 2006, the MRI scan findings and that appellant was seen for refills of pain medication.[1]

In an October 12, 2006 report, Dr. Seth Joseffer, a Board-certified neurosurgeon, noted a history that appellant reported that he had radiating left lower extremity pain since a lifting and twisting incident at work on September 18, 2006 where he tossed parcels weighing up to 60 pounds. He reviewed the MRI scan findings and diagnosed left lower extremity pain and a herniated disc at L3-4 on the left. Dr. Joseffer recommended an MRI scan of the left knee and back surgery. An October 19, 2006 MRI scan of the left knee was reported as normal and in a November 2, 2006 treatment note, he noted the left knee MRI scan findings and appellant's complaints of continued left leg and lower back pain. Dr. Joseffer diagnosed left lower extremity dysesthetic pain from irritation of the nerve root ganglion and left herniated disc at L3-4. Surgery was discussed. On October 21, 2006 Dr. Joseffer performed a left L3-4 far lateral discectomy and on December 7, 2007 reported that appellant could return to light-duty work.

The employing establishment controverted the claim, noting that appellant began work there on August 7, 2006. By letter dated January 17, 2006, the Office informed appellant that his claim had initially been administratively handled, but that, as his medical bills had exceeded $1,500.00, his claim would be formally adjudicated. It informed him that he should submit evidence regarding the lifting incident and provide a detailed medical report that explained why the diagnosed condition was caused or aggravated by the employment injury. Appellant was given 30 days to respond.[2] In a February 2, 2007 treatment note, Dr. Joseffer noted appellant's complaint of hypersensitivity on the inside of his left knee. Examination findings included full strength, normal gait and a well-healed wound. Dr. Joseffer diagnosed status post left L3-4 discectomy, doing well except for some persistent dysesthetic pain.

By decision dated February 20, 2007, the Office denied the claim, finding that appellant failed to establish fact of injury.

On January 10, 2008 appellant, through his attorney, requested reconsideration. Counsel noted that the January 17, 2007 Office letter contained an error regarding the injury claimed in that it referred to a right wrist injury. Medical evidence submitted with the reconsideration request included duplicates of that previously of record, a decree regarding child support and reports from Dr. Joseffer dated April 3 and December 7, 2007. Dr. Joseffer noted appellant's report that on September 18, 2006 he was lifting, twisting and tossing parcels that weighed up to 60 pounds and developed radiating left leg pain which progressively worsened such that he went

[1] The physician's signature is illegible.

[2] The letter noted that appellant filed a claim for a right wrist condition, but the questions asked were in reference to the claimed lifting incident.

to the emergency room where an MRI scan demonstrated a herniated disc at L3-4. He noted that appellant underwent medically necessary microdiscectomy on November 21, 2006. Dr. Joseffer concluded that, as documented by the MRI scan, the L3-4 disc herniation occurred at work on September 18, 2006 and caused the disabling condition that required surgical intervention.

By decision dated January 24, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was duplicative or irrelevant as to whether he sustained an injury at the time, place and in the manner alleged.

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 timely filed within the applicable time limitation period of the Act, that an injury was sustained 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[4]

Office regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[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. 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. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[6]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[7] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be

[3] 5 U.S.C. §§ 8101-8193.

[4] *Gary J. Watling*, 52 ECAB 278 (2001).

[5] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

[6] *Gary J. Watling*, *supra* note 4.

[7] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[8] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[9]

ANALYSIS -- ISSUE 1

The Board finds that the September 18, 2006 incident occurred as alleged. Appellant was consistent in his description of the incident as found on the claim form and in the history reported to the emergency room on September 27, 2006 and to Dr. Joseffer. In addition the Office administratively accepted the claim. 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 and persuasive evidence.[10] The Board finds that the evidence of record is sufficient to establish that appellant sustained a twisting, lifting incident at work on September 18, 2006. However, the Board finds that the evidence of record submitted prior to the February 20, 2007 Office decision is insufficient to establish that appellant sustained an injury caused by this incident. The evidence included September 28, 2006 reports from a physician's assistant. Reports from a physician's assistant, however, are not considered, probative medical evidence as a physician's assistant is not a physician as defined under the Act.[11] As for the October 2, 2006 report, the Board has held that medical reports lacking proper identification cannot be considered as probative evidence in support of a claim.[12] Appellant also provided Dr. Yearley's September 27, 2006 emergency room report and treatment notes from Dr. Joseffer dated October 12, 2006 to February 2, 2007 and an operative report dated November 21, 2006. Neither physician, however, provided an opinion addressing the cause of the diagnosed back conditions. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[13] The MRI scan studies did not provide any opinion regarding the cause of the diagnosed condition.[14]

To meet his or her burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[15] The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to

[8] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

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

[10] *Allen C. Hundley*, 53 ECAB 551 (2002).

[11] *Ricky S. Storms*, 52 ECAB 349 (2001).

[12] *D.D.*, 57 ECAB 734 (2006).

[13] *Willie M. Miller*, 53 ECAB 697 (2002).

[14] *Id*.

[15] *Gary J. Watling*, *supra* note 4.

federal employment and such relationship must be support with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[16] Appellant submitted an sufficient medical evidence to establish the critical element of causal relationship. He did not meet his burden of proof to establish that he sustained an injury on September 18, 2006.[17]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[18] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[19] This section provides that the application for reconsideration must be submitted in writing and 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.[20] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[21]

ANALYSIS -- ISSUE 2

The Board finds that the Office improperly denied appellant's request for a merit review pursuant to section 8128(a) of the Act. Appellant's arguments did not show that the Office erroneously interpreted a point of law or advanced a legal argument not previously considered by the Office. While appellant's attorney correctly noted that the Office's January 17, 2006 development letter referred to a right wrist injury, the questions attached to the letter were relevant to appellant's claim. The Board therefore finds this error harmless and insufficient to establish a basis for merit review.[22] Consequently, appellant was 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).[23]

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[16] *Patricia J. Glenn*, 53 ECAB 159 (2001).

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

[18] 5 U.S.C. § 8128(a).

[19] 20 C.F.R. § 10.608(a).

[20] *Id*. at § 10.608(b)(1) and (2).

[21] *Id*. at § 10.608(b).

[22] *See generally, L.H.*, 59 ECAB ____ (Docket No. 07-1191, issued December 10, 2007).

[23] 20 C.F.R. § 10.606(b)(2).

Appellant also submitted evidence previously of record. The Board has long held that the submission of evidence which repeats of duplicates evidence already in the record does not constitute a basis for reopening a case.[24] However, appellant also submitted reports dated April 3 and December 7, 2007 in which Dr. Joseffer noted the history of injury and appellant's complaints of radiating left leg pain which progressively worsened such that he went to the emergency room where an MRI scan demonstrated a herniated disc at L3-4. Dr. Joseffer noted that appellant underwent medically necessary microdiscectomy on November 21, 2006 and concluded that, as documented by the MRI scan, the L3-4 disc herniation occurred at work on September 18, 2006 and caused the disabling condition that required surgical intervention. The Board finds that, as Dr. Joseffer advised that the herniated disc was caused by the September 18, 2006 employment incident, these reports constitute new and relevant evidence not previously considered by the Office. Appellant therefore met the requirements of section 10.606(b)(2).

As appellant submitted new and relevant evidence not previously considered by the Office, the case will be remanded to the Office for a decision on the merits of whether he met his burden of proof to establish that he sustained an employment-related back injury on September 18, 2006.[25]

[24] *D.K.*, 59 ECAB ____ (Docket No. 07-1441, issued October 22, 2007).

[25] *Annette Louise*, 54 ECAB 783 (2003).

CONCLUSION

The Board finds that the Office properly denied the claim by its February 20, 2007 merit decision. However, it improperly denied appellant's request for further merit review pursuant to section 8128(a) of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 20, 2007 be affirmed. The decision dated January 24, 2008 is set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: August 26, 2008
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