United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 07-2382**
	)	**Issued: June 9, 2008**
DEPARTMENT OF THE ARMY, NATIONAL GUARD YOUTH CHALLENGE PROGRAM, Dillon, MT, Employer	)	

Appearances:
Chuck Wall, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 20, 2007 appellant filed a timely appeal from the January 11, 2007 merit decision of the Office of Workers' Compensation Programs denying his claim for a traumatic injury. He also filed a timely appeal of the June 14, 2007 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained an injury on November 14, 2006, as alleged; and (2) whether the Office properly refused to reopen his claim for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 14, 2006 appellant, then an 18-year-old student/cadet, was struck in the face, fell down stairs and was kicked in the head during an unprovoked assault by another cadet.

The claim alleged possible head injury, possible broken nose, laceration to head and possible concussion. Appellant was treated at the Barrett Memorial Hospital emergency room.

By letter dated November 29, 2006, the Office informed appellant that his claim could not be accepted as there was no medical evidence to support his claim. A memorandum to file dated December 11, 2006 indicated that this letter was returned as undeliverable. This letter was resent to appellant's address as written on the claim form. However, no further evidence was submitted.

By decision dated January 11, 2007, the Office denied appellant's claim. The Office found that, although the evidence established that the claimed event occurred as alleged, there was no medical evidence that provided a diagnosis that could be related to the incident.

Therefore, the Office received a report from the Barrett Memorial Hospital and Health Care emergency room signed by a physician's assistant on November 14, 2006. The report noted that appellant was hit by another cadet, that his head struck a wall and that he was punched in the nose and fell to the ground, at which time he was kicked in the head. Appellant had bruising on the right side of his face and a one centimeter scalp wound to the back of the head with tissue softness and hematoma. The wound was scrubbed and closed with two staples. Appellant was released in good condition and given aftercare instructions.

On June 11, 2007 appellant requested reconsideration. Appellant noted that on November 14, 2006 he was assaulted by another cadet, knocked down the stairs and kicked in the head. He submitted the Barrett Memorial Hospital records in support of his claim.

By decision dated June 14, 2007, the Office denied reconsideration without merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim. When the employee claims injury in the performance of duty, he must submit sufficient evidence to establish that he sustained a specific incident at the time, place and in the manner alleged and that such incident caused an injury.[2] The mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship.[3]

To establish a causal relationship between an employee's condition and an alleged employment injury, appellant must submit rationalized medical opinion from a physician based on a complete and accurate medical and factual background.[4] The physician's opinion must be expressed in terms of reasonable medical certainty and must be supported by medical rationale

[1] 5 U.S.C. §§ 8101-8193.

[2] *See John W. Montoya*, 54 ECAB 308 (2003).

[3] *See Louis T. Blair*, 54 ECAB 348 (2003).

[4] *See Kathryn E. Demarsh*, 56 ECAB 677 (2005).

explaining the nature of the relationship between the diagnosed condition and the claimant's employment factors.[5]

ANALYSIS -- ISSUE 1

The Office accepted that the employment incident occurred as alleged. The issue on appeal, therefore, is whether appellant submitted sufficient medical evidence to establish that he sustained an injury as a result of this accepted incident. At the time of the January 11, 2007 decision, appellant had not submitted any medical evidence in support of his claim. Without medical evidence, the Office properly denied appellant's claim for compensation.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor his belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence.[6] As appellant failed to submit such evidence, the Office properly denied his claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under 5 U.S.C. § 8128(a), the Office's regulations provide that 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 legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[7]

A timely request for reconsideration may be granted if the Office determines that the employee has submitted evidence and/or argument that meet at least one of these standards. If reconsideration is granted, the case is reopened and is reviewed on the merits.[8]

ANALYSIS -- ISSUE 2

In the instant case, appellant did not meet any of the criteria for requiring the Office to reopen his case for merit review. Appellant did not argue that the Office erroneously applied or interpreted a specific point of law nor did he raise legal arguments not previously considered. Appellant did submit the medical records from the Barrett Memorial Hospital emergency room showing that he was treated on the date of the accepted incident. However, these reports were signed by a physician's assistant. A physician's assistant is not a "physician" as defined under

[5] *See Charles W. Downey*, 54 ECAB 421 (2003).

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

[7] 20 C.F.R. § 10.606.

[8] 5 U.S.C. §§ 8101-8193, § 8128(a). The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

the Act. This report does not constitute probative medical evidence and is accordingly irrelevant.[9] Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

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

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on November 14, 2006, as alleged. The Board further finds that the Office properly refused to reopen his claim for further merit review under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 14 and January 11, 2007 are affirmed.[10]

Issued: June 9, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[9] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2). Section 8101(2) provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[10] The Board notes that the record on appeal contains evidence which the Office received after its June 14, 2007 decision denying reconsideration. The Board lacks jurisdiction to review this evidence for the first time on appeal. 5 U.S.C. § 501.2(c). This, however, does not preclude appellant from having such evidence considered by the Office as part of a reconsideration request before the Office.