# United States Department of Labor
# Employees' Compensation Appeals Board

| | | |
|---|---|---|
| **P.M., Appellant** | ) | |
| **and** | ) | |
| **NATIONAL AERONAUTICS SPACE ADMINISTRATION, JOHN F. KENNEDY SPACE CENTER, Kennedy Space Center, FL, Employer** | ) | **Docket No. 08-850**<br>**Issued: September 11, 2008** |

*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
COLLEEN DUFFY KIKO, Judge

### ***JURISDICTION***

On January 28, 2008 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs' dated July 13, 2007 denying her claim that her back condition was employment related. She also appealed an October 25, 2007 nonmerit decision denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

### ***ISSUES***

The issues are: (1) whether appellant established that she sustained a back injury causally related to her October 25, 2006 employment incident; and (2) whether the Office properly denied her request for merit review of her claim under 5 U.S.C. § 8128.

## ***FACTUAL HISTORY***

On October 30, 2007 appellant, then a 48-year-old engineer, filed a traumatic injury claim alleging that on October 25, 2006 she injured her back when she turned sharply while seated.

In October 31, 2006 treatment notes, Dr. Robert B. McShane, a treating Board-certified orthopedic surgeon, noted that appellant injured her back on October 22, 2006 when she twisted her back after turning quickly.

By letter dated February 22, 2007, the Office informed appellant that the evidence of record was insufficient to support her claim. She was advised as to the type of medical and factual evidence that was required to support her claim.

By decision dated March 22, 2007, the Office denied appellant's claim on the grounds that she failed to establish fact of injury. It found that, while the evidence established the October 25, 2006 employment incident, there was no medical evidence diagnosing a condition as a result of the incident.

Subsequent to the March 22, 2007 decision, the Office received additional evidence including treatment notes by Dr. McShane for the period December 22, 2006 to April 17, 2007. He noted that appellant was working full duty in all the treatment notes. On December 22, 2006 Dr. McShane reported that she had diffuse tenderness upon palpitation of her lower back along with restricted side bending and forward flexion. He noted on January 23, 2007 that appellant had "minimal tenderness and spasm on the right and left side of her back" and good side bending and forward flexion. On February 20, 2007 Dr. McShane reported that she had "some pain in the right side of her low back" along with restricted side bending and forward flexion. In a March 20, 2007 treatment note, he reported that appellant remained "tender diffusely to deep palpation and across her low back. In April 17, 2007 treatment notes, Dr. McShane reported that she had diffuse tenderness upon deep palpitation of her lower back. He diagnosed a herniated nucleus pulposus times two. Dr. McShane also stated that appellant had "a definite date of injury and definite mechanism of injury" and attributed her problems to her work.

On April 26, 2007 appellant requested reconsideration and submitted evidence in support of her claim including treatment notes by Dr. McShane for the period October 31, 2006 to April 17, 2007 and a November 4, 2006 magnetic resonance imaging (MRI) scan.

A November 4, 2006 MRI scan revealed L4-5 and L5-S1 central disc protrusion with mild L3-4 disc bulging without herniated nucleus pulposus.

On October 31, 2006 Dr. McShane reported that appellant injured herself on October 22, 2006 when she turned quickly and injured her back. He noted x-ray interpretations showed mild degenerative changes. Dr. McShane stated that appellant had a history of an L3-4 herniated nucleus pulposus and recommended an MRI scan be performed. Dr. McShane reported diffuse tenderness upon deep palpation across appellant's lower back in treatment notes dated November 21 and December 15, 2006. In the November 21, 2006 notes, he noted that a recent MRI scan revealed an L4-5 and L5-S1 herniated nucleus pulposus.

Subsequent to appellant's reconsideration request, the Office received treatment notes for the period February 20 to May 15, 2007 by Dr. McShane. In May 15, 2007 treatment notes, Dr. McShane reported that appellant had pain along with restricted side bending and forward flexion and "a lot of aching across the low back."

By decision dated July 13, 2007, the Office affirmed as modified the denial of appellant's claim. It found that she had established fact of injury, but failed to establish that the diagnosed condition was caused or aggravated by her October 25, 2006 employment incident.

On October 9, 2007 appellant requested reconsideration and submitted a July 20, 2007 report by Dr. McShane in support of her request. She noted the evidence established that she sustained a herniated nucleus pulposus at L4-5 and L5-S1. Dr. McShane stated that appellant was being treated for the conditions arising from her "traumatic injury of October 25, 2006."

By decision dated October 25, 2007, the Office denied appellant's request for reconsideration of the merits of her claim.

## ***LEGAL PRECEDENT -- ISSUE 1***

The Federal Employees' Compensation Act[1] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] An employee seeking benefits under the Act has the burden of proof to establish 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 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 or specific condition for which compensation is claimed is causally related to the employment injury.[3]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[4] An award of compensation may not be based on appellant's belief of causal relationship. 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 a causal relationship.[5]

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which

[1] 5 U.S.C. § 8101 *et seq.*

[2] 5 U.S.C. § 8102(a).

[3] *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *See Paul Foster*, 56 ECAB 208 (2004); *see also Katherine J. Friday*, 47 ECAB 591 (1996).

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

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.[6] The opinion of the physician must be based on a complete factual and medical background of the claimant[7] and must be one of reasonable medical certainty[8] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9]

## ***ANALYSIS -- ISSUE 1***

The Office accepted that the October 25, 2006 employment incident occurred as appellant alleged, *i.e.*, that she turned around quickly in her chair and felt a sharp pain in her arm and back. However, it found that the medical evidence of record was insufficient to support a causal relationship between her diagnosed condition and the accepted employment incident. The Board finds that appellant has not met her burden of proof in establishing that the October 25, 2006 incident caused a personal injury sustained in the performance of duty.

Appellant provided various treatment notes and reports from Dr. McShane, who noted in all the treatment notes that appellant was working full duty. Dr. McShane diagnosed a herniated nucleus pulposus in treatment notes dated November 21, 2006 and April 17, 2007. In the April 17, 2007 notes, he attributed appellant's herniated nucleus pulposus to her employment injury. In support of this conclusion, Dr. McShane noted that appellant had "a definite date of injury and definite mechanism of injury." However, he did not discuss the etiology of appellant's condition or relate it to her work in the November 21, 2006 note. While Dr. McShane attributed appellant's condition to her work injury in his April 17, 2007 treatment notes, he does not note the date of injury nor provide any explanation as to how the condition was caused by the incident beyond noting a "definite mechanism of injury." The Board has held that a medical report which does not offer a detailed opinion on causal relationship is of limited probative value on that issue.[10] Moreover, Dr. McShane did not note the October 25, 2006 date of injury, he noted October 22, 2006 instead, nor did he describe how the incident of sharply turning in her chair at work would have caused the diagnosed condition. The Board finds that, without additional explanation and rationale,[11] the physician's statement which attributed his condition to appellant's employment is insufficient to establish that she experienced a work

[6] *G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007); *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[7] *L.D.*, 58 ECAB ___ (Docket No. 06-1627, issued February 8, 2007); *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[8] *Roy L. Humphrey*, 57 ECAB 238 (2005); *John W. Montoya*, 54 ECAB 306 (2003).

[9] *J.M.*, 58 ECAB ___ (Docket No. 06-2094, issued January 30, 2007); *Judy C. Rogers*, 54 ECAB 693 (2003).

[10] *See A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[11] *Id.*

injury which directly caused her diagnosed condition. The Board finds that Dr. McShane's reports fail to establish that the June 5, 2007 employment incident caused a diagnosed condition.

## ***LEGAL PRECEDENT -- ISSUE 2***

The Act[12] provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.[13] 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.

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 considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[14]

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.[15] 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.[16]

## ***ANALYSIS -- ISSUE 2***

The Board finds that appellant's request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. With regard to the evidence submitted with her request, she submitted a new report dated July 20, 2007 by Dr. McShane. This report is duplicative of Dr. McShane's prior opinion that appellant's herniated nucleus pulposus is employment related. The Board has held that evidence that repeats or duplicates that already of record does not constitute a basis for reopening a claim for merit review.[17]

---

[12] *See supra* note 1.

[13] 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[14] 20 C.F.R. § 10.606. *See Susan A. Filkins*, 57 ECAB 630 (2006).

[15] *Id*. at § 10.607(a). *See Joseph R. Santos*, 57 ECAB 554 (2006).

[16] *Id*. at §10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

[17] *See L.H.*, 59 ECAB ___ (Docket No. 07-1191, issued December 10, 2007); *James E. Norris*, 52 ECAB 93 (2000).

Appellant has not submitted any relevant and pertinent new evidence, advanced a legal argument not previously considered by the Office, nor argued that the Office erroneously interpreted a specific point of law. Thus, she has not met the criteria to have the Office reopen her case for review on the merits.[18]

## ***CONCLUSION***

The Board finds that appellant has not met her burden of proof in establishing that she sustained a back injury causally related to the October 25, 2006 employment incident. The Board also finds the Office properly denied her request for a merit review.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** decisions of the Office of Workers' Compensation Programs dated October 25 and July 13, 2007 are affirmed.

Issued: September 11, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[18] *M.E.*, 58 ECAB ___ (Docket No. 07-1189, issued September 20, 2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits).