United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 09-283**
	)	**Issued: August 17, 2009**
DEPARTMENT OF DEFENSE, DEPARTMENT OF THE AIR FORCE, BUCKELY AIR FORCE BASE, CO, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 10, 2008 appellant filed a timely appeal from an October 17, 2008 nonmerit decision of the Office of Workers' Compensation Programs that denied reconsideration of a May 29, 2008 merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit decisions in this case.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office properly denied his request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128.

FACTUAL HISTORY

On March 10, 2008 appellant, a 57-year-old store worker, filed an occupational disease claim (Form CA-2) for trigger finger. He first became aware of his condition on June 1, 2007 and realized its relation to his federal employment on December 28, 2007. Appellant attributed

his condition to stocking items at the store where he is employed. He reported that in the course of stocking items, he grabs items, using his fingers in a compressed position.

Appellant submitted a December 27, 2007 note signed by Dr. Pierre T. Onda, a Board-certified internist, who reported that he "may have work-related injuries and we recommend [him to] be evaluated by the occupational medicine department." In a separate report, also dated December 27, 2007, Dr. Onda diagnosed him with an inguinal hernia and trigger finger.

Appellant submitted a personal note dated January 10, 2008, which he identified stocking shelves as the potential cause of his condition. He stated that he discussed the matter with his physician, Dr. Onda who told him that grabbing items with fingers in a compressed position could cause trigger finger. Appellant reported that he was aware of his condition in June 2007 but assumed that it was caused by his diabetes or osteoarthritis.

By decision dated May 29, 2008, the Office denied appellant's claim because the evidence of record did not demonstrate the claimed medical condition was related to the established work-related events.

Appellant disagreed and requested reconsideration. In support of his reconsideration request, he submitted an August 25, 2008 medical note signed by Dr. Onda who asserted that appellant's acquired trigger fingers condition was work related. Dr. Onda asserted that appellant's job involved repetitive hand motions and, therefore, it was more than likely that his job activities had contributed to the causation of his condition.

By decision dated October 17, 2008, the Office denied reconsideration of its May 29, 2008 decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[2] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[3] As part of his burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[4] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality,

[1] 5 U.S.C. §§ 8101-8193.

[2] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[3] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *Supra* note 3; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[5]

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[6]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[7]

ANALYSIS -- ISSUE 1

Appellant identified stocking items at the store where he is employed as factors of his employment that produced his alleged injury. His burden is to establish, through the production of rationalized medical opinion evidence based on a complete factual and medical background, a causal relationship between the employee's diagnosed condition and the compensable employment factors. The Board finds the evidence of record insufficient to meet this burden and, therefore, appellant has not established that he sustained an injury in the performance of duty.

The relevant evidence of record consisted of two notes dated December 27, 2007 signed by Dr. Onda and appellant's January 10, 2008 personal note.

Appellant's personal note is of no probative value because an award of compensation may not be based on surmise, conjecture, speculation or his belief of causal relationship.[8] Causal relationship is a medical issue and must be established by a well-reasoned medical opinion.

[5] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[6] *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

[7] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[8] *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz*, 30 ECAB 57 (1979). *See also Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's self-serving declarations do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).

Because lay opinions carry no evidentiary weight, appellant's personal note is of no probative medical value and insufficient to meet his burden.[9]

Dr. Onda's notes are of diminished probative value as the content of one of the notes indicates his opinion is equivocal and the other note lacks an opinion on causal relationship. In his note, he reported that appellant "may have work-related injuries and we recommend [appellant] be evaluated by the occupational medicine department." This is an equivocal statement because, as a matter of law, such terms as "suspected, could, may, might be or probably" indicate that the report is equivocal, speculative or conjectural and, therefore, the report is of diminished probative value.[10]

While Dr. Onda's other note also dated December 27, 2007, proffered a diagnosis, it is of limited probative value because it does not provide an opinion on the causal relationship between the diagnosed condition and the identified factors of appellant's employment. The Board has consistently held that medical reports lacking a rationale on causal relationship are of diminished probative value.[11]

As there was no probative rationalized medical evidence of record establishing appellant's trigger finger was causally related to the identified factors of his employment, he had not established he sustained an injury in the performance of duty, as of May 29, 2008 the date the Office initially denied his claim.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[12] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[13] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[14] When a claimant

[9] *See Sheila Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.3(g) (April 1993).

[11] *See Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[12] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.606(b)(2).

[14] *Id*. at § 10.607(a).

fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[15]

The Board also has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[16] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[17]

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision. The Board finds that the Office did not consider all evidence submitted in support of appellant's reconsideration request.[18]

Appellant's August 28, 2008 reconsideration request neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, it did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant is not entitled to a review of the merits of his claim based upon the first and second above-noted requirements under section 10.606(b)(2).[19]

However, appellant did satisfy the third requirement under section 10.606(b)(2). He submitted relevant and pertinent new evidence with his August 28, 2008 reconsideration request. With appellant's reconsideration request, he submitted an August 25, 2008 note signed by Dr. Onda who asserted that appellant's acquired trigger finger condition was work related. Dr. Onda asserted that his job involved repetitive hand motions and, therefore, it was more likely than not that his job activities had contributed to the causation of his condition. This medical note is relevant and pertinent new evidence because it constitutes evidence of a physician's medical opinion which is relevant to a medical issue underlying the case at hand. As Dr. Onda's opinion in this report was not speculative, this report was not merely duplicative of his prior reports. The record reflects that this medical note, though filed with the wrong claim number, was of record at the time the Office made its October 17, 2008 decision.

The Act[20] provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as it considers necessary with respect to the claim.[21] Since the Board's jurisdiction of a case is limited to reviewing that evidence which was

[15] *Id*. at § 10.608(b).

[16] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[17] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[18] *William A. Couch*, 41 ECAB 548 (1990).

[19] 20 C.F.R. § 10.606(b)(2)(i) and (ii).

[20] 5 U.S.C. § 8101 *et seq.*

[21] 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.130; *see generally* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.7 (October 2005).

before it at the time of its final decision,[22] it is necessary that the Office review all evidence submitted by a claimant and received by it prior to issuance of its final decision. As Board decisions are final as to the subject matter appealed,[23] it is crucial that all evidence relevant to that subject matter which was properly submitted to it prior to the time of issuance of its final decision be addressed by the Office.

In the instant case, the Office did not review all the evidence of record prior to issuing its October 17, 2008 final decision, *i.e.*, the August 25, 2008 medical note signed by Dr. Onda. The Board, therefore, must set aside its October 17, 2008 compensation order and remand the case to the Office to fully consider the evidence which was properly submitted by appellant prior to the October 17, 2008 compensation order.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty. The Board also finds this case is not in posture for decision as the Office did not consider all evidence submitted in support of appellant's reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2008 decision of the Office of Workers' Compensation Programs is affirmed. The Board also orders that the October 17, 2008 decision of the Office is set aside and the case is remanded to the Office for further development in accordance with this decision.

Issued: August 17, 2009
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

[22] 20 C.F.R. § 501.2(c).

[23] *Id.* at § 501.6(c).