United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 09-1161**
	)	**Issued: December 1, 2009**
DEPARTMENT OF VETERANS AFFAIRS, TOGUS VETERANS ADMINISTRATION MEDICAL CENTER, Augusta, ME, 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 March 26, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 27, 2009 nonmerit decision and the September 29, 2008 merit decision. 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 established that she sustained an injury in the performance of duty on June 4, 2007; and (2) 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 June 7, 2007 appellant, a 46-year-old staff nurse, filed a traumatic injury claim (Form CA-1) for a "probable herniated disc." She alleged that, on June 7, 2007, after sitting down at a computer, she felt a "pop" in her thoracic spine and experienced "immediate pain."

Appellant submitted witness statements and June 5 and 14, 2007 notes signed by Dr. Charles D. Radis, an orthopedic surgeon, who reported findings on examination and diagnosed mid-thoracic pain.

In a June 5, 2007 report (Form CA-20), Dr. Melanie M. Thompson, Board-certified in family medicine, reported findings on examination and diagnosed thoracic back pain. She attributed this condition to the June 4, 2007 incident described by appellant.

In a report and note dated January 8 and July 6, 2007, Dr. Michael F. Regan, a Board-certified orthopedic surgeon, reported findings on examination and opined that appellant "certainly may have a lumbar herniation … [that] is probably work related." He also diagnosed low back pain and discomfort "probably due to spasm."

By decision dated October 10, 2007, the Office denied the claim because the evidence of record did not establish that appellant sustained an injury as defined by the Federal Employees' Compensation Act.

On December 18, 2007 appellant requested reconsideration.

Appellant submitted a copy of Dr. Regan's January 8, 2008 note previously of record.

By decision dated September 29, 2008, the Office denied modification of its prior decision because, while the evidence of record established that the incident occurred as alleged, it did not establish that this incident caused an injury for purposes of the Act.

Appellant disagreed and on October 5, 2008 requested reconsideration, again submitting a copy of Dr. Regan's January 8, 2008 note.

By decision dated January 27, 2009, the Office denied the request because it did not demonstrate that the Office's prior decision was erroneous, raise a new legal argument not previously considered by the Office or present new relevant and pertinent evidence not previously considered by the Office.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[1] has the burden of establishing the essential elements of the 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 as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2] These are essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[3]

[1] 5 U.S.C. §§ 8101-8193.

[2] *C.S.*, 60 ECAB __ (Docket No. 08-1585, issued March 3, 2009).

[3] *S.P.*, 59 ECAB __ (Docket No. 07-1584, issued November 15, 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[4] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[5]

ANALYSIS -- ISSUE 1

The Office accepted that the employment incident occurred as alleged. Appellant's burden is to demonstrate that the accepted employment incident caused a personal injury. Causal relationship is a medical issue that can only be proven by probative rationalized medical opinion evidence. The Board finds the evidence of record insufficient to satisfy appellant's burden.

The medical evidence of record consists of notes and reports signed by Drs. Radis, Regan and Thompson.[6] This evidence is of no probative value on the issue of causal relationship as they diagnosed pain, which, for purposes of the act, is merely a symptom, not a compensable medical diagnosis.[7] While Dr. Regan surmised that appellant "may have a lumbar herniation," his conclusion is conjectural in nature and is unsupported by medical rationale.[8] Although Dr. Thompson, diagnosing thoracic back pain, attributed appellant's condition to the accepted June 4, 2007 incident, she is merely repeating appellant's allegations and her opinion is unsupported by medical rationale. Furthermore, this evidence does not describe the mechanism of injury or proffer a medical rationale explaining how the accepted employment incident caused a medically diagnosed compensable injury. These deficiencies reduce the probative value of this evidence such that it is insufficient to satisfy appellant's burden.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[9]

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[4] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[5] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[6] The Board notes that appellant submitted reports signed by a certified physician assistant and a physical therapist. Because healthcare providers such as nurses, acupuncturists, physician assistants and physical therapists are not considered "physicians" under the Act, their reports and opinions do not constitute competent medical evidence. 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983). Thus, these reports have no evidentiary value.

[7] *Robert Broome*, 55 ECAB 339, 342 (2004).

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

[9] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

Appellant has not submitted probative medical opinion evidence supporting her claim as, consequently, has not satisfied her burden of proof.

LEGAL PRECENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[10] 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.[11] 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.[12] When a claimant 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.[13]

ANALYSIS -- ISSUE 2

Appellant did not argue that the Office erroneously applied a point of law, nor did she advance a new legal argument not previously considered by the Office. Therefore, she was not entitled to a merit review based upon the first two enumerated grounds noted above.[14]

Appellant also failed to submit relevant and pertinent new evidence not previously considered by the Office and therefore did not satisfy the third requirement for further merit review. She submitted a copy of Dr. Regan's January 8, 2008 note. This note was already of record and considered by the Office in its prior decision. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[15]

The evidence submitted by appellant does not satisfy the third criterion noted above, for reopening a claim for merit review. As she did not meet any of the regulatory requirements, the Board finds that the Office properly denied the application for reconsideration without reopening the case for a review on the merits.[16]

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[10] 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).

[11] 20 C.F.R. § 10.606(b)(2).

[12] *Id.* at § 10.607(a).

[13] *Id.* at § 10.608(b).

[14] *Supra* note 3.

[15] *Richard Yadron*, 57 ECAB 207 (2005); *Eugene Butler*, 36 ECAB 393 (1984).

[16] *See James E. Norris*, 52 ECAB 93 (2000).

CONCLUSION

The Board finds that appellant has not established that she sustained an injury in the performance of duty on June 4, 2007. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2009 and September 29, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 1, 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