United States Department of Labor
Employees' Compensation Appeals Board

N.L., Appellant	)	
and	)	**Docket No. 09-24**
	)	**Issued: February 10, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brecksville, OH, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 2, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 15, 2008 denying her traumatic injury claim, and its September 11, 2008 nonmerit decision denying her 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 sustained a traumatic injury while in the performance of duty on June 17, 2008; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 7, 2008 appellant, a 49-year-old administrative assistant, filed a traumatic injury claim alleging that on June 17, 2008 she sustained an injury while "lifting and carrying a stack of

patients' C-Files from Building 5 to Building 2 C & P Office." When asked to describe the nature of the injury, she stated, "It hurt to set for a short period of time."

In a letter dated July 14, 2008, the Office informed appellant that the information and evidence submitted was insufficient to establish that she actually experienced the incident as alleged. Appellant was advised to provide details of the facts and the circumstances surrounding the alleged incident, including the specific body part that was injured, as well as a medical report with a diagnosis and an opinion as to how the alleged incident caused the diagnosed condition.

Appellant submitted notes dated June 17, 2008 from Dr. Edward P. Horvath, a Board-certified internist, reflecting appellant's report that she was experiencing acute muscle spasms and lower back pain after moving and lifting files. Dr. Horvath noted that appellant claimed a history of chronic, service-related low back pain. Appellant provided a June 25, 2008 report from Dr. Sangeeta S. Bhavnani, a Board-certified internist, noting appellant's complaints of low back pain after lifting files approximately one week earlier. Dr. Bhavnani observed that a report of a 2007 magnetic resonance imaging (MRI) scan revealed a herniated disc at L5-S1. Appellant submitted notes for the period July 23 to August 8, 2008 from Dr. James D. Kristosik, a chiropractor, indicating that appellant was receiving treatment for spasm and lumbar strain.

On July 22, 2008 the employing establishment related that appellant was treated by Dr. Horvath, an employee health physician, on June 17, 2008 for complaints of left lower back pain after moving and lifting files. Appellant stated a history of chronic, service-connected back pain. She was seen on June 23, 2008 by Dr. George Knappenberger, a Board-certified internist, who diagnosed "tail-bone pain injury with exacerbation of chronic condition." On June 26, 2008 appellant was assessed with "very severe left ischial bursitis and mild low back pain." On July 2, 2008 Dr. Kyung Hee Nam, a Board-certified physiatrist, stated that appellant's very severe left ischial bursitis was resolving nicely. On July 2, 2008 appellant returned to limited-duty work.

The record contains a July 22, 2008 workers' compensation form for the prevention of dual benefits for job-related injuries. The form reflects that appellant is currently receiving veterans' benefits for a disability related to a spinal condition. The form also reflects that she has claimed that she sustained a work-related injury to her lower back and buttock on June 17, 2008.

In a merit decision dated August 15, 2008, the Office denied appellant's claim, finding the evidence insufficient to establish that the events had occurred as alleged on June 17, 2008.

On August 22, 2008 appellant submitted an appeal request form for reconsideration. In support of her request, she submitted copies of medical reports previously received and reviewed by the Office. Appellant also submitted the following medical evidence: notes dated June 23, 2008 from Dr. Knappenberger, reflecting appellant's statement that she "hurt" her back the previous week while lifting C-Files; notes dated June 26, 2008 from Dr. Nam relating appellant's claim that she developed sudden lower back and buttock pain while lifting C Files at work on June 17, 2008, and assessing left ischial bursitis; nursing notes dated June 23 and 25, 2008; a June 26, 2008 report of an x-ray of the lumbosacral spine; and a report of a July 10, 2008 MRI scan of the lumbar spine.

By decision dated September 11, 2008, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review.[1]

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act[2] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[4]

An employee seeking benefits under the Act has the burden of proof to establish 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 or specific condition for which compensation is claimed is causally related to the employment injury.[5] When an employee claims that she sustained a traumatic injury in the performance of duty, she must establish the "fact of injury," namely, she must submit sufficient evidence to establish that she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged, and that such event, incident or exposure caused an injury.[6]

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury and failure to obtain medical treatment may, if otherwise unexplained, cast substantial

[1] The Board notes that appellant submitted additional evidence after the Office rendered its February 1, 2007 decision. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Therefore, this new evidence cannot be considered by the Board on appeal. Appellant may submit this evidence to the Office, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

[2] 5 U.S.C. § 8101 *et seq.*

[3] 5 U.S.C. § 8102(a).

[4] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

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

[6] *See Paul Foster*, 56 ECAB 208 (2004); *see also Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002). 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(ee).

doubt on a claimant's statements. The employee has not met her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[7]

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.[8] 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.[9]

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 that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, 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 established incident or factor of employment.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a traumatic injury on June 17, 2008.

Appellant noted on her CA-1 form that she sustained an injury while "lifting and carrying a stack of patients' C-Files from Building 5 to Building 2 C & P Office." When asked to describe the nature of the injury, she stated, "It hurt to set for a short period of time." Appellant provided no detailed account of the alleged injury and failed to identify a specific body part that was affected. She presented no evidence regarding the specific mechanism of injury, as required in a claim for traumatic injury, nor did she allege that she experienced a specific event, incident or exposure at a definite time, place and manner.[11] Appellant's vague recitation of the facts does not support her allegation that a specific event occurred which caused an injury.[12]

The contemporaneous medical evidence of record is insufficient to establish appellant's claim. Drs. Horvath, Kristosik and Bhavnani reported that appellant was experiencing lower back pain after allegedly moving and lifting files. Dr. Nam assessed severe left ischial bursitis.

[7] *See Betty J. Smith, supra* note 6.

[8] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[9] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

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

[11] *See Betty J. Smith, supra* note 6; *see also Tracey P. Spillane, supra* note 6.

[12] *See Dennis M. Mascarena, supra* note 9.

Dr. Knappenberger diagnosed "tail-bone pain injury with exacerbation of chronic condition." However, none of appellant's physicians provided a detailed history of injury, describing the time, place and manner in which the alleged injury occurred. Their reports do not identify a specific causative event, and reflect uncertainty as to the derivation of appellant's condition.

The July 22, 2008 workers' compensation form for the prevention of dual benefits for job-related injuries reflects that appellant is currently receiving veterans' benefits for a disability related to a spinal condition. It also reflects that appellant has claimed that she sustained a work-related injury to her lower back and buttock on June 17, 2008. As the form provides no details as to the time, place and manner in which the injury occurred, it is insufficient to establish that the incident occurred as alleged.

Appellant has not presented any evidence, such as witness statements, to substantiate that an incident occurred on June 17, 2008 which caused an injury, as alleged. Her representation that "it hurt to set for a short period of time," does not describe the occurrence of an injury.

In *Tracey P. Spillane*,[13] an employee filed a claim alleging that she sustained an allergic reaction at work. However, she did not clearly identify the aspect of her employment which she believed caused the claimed condition, but only made vague references to "possibly having a reaction to magazines or latex gloves." The Board held that she did not adequately specify the employment factors which caused her need for medical treatment, nor did she specify details such as the extent and duration of exposure to any given employment factors. The medical record reflected that the employee did not clearly report to her physicians that she felt her claimed condition was due to a specific and identifiable employment factor. In this case, appellant's allegations are vague and do not relate with specificity the cause of the injury or how she injured her back while performing her duties on June 17, 2008. Although she stated that she was lifting files, she did not address the immediate consequence of the injury, such as whether she experienced immediate pain, or what actions she took immediately following the alleged incident (*e.g.*, whether she fell, stumbled or had to sit down).

Appellant has not met her burden of proof to establish that she actually experienced an employment incident at the time, place, and in the manner alleged, or that the alleged incident caused an injury. As she has not met her burden of proof to establish the fact of injury, it is not necessary to discuss the probative value of the medical reports.[14]

LEGAL PRECEDENT -- ISSUE 2

The Act[15] provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.

[13] *See Tracey P. Spillane, supra* note 6.

[14] *Id.*

[15] 5 U.S.C. § 8101 *et seq.*

The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[16]

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 relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[17]

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 these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits.[18] 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.[19]

ANALYSIS -- ISSUE 2

Appellant's August 22, 2008 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by the Office. The Office denied appellant's claim on the grounds that she failed to sufficiently allege, or provide evidence to establish, that she actually experienced a specific incident on June 17, 2008 that caused an injury. Its August 15, 2008 merit decision, therefore, turned on a factual issue. When appellant requested reconsideration, she did not submit a narrative statement addressing the circumstances surrounding the alleged incident. She did not clarify the specific body part injured, or the mechanics of the alleged injury. Rather, appellant submitted medical notes and reports, which largely duplicated documents already received and considered by the Office. As these documents did not address the issue decided by the Office in its August 15, 2008 decision, namely, whether appellant experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged, they are irrelevant to the issue at hand.[20] Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

[16] 20 C.F.R. § 10.605.

[17] 20 C.F.R. § 10.606.

[18] *Donna L. Shahin*, 55 ECAB 192 (2003).

[19] 20 C.F.R. § 10.608.

[20] *D. Wayne Avila*, 57 ECAB 642 (2006).

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her August 22, 2008 request for reconsideration .

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained a traumatic injury to her back in the performance of duty on June 17, 2008. The Board further finds that the Office properly refused to reopen appellant's claim for merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 11 and August 15, 2008 are affirmed.

Issued: February 10, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board