United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 09-19**
	)	**Issued: March 13, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Monticello, KS, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 1, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated February 20 and June 27, 2008 denying her claim. The February 20, 2008 decision also denied her request for a subpoena. 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 has met her burden of proof in establishing that she sustained a back condition causally related to factors of her federal employment; and (2) whether the Office properly denied her request for a subpoena.

FACTUAL HISTORY

On May 15, 2007 appellant, then a 42-year-old hearing impaired rural carrier, filed a traumatic injury claim for back pain that she stated began on May 3, 2007. She stopped work on May 5, 2007. The employing establishment controverted the claim, stating that when appellant went home sick on May 5, 2007 she told her supervisor she did not hurt her back at work.

In a written statement, appellant noted that on May 3, 2007 she worked her normal duties, which included having to case and lift one to two bunches of flats. When she finished her work at 11:30 a.m., she went to a farewell party. When appellant arose from sitting, she felt a "knot" in her back with back pain that became worse on May 4 and 5, 2007 and she was unable to do any lifting. She saw her doctor on May 7, 2007 and was told she was having muscle spasms from lifting. Appellant stayed home until she returned to the doctor on May 14, 2007. She indicated that her doctor told her she had a herniated disc or diverticulitis. In a May 14, 2007 disability slip, Dr. David B. Karty, a Board-certified family practitioner, advised that he was holding appellant off work for a week for low back pain and a possible herniated disc or diverticulitis.

On May 30, 2007 the Office requested additional factual and medical information, including a medical report which contained history of injury, firm diagnosis, objective findings, test results, treatment provided, prognosis, and period and extent of disability.

In a May 7, 2007 progress note, Dr. Karty advised that appellant had back pain for about five days, which began after lifting at work. He previously treated her in January and February for back pain, but her present pain was different and that lifting, in particular, was painful. On May 14, 2007 Dr. Karty assessed low back pain with radicular-type symptoms and diarrhea. He noted that appellant's pain was unchanged without the use of medications. The pain was in the lower right side and kept her awake at night. Dr. Karty also noted that appellant developed severe diarrhea over the previous week, but advised that it was not clear whether he could connect the two sets of symptoms. He ordered diagnostic testing of the abdomen and pelvis. On May 17, 2007 Dr. Karty advised that appellant's symptoms were severe back pain and diarrhea. He advised that the condition commenced May 2, 2007 and was ongoing. Appellant was unable to work and needed pain management, possible physical therapy and ongoing medical treatment. A disability slip indicated that appellant could return to light duty on June 2, 2007. In a June 6, 2007 note, Dr. Ira M. Fishman, a Board-certified physiatrist, advised that appellant was seen for right sacroiliac joint dysfunction. He provided appellant's work restrictions.

By decision dated July 10, 2007, the Office denied appellant's claim for compensation, finding that fact of injury was not established. It noted that appellant failed to respond to its request for additional factual information, including whether her back pain occurred over one work shift or over more than one work shift. The Office also found that the medical evidence did not provide a definite diagnosis for the back pain.

On August 6, 2007 appellant's attorney requested an oral hearing, which was scheduled for December 11, 2007.

On September 18, 2007 appellant's attorney requested subpoenas for several personnel at the employing establishment, Office and medical providers to appear at the hearing. By letter dated October 23, 2007, the Office hearing representative denied appellant's subpoena request, finding that written statements from any or all of the witnesses appellant requested would be equally compelling. Counsel was advised that additional evidence could be submitted post-hearing. In a November 10, 2007 letter, counsel disagreed with the Office's hearing representative's decision not to issue subpoenas.

Appellant submitted a May 30, 2007 CT of the abdomen and pelvis, which revealed a left kidney with several small parapelvic cysts without obstructive uropathy; mild sigmoid colon diverticulosis and surgical absence of the gallbladder. A May 30, 2007 MRI scan revealed no evidence of significant discogenic disease or neural compression. Appellant also submitted notes performing to physical therapy.

At the December 11, 2007 hearing, appellant noted that she first had symptoms of the claimed injury on May 3, 2007 and that it worsened on May 5, 2007. In a September 11, 2007 document, she advised her supervisors that she had injured herself at work on May 3, 2007. Appellant told her temporary supervisor that she injured her low back at work that day while lifting tubs and flats of mail. She stated that, on May 5, 2007, she told a coworker that she had injured her back on May 3, 2007 while lifting tubs and flats of mail. Appellant also submitted a May 7, 2007 progress report from Dr. Karty.

By decision dated February 20, 2008, an Office hearing representative modified the July 10, 2007 decision to find that appellant's claim should be adjudicated an occupational disease claim as she developed her back pain over a three-day period. The hearing representative affirmed the denial of the claim on the basis that causal relationship was not established. The hearing representative also denied appellant's attorney's request for subpoenas for the reason the requested information and individual's statements could be obtained by other methods.

On May 19, 2008 appellant requested reconsideration of the February 20, 2008 decision. She submitted medical records from 2003; a July 18, 2007 pain evaluation form; a July 18, 2007 work restriction form; and July 13 and 30, 2007 rehabilitation progress reports.

In a June 6, 2007 report, Dr. Fishman noted that appellant had lower back pain since May 3, 2007 that occurred when she was repetitively lifting and twisting her torso while handling tubs of mail. Appellant had been placed on light-duty restrictions by Dr. Karty and remained off work as the employing establishment could not accommodate her restrictions. Dr. Fisher found evidence of sacroiliac joint dysfunction with significant right-sided involvement which was a result of her work injury in May 2007. He advised that the sacroiliac joint dysfunction was the major contributing factor to her lower back pain and she may have intermittent sciatic nerve irritation from this. Dr. Fishman recommended physical therapy and provided work restrictions. In a July 18, 2007 report, he advised that examination revealed a slight improvement in her right sacroiliac joint dysfunction. Dr. Fishman indicated that appellant should continue physical therapy and light-duty work within the restrictions he outlined. On August 8, 2007 he noted significant improvement in her residual right sacroiliac joint dysfunction. Dr. Fishman recommended physical therapy and light-duty restrictions. A sacroiliac belt was recommended when appellant resumed her regular work activities.

By decision dated June 27, 2008, the Office denied modification of the February 20, 2008 decision.

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 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 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 the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[3]

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.[4]

Rationalized medical opinion evidence is medical evidence which 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. The opinion of the physician must: be based on a complete factual and medical background of the claimant; be one of reasonable medical certainty; and, be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[5] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[6] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value.[7]

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between her claimed injury and her employment.[8] To establish a causal relationship, appellant must submit a physician's report in

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Anthony P. Silva*, 55 ECAB 179 (2003).

[3] *See Ellen L. Noble*, 55 ECAB 530 (2004).

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

[5] *Leslie C. Moore*, 52 ECAB 132 (2000); *Bobby J. Parker*, 49 ECAB 260 (1997).

[6] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

[7] *Paul Kovash*, 49 ECAB 350 (1998).

[8] *Donald W. Long*, 41 ECAB 142 (1989).

which the physician reviews the employment factors identified by appellant as causing her condition and, taking these factors into consideration as well as findings upon examination of appellant and her medical history, state whether the employment injury caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his or her opinion.[9]

ANALYSIS -- ISSUE 1

Appellant claimed that she sustained a back condition due to lifting flats between May 3 and 5, 2007. The record supports that she lifted flats and performed lifting and similar duties as part of her job; however, she did not submit sufficient rationalized medical evidence explaining how and why work factors would cause or contribute to her back condition.

On May 7, 2007 Dr. Karty related appellant's account of back pain after lifting something at work,[10] but provided no rationalized opinion as to how her employment activities caused or aggravated a diagnosed medical condition.[11] The subsequent reports from Dr. Karty do not specifically address whether particular work activities caused a specific medical diagnosis. Dr. Karty's opinion is of limited probative value in establishing causal relationship.

Dr. Fishman also noted appellant's history of back pain arising on May 3, 2007 after repetitively lifting and twisting her torso while handling tubs of mail. He opined that appellant's sacroiliac joint dysfunction was the result of her work. However, Dr. Fishman did not provide any medical rationale to explain the basis for his stated conclusion. He did not explain how her particular work activities in lifting or twisting would cause or aggravate appellant's joint dysfunction. Dr. Fishman's opinion is insufficiently rationalized to establish causal relationship.[12]

The record contains several diagnostic reports. However, these reports do not contain any opinion on the causal relationship of the conditions found on diagnostic testing. Therefore, these reports have no probative value in establishing causal relationship.[13] The Office also

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[9] *Id.*

[10] Dr. Karty noted May 2, 2007 as the onset of appellant's symptoms and indicated in his May 7, 2007 progress note that appellant had back pain "for about five days" after lifting something at work. Since the Office hearing representative found appellant's injury occurred over more than one work shift and considered her claim to be an occupational disease as opposed to a traumatic injury, Dr. Karty's deviation from the May 3, 2007 accepted date of injury is not based on an incorrect factual history.

[11] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[12] *Deborah L. Beatty*, 54 ECAB 340 (2003) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[13] *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).

received physical therapy reports. However, physical therapists are not physicians under the Act. Thus, their opinions do not constitute medical evidence and have no weight or probative value.[14]

Consequently, appellant has not met her burden of proof in establishing causal relationship between employment factors and her claimed back condition.

LEGAL PRECEDENT -- ISSUE 2

Section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.[15] The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.[16]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained.[17] Section 10.619(a)(1) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[18]

The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.[19] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.[20]

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[14] *See Jane A. White*, 34 ECAB 515, 518 (1983). *See* 5 U.S.C. § 8101(2). This subsection defines the term physician. *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[15] 5 U.S.C. § 8126(1).

[16] 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

[17] *Id.*

[18] 20 C.F.R. § 10.619(a)(1).

[19] *See Gregorio E. Conde*, *supra* note 16.

[20] *Claudio Vazquez*, 52 ECAB 496 (2001).

ANALYSIS -- ISSUE 2

On August 6, 2007 appellant requested a hearing and by letter dated September 18, 2007, requested subpoenas to compel the attendance and testimony of personnel at the employing establishment, the Office and certain medical providers. On February 20, 2008 the Office hearing representative denied appellant's request to subpoena such witnesses, finding that written statements from any or all of the persons identified by appellant would be equally compelling. The hearing representative noted that appellant could obtain a copy of her medical records and case file.

The Board finds that the hearing representative properly denied appellant's subpoena request because she did not establish why a subpoena was the best method to obtain the evidence in question and why there was no other means by which the testimony could be obtained. An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[21] The mere showing that the evidence would support a contrary conclusion is insufficient to prove an abuse of discretion. The Board finds that the hearing representative did not abuse her discretion in denying appellant's request for subpoenas.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a back condition in the performance of duty. The Board further finds that the Office properly denied her request for a subpoena.

[21] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 27 and February 20, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 13, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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