

FACTUAL HISTORY

On May 18, 2005 appellant, then a 59-year-old screener, filed a traumatic injury claim alleging that on May 14, 2005 she injured her lower back while lifting a bag.¹ On her claim form, the employing establishment manager controverted the claim stating that it had no knowledge of the injury and that the supervisor was not told of the injury at the time it occurred.

By letter dated June 29, 2005, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It requested factual and medical evidence to establish her claim.

In response to the Office's request for information, appellant submitted medical and factual information including: a May 18, 2005 employing establishment incident report; her July 27, 2005 statement; a duty status report (Form CA-17) and an attending physician's report (Form CA-20) dated June 29, 2005, disability notes and reports dated June 13 and 20 and October 17, 2005 from Dr. Dante Trovato, a treating Board-certified orthopedic surgeon; reports dated June 17 and 22, November 29 and December 8 and 21, 2005 and disability notes from Dr. Carlisle L. Saint Martin, a treating physician; a May 19, 2005 duty status report (Form CA-17) and July 18, 2005 report by Dr. Lawrence J. Marino, a treating physician; a March 27, 2006 report by Dr. Richard W. Johnson, an examining Board-certified neurological surgeon.

In the May 18, 2005 incident report, the employing establishment noted that appellant alleged that she injured her back on May 14, 2005 due to lifting a heavy bag at approximately 19:00 hours. The report further noted that when appellant reported to work on May 17, 2005 she informed Kelly Turner, a supervisor, "that her back was sore but she didn't know what she did to it."

On June 13, 2005 Dr. Trovato diagnosed cervical, lumbar and thoracic strains. He noted that appellant injured herself at work on May 15, 2005 when she lifted a heavy bag.

In the June 17, 2005 report, Dr. Saint Martin diagnosed lower back pain since May 2005. He stated that appellant related that she injured her back on May 15, 2005 while lifting heavy luggage for inspection. Appellant stated that following the lifting of the heavy luggage she felt increased lower back pain. Dr. Saint Martin, in the June 22, 2005 report, diagnosed a lumbar herniated nucleus pulposus and stated that appellant could no longer do any lifting.

In a June 29, 2005 attending physician's report (Form CA-20), Dr. Trovato diagnosed a disc herniation which he attributed to lifting a heavy bag. He checked "yes" to the question of whether he thought the injury was employment related.

On July 18, 2005 Dr. Marino noted that appellant sustained an injury at work on May 14, 2005 and that she was first seen for the injury on May 19, 2005. Appellant related that she injured her back while lifting a heavy bag and she immediately felt low back pain. Dr. Marino noted that she continued to complain of back pain at her next visit on May 26, 2005. At this point he believed appellant might have developed a disc herniation and referred her to

¹ Appellant retired on disability from the employing establishment effective June 5, 2008.

Dr. Trovato, who diagnosed a compressed nerve in the lumbar region and referred her to Dr. Saint Martin.

In a July 27, 2005 response, appellant noted that she injured her lower back on May 14, 2005 while working. She noted a bag from the conveyor belt which was too heavy and felt a sharp pain in her back. Appellant stated that she reported the injury to lead supervisor, Gaitree Chan, and worked the rest of her shift. She noted that she was off work on May 16 and 17, 2005 and had leg and back pain hurt when she reported to work on May 18, 2005. As appellant had so much back and leg pain, she completed an accident report on May 18, 2005 and left work before her shift ended. On May 19, 2005 she stated that she sought medical treatment.

On March 27, 2006 Dr. Johnson reported that appellant injured her back at work in May 2005 when she lifted a bag and immediately felt back pain. He reported that she continued to have back pain which radiated into her left leg.

By decision dated April 10, 2006, the Office denied appellant's claim, finding that she did not sustain an injury while in the performance of duty. It determined that the May 14, 2005 incident had not occurred at work. The Office also found the medical evidence of record was insufficient to establish that appellant sustained an injury causally related to factors of her employment.

On April 5 and May 8, 2007 appellant requested reconsideration and submitted medical and factual evidence in support of her request including an April 30, 2006 statement by Ms. Chan and an undated statement by Tameka Mells, who stated that she had been working with appellant on May 14, 2005 when appellant injured her back picking up a bag. In her statement, Ms. Chan noted that she was the supervisor on duty on May 16, 2006 when appellant informed her that her back hurt and requested to be reassigned. Appellant stated that she had injured her back the previous day while lifting a bag and added that she was unaware of the proper reporting procedures.

On May 15, 2007 the Office received an undated report from Dr. Marino. In the report, Dr. Marino noted that appellant sustained a back injury at work on May 14, 2005 due to lifting a bag. He opined that appellant sustained a significant lower back injury and was precluded from any stretching, lifting and bending.

On April 30, 2007 the employing establishment contended that there was no evidence that appellant was injured at work as there were no witness statements and she did not report the injury until May 18, 2005. The employing establishment also submitted evidence that Ms. Mells had not worked on May 14, 2005.

In a May 1, 2007 statement, Ms. Chan stated that her April 30, 2006 statement that appellant had been accommodated on May 16, 2005 was incorrect. She noted that as the statement was written up almost a year later she "was unaware of specific dates." Ms. Chan stated that she recalled that appellant worked with her at some point during the week in question "and stated that her back was hurting from lifting a day ago." She related that she "had no evidence of this and did not witness this" nor could she "pinpoint the day this occurred or the day we entered work when she stated that her back was already hurting prior to her shift."

In a May 3, 2007 statement, Ms. Mells, a coworker, explained that her statement that she had been working with appellant on May 14, 2005 was incorrect. She stated that appellant requested that she provide a statement several times which she did more than a year after the injury. Ms. Mells related that appellant stated that she had injured her back at work while lifting a bag. She noted that she did not realize that her statement would be used to support appellant's claim and that she did not witness appellant's alleged injury.

By decision dated July 3, 2007, the Office denied appellant's request for modification of the denial of her claim.

On June 23, 2008 appellant's counsel requested reconsideration. She contended that appellant's statement that she was injured on May 14, 2008 constituted the weight of the evidence as there was no strong or persuasive evidence refuting her statement. Counsel also contended that the medical evidence of record established that her back condition was causally related to her employment injury and was entitled to benefits.

In a September 17, 2008 decision, the Office denied appellant's request for reconsideration. It found that the arguments presented by appellant were without probative value as he did not address the inconsistencies in the record and the statements from her coworkers.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128 of the Act,² the Office's regulation provide that 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.³ 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.⁴ 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 of the merits.⁵

ANALYSIS

Appellant's June 23, 2008 request for reconsideration neither showed that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered. Her representative recited the law as it relates to her burden in establishing the fact of injury and strongly contended that appellant met her burden. However, appellant failed to show how the Office erred, nor did she advance a relevant legal argument not

² 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).

³ 20 C.F.R. § 10.606(b)(1)-(2). *See C.N.*, 60 ECAB ___ (Docket No. 08-1569, issued December 9, 2008).

⁴ 20 C.F.R. § 10.607(a). *See A.F.*, 59 ECAB ___ (Docket No. 08-977, issued September 12, 2008).

⁵ *R.M.*, 59 ECAB ___ (Docket No. 08-734, issued September 5, 2008).

previously considered. In this regard, counsel merely disagreed with the Office's conclusion that appellant failed to establish the fact of injury. She contended that appellant's statement that she injured herself on May 14, 2005 should stand as it was not refuted by strong or persuasive evidence. However, in denying appellant's claim, the Office found that the factual basis for the claim contained too many inconsistencies as to when the injury occurred based on both the medical and factual evidence. Appellant did not address the inconsistencies noted by the Office in concluding that her statements describing the facts and the circumstances surrounding the alleged injury should suffice. The Board finds, therefore, that appellant has failed to satisfy either of the first two requirements under section 10.606(b)(2).

Appellant also failed to satisfy the third requirement listed in section 10.606(b). She did not submit any relevant and pertinent new evidence not previously considered by the Office.

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

CONCLUSION

The Board finds that the Office properly denied appellant's July 23, 2008 request for reconsideration without conducting a merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 17, 2008 be affirmed.

Issued: September 9, 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