United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 09-2170**
	)	**Issued: April 26, 2010**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Ray Brook, NY, 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 August 21, 2009 appellant filed a timely appeal from the February 24, 2009 merit decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and the May 22, 2009 nonmerit decision denying his request for merit review. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a back injury while in the performance of duty on December 18, 2008; and (2) whether the Office properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 7, 2009 appellant, a 46-year-old correctional officer, filed a traumatic injury claim alleging that he sustained a back injury on December 18, 2008. He stated that he felt a pain in his lower back while wrestling with an inmate to break up a fight.

In a letter dated January 14, 2009, the Office informed appellant that the information submitted was insufficient to establish his claim. He was advised to submit additional evidence, including a physician's report, with a diagnosis and a rationalized opinion as to how the diagnosed condition was causally related to the December 18, 2008 incident.

Appellant submitted a report of a December 29, 2008 magnetic resonance imaging (MRI) scan of the thoracic spine, which revealed mild degenerative disease of the thoracic spine.

By decision dated February 24, 2009, the Office denied appellant's claim. Although it accepted that the work event occurred as alleged, the Office found that the medical evidence did not contain a diagnosis that could be connected to the accepted event and, therefore, was insufficient to establish that appellant had sustained an injury under the Federal Employees' Compensation Act on December 18, 2008.[1]

Appellant requested reconsideration of the February 24, 2009 decision. In support of his request, he submitted a January 14, 2009 employing establishment injury report, signed by Noreen von Borstel, a nurse practitioner. The form contained a diagnosis of sternocleidomastoid muscle strain and identified the date of injury as December 18, 2008.

By decision dated May 22, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

The Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] 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.[3]

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his 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

[1] Appellant submitted new evidence on appeal, which he asserted, would establish his claim. 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. § 8102(a).

[3] 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).

causally related to the employment injury.[4] When an employee claims that he sustained a traumatic injury in the performance of duty, he must establish the fact of injury, consisting of two components, which must be considered in conjunction with one another. The first is whether the employee actually experienced the incident that is alleged to have occurred at the time, place and in the manner alleged. The second is whether the employment incident caused a personal injury and, generally, this can be established only by medical evidence.[5]

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.[6] An award of compensation may not be based on appellant's belief of causal relationship.[7] 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.[8] Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under the Act.[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 Office accepted that appellant was a federal employee, that he timely filed his claim for compensation benefits and that the December 18, 2008 workplace incident occurred as alleged. The issue, therefore, is whether appellant has submitted sufficient medical evidence to establish that the employment incident caused an injury. The medical evidence presented does not contain a rationalized medical opinion establishing that the work-related incident caused or

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

[5] *Deborah L. Beatty*, 54 ECAB 340 (2003). *See also Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002). The term injury as defined by the Act refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q)(ee).

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

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

[8] *Id.*

[9] 20 C.F.R. § 10.303(a).

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

aggravated any particular medical condition or disability. Therefore, appellant has failed to satisfy his burden of proof.

Medical evidence submitted by appellant consisted of a December 29, 2008 MRI scan of the thoracic spine, which showed mild degenerative disease of the thoracic spine. The MRI scan report does not contain an opinion as to the cause of the diagnosed condition. Therefore, it is of limited probative value and is insufficient to establish appellant's claim.[11] The record does not contain an opinion by any qualified physician supporting appellant's contention that he sustained a back condition as a result of the accepted employment activity.

Appellant expressed his belief that his back condition resulted from the December 18, 2008 employment incident. The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[12] Neither the fact that the condition became apparent during a period of employment, nor the belief that the condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.[13] Causal relationship must be substantiated by reasoned medical opinion evidence, which it is appellant's responsibility to submit. Therefore, appellant's belief that his condition was caused by the work-related incident is not determinative.

The Office advised appellant that it was his responsibility to provide a comprehensive medical report, which described his symptoms, test results, diagnosis, treatment and the doctor's opinion, with medical reasons, on the cause of his condition. Appellant failed to submit appropriate medical documentation in response to the Office's request. As there is no probative, rationalized medical evidence addressing how appellant's claimed back condition was caused or aggravated by his employment, appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty causally related to factors of his federal employment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[14] the Office 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.[15] To be entitled to

[11] The Board has long held that medical evidence, which does not offer an opinion regarding the cause of an employee's condition, is of limited probative value on the issue of causal relationship. *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

[12] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[13] *Id.*

[14] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

[15] 20 C.F.R. § 10.606(b)(2).

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.[16] 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.[17] The Board has held that the submission of evidence, which does not address the particular issue involved, does not constitute a basis for reopening a case.[18]

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to further review of the merits based on the first and second above-noted requirements.

The Office's February 24, 2009 decision was based on a lack of medical evidence establishing that appellant sustained a diagnosed medical condition as a result of the December 18, 2008 incident. In support of his request for reconsideration, appellant submitted a January 14, 2009 employing establishment injury report, signed by Ms von Borstel, a nurse practitioner. A nurse practitioner is not considered to be a "physician" under the Act. Thus, her report does not constitute probative medical evidence,[19] and her opinion is not relevant to the issue at hand.[20] The Board finds that Ms. von Borstel's report does not constitute relevant and pertinent new evidence not previously considered by the Office.[21] Therefore, the Office properly determined that this evidence did not comprise a basis for reopening the case for a merit review.[22]

The Board finds that the Office properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his March 6, 2009 request for reconsideration.

[16] *Id*. at § 10.607(a).

[17] *Id*. at § 10.608(b).

[18] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[19] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a "physician" as defined in 5 U.S.C. § 8101(2). Section 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[20] *See Arnold A. Alley*, 44 ECAB 912, 920-21 (1993) (finding that the opinions of nonphysicians are not relevant in evaluating medical matters); *see also Theresa K. McKenna*, 30 ECAB 702 (1979).

[21] *See Susan A. Filkins*, 57 ECAB 630 (2006).

[22] *Joseph A. Brown, Jr*., 55 ECAB 542 (2004) (reports from laypersons, such as nurses and physicians' assistants, are of no relevance to the issue of causal relationship and do not comprise a basis for reopening a case).

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a traumatic injury in the performance of duty on December 18, 2008. The Board further finds that the Office properly refused to reopen his claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 22 and February 24, 2009 are affirmed.

Issued: April 26, 2010
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