United States Department of Labor
Employees' Compensation Appeals Board

C.L., Appellant	)	
and	)	**Docket No. 09-1112**
	)	**Issued: February 18, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, MI, 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 March 17, 2009 appellant timely appealed a January 26, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her reconsideration request, and a May 30, 2008 merit decision affirming the denial of her claim. 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 occupational disease in the performance of duty; and (2) whether the Office properly refused to reopen her claim for merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 11, 2007 appellant, then a 57-year-old general clerk, filed an occupational disease claim alleging that her sciatica and lumbar radiculopathy were due to factors of her federal employment. She did not stop work.

In a July 30, 2007 letter, the Office noted that there was insufficient information to determine whether appellant was eligible for benefits. It requested that she submit a comprehensive medical report from her treating physician which contained a well-rationalized medical opinion explaining how the exposure or incidents in her federal employment contributed to her condition.

In an August 7, 2007 statement, appellant advised that her condition developed due to continuous carrying tubs of mail, edit books and supplies weighing up to 50 pounds repeatedly from her work area in the basement, up 15 stairs to the main floor from six to nine times per day. She further noted that, during mail edit, which usually lasts two weeks, she carried between 6 and 10 tubs of mail and edit books each day. Appellant explained that the elevator had not worked since she arrived in 2004. She also attributed her left hip, left calf and left toe conditions to work factors. Appellant submitted a statement regarding the freight elevator being out of service and a listing of dates she was seen at a pain clinic or underwent physical therapy in 2006.

On September 5, 2005 x-ray results of the right hip revealed mild degeneration. A December 9, 2005 x-ray of the left hip demonstrated minimal osteoarthritis in both hip joints. A May 1, 2007 x-ray of the right hip was negative while the left hip had mild degenerative changes, unchanged from December 9, 2005. A September 5, 2005 magnetic resonance imaging (MRI) scan of the lumbar spine revealed mild lower lumbar degenerative changes. A September 8, 2005 MRI scan of the lumbar spine was reported as normal. An April 10, 2007 MRI scan of the lumbar spine demonstrated stable, mild diffuse disc bulge at L4-5 and a five millimeter synovial cyst posterior to the L2-3 facet joint.

In a March 20, 2007 report, Dr. Steven R. Hinderer, a Board-certified physiatrist, evaluated appellant for persistent lower back pain. He noted that she started working at the employing establishment in the fall of 2004 and by July 2005 had developed severe lower back pain. Dr. Hinderer noted that an MRI scan showed a degenerative process in her back and an electromyogram (EMG) confirmed some nerve root compression involving the left lower limb. Appellant also developed right knee pain in 2006. Dr. Hinderer provided a detailed description of appellant's work duties. He opined that the nature of her job exacerbated any preexisting back or knee problems and could precipitate such problems if there was no preexisting condition. However, Dr. Hinderer advised it was impossible for him to determine whether there was any preexisting condition, as appellant reported she was asymptomatic with regard to her back and right knee prior to beginning her employment. He noted the results of his physical examination. Dr. Hinderer provided an impression of degenerative arthritis of the right knee, as demonstrated by MRI scan. He also noted some possible degenerative problems involving the lumbar spine, but recommended additional MRI scan testing be performed. Dr. Hinderer noted that appellant was already on a 10-pound lifting restriction and recommended additional work restrictions and treatment.

In a May 1, 2007 report, Dr. Hinderer noted that an MRI scan of the lumbar spine showed very mild bulging of the L4-5 disc with no frank disc herniation and incidental findings of a small synovial cyst of the left L2-3 facet. He noted these findings were unchanged from the September 8, 2005 MRI scan and did not explain appellant's lower back pain with referred pain down the left leg. Dr. Hinderer noted that her participation in physical therapy apparently

exacerbated her knee and back pain, so it was discontinued. Appellant exhibited a mildly positive left straight leg raise in a sitting position and he continued her work restrictions.

By decision dated October 26, 2007, the Office denied appellant's claim. It found the medical evidence did not establish that her claimed conditions resulted from the accepted work-related activities.

In a November 26, 2007 letter, appellant requested reconsideration. In a November 20, 2007 report, Dr. Hinderer noted that appellant continued to complain of persistent low back pain and had been treating with Teri Hammer, D.O., an osteopath and Board-certified family practitioner, with some benefit. On September 18, 2007 there was pain at the SI joints bilaterally and some suggestion of asymmetry of the pelvis, which had been confirmed by Dr. Hammer. Dr. Hinderer explained that appellant's pain down her legs was attributable to the sciatic nerves being anterior to the SI joints and exiting through the sciatic notch and the ischial bone just beneath the SI joint. He diagnosed mechanical sacroiliac joint pain bilaterally with referred pain from the sciatic nerve. Dr. Hinderer explained that this was consistent with the symptoms appellant described. He outlined his recommendations for work restrictions and treatment with Dr. Hammer.

By decision dated January 15, 2008, the Office denied modification of its October 26, 2007 decision.[1]

In an April 15, 2008 letter, appellant requested reconsideration. In a March 5, 2008 report, Dr. Hinderer indicated that appellant's disability carrier was unclear as to appellant's diagnoses. He advised that appellant's diagnosis was left sacral ileitis. Dr. Hinderer related the diagnosis to appellant's job of carrying bins of mail up and down stairs. He explained that any sort of minor slip or malpositioning of a lower limb could cause the sacroiliac joint to be placed out of alignment by stretching the ligaments that hold it together. Dr. Hinderer indicated that this was commonplace by activities such as misstepping a curb or slipping on ice and how the trauma is often not recognized at the time as being a cause of the later problem because it is often mistaken for being low back pain. Appellant had been diagnosed with lumbar radiculopathy at Sinai-Grace Hospital and he explained how sacroiliac problems could mimic lumbar radiculopathy. Dr. Hinderer noted that, when the sacroiliac joint has problems, it caused irritation of the nerve and referred pain throughout the left leg, which is what occurred with appellant. He discussed his recommendations for appellant and for the continuation of her light-duty restrictions.

By decision dated May 30, 2008, the Office denied modification of its January 15, 2008 decision.

In a November 24, 2008 letter, appellant requested reconsideration. She indicated she was submitting a September 24, 2008 report from Dr. Hinderer. No additional evidence was received by the Office.

[1] The Office noted that, while some evidence pertained to appellant's right knee, it was not adjudicating the cause of any right knee condition as appellant had not attributed her right knee condition to work factors.

By decision dated January 26, 2009, the Office denied appellant's request for further review of the merits of her claim.

LEGAL PRECEDENT -- ISSUE 1

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.[2]

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 which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 specific employment factors identified by the employee.[3]

ANALYSIS -- ISSUE 1

Appellant claimed that she developed sciatica and lumbar radiculopathy from continuous climbing of stairs while carrying tubs of mail edit, books and supplies. The record supports that her duties include these tasks. Appellant also claimed illness involving her left hip, left calf and left toes. Her burden is to submit probative medical evidence that explains how the identified employment factors caused her back, hip or left leg conditions. As noted, causal relationship is a medical issue. The medical evidence of record is insufficient to establish that appellant's claimed conditions arose in the performance of duty.

The medical evidence of record consists of reports from Dr. Hinderer. In his March 20, 2007 report, Dr. Hinderer provided a description of appellant's work and medical history and opined that the nature of appellant's job would exacerbate any preexisting back or knee condition. He stated that it was impossible, however, to determine whether there were any preexisting conditions as appellant stated that she was asymptomatic prior to working at the employing establishment. The Board has noted that the mere fact that an employee is asymptomatic before an employment injury is insufficient, without supporting medical rationale, to establish causal relationship.[4] While Dr. Hinderer noted possible degenerative problems of

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

[3] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[4] *Thomas Petrylak*, 39 ECAB 276 (1987).

the lumbar spine, he did not provide an opinion on causation.[5] In a May 1, 2007 report, Dr. Hinderer advised the MRI scan of the lumbar spine showed very mild bulging of the L4-5 disc with no frank herniation and incidental findings of a small synovial cyst of the left L2-3 facet. However, he stated that these findings did not explain appellant's lower back pain with referred pain down the left leg. Although Dr. Hinderer also identified a mildly positive left straight leg raise in the sitting position, he did not provide an opinion addressing how her symptoms of lumbar condition were caused or contributed to by her work factors.

In a November 20, 2007 report, Dr. Hinderer diagnosed mechanical sacroiliac joint pain bilaterally with referred pain from the sciatic nerve and explained that this was consistent with the symptoms appellant described. However, he did not provide adequate medical rationale explaining how this diagnosed condition arose from appellant's work activities. The Board has held that a medical opinion that is not fortified by medical rationale is of diminished probative value.[6] Without more explanation of how Dr. Hinderer came to his opinion, it is of diminished probative value.

On March 5, 2008 Dr. Hinderer diagnosed left sacral ileitis and related it to appellant's job of carrying bins of mail up and down stairs. He explained how the sacroiliac joint could be placed out of alignment and how sacroiliac problems could mimic lumbar radiculopathy. Dr. Hinderer further stated that problems with the sacroiliac joint could cause irritation of the nerve and referred pain throughout the left leg and indicated this is what happened to appellant. Although this report generally supports causal relationship, he failed to provide adequate objective findings of a misaligned sacroiliac joint or pelvis, to which he attributed appellant's sacroiliitis. The report, therefore, is of diminished probative value and does not satisfy appellant's burden of proof.

The diagnostic testing of record does not support appellant's claim as those reports do not offer any opinion regarding the cause of appellant's condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[7]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act[8] vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[9] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the

[5] While Dr. Hinderer provided an impression of degenerative arthritis of the right knee, as previously noted, the right knee is not being considered as appellant did not indicate she was claiming a right knee condition due to work factors.

[6] *Brenda L. DuBuque*, 55 ECAB 212 (2004).

[7] *K.W.,* 59 ECAB ___ (Docket No. 07-1669, issued December 13, 2007).

[8] 5 U.S.C. §§ 8101-8193.

[9] *Id.* at § 8128(a).

Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[10] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[11] Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[12]

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; nor has she advanced a relevant legal argument not previously considered by the Office. While she indicated that she was submitting a September 24, 2008 report from Dr. Hinderer, this evidence was not received by the Office. Appellant failed to submit any new medical evidence which addresses the relevant issue of whether her employment caused a personal injury. Her reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Accordingly, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

On appeal, appellant argues that Dr. Hinderer's report of September 24, 2008 was received by the Office on November 24, 2008. However, a review of the case file indicates that that report is not of record.[13]

CONCLUSION

The Board finds that appellant has not established her burden of proof that she sustained a medical condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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[10] 20 C.F.R. § 10.608(a).

[11] *Id.* at § 10.608(b)(1) and (2).

[12] *Id.* at § 10.608(b).

[13] On appeal, appellant also submitted a packet of information relating to her claim. The Board has no jurisdiction to review new evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated January 26, 2009 and May 30, 2008 are affirmed.

Issued: February 18, 2010
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