



On May 16, 2008 Dr. Loren C. King, appellant's family practitioner, noted a history that on May 15, 2008 she twisted her body while loading mail at work and felt something pull in her abdomen. She provided findings on physical examination and indicated that appellant had low back pain and spasm of the lower abdominal muscles. Dr. King did not provide an opinion as to the cause of appellant's condition. On May 28, 2008 she noted that appellant's lower back tenderness had resolved. On May 30, 2008 Dr. King stated that appellant lifted 25 pounds the previous day and her back pain worsened. On June 4, 2008 she recommended that she consult a back specialist.

On June 17 and July 29, 2008 Dr. W. Carl Dyer, Jr., an attending Board-certified orthopedic surgeon, provided findings on physical examination and noted that appellant gave a history of back problems for the past several years. On May 15, 2008 appellant experienced abdominal pain. She then injured her back on May 29, 2008<sup>1</sup> when she lifted a mail tub weighing 20 to 25 pounds. Lumbar spine x-rays revealed degenerative disc disease. Dr. Dyer diagnosed degenerative disc disease of the lumbar spine, a lumbar strain, lumbar lordosis, radiculopathy involving the sciatic nerve, atrophy of the paraspinal muscles, myofascial contracture, myofascial pain syndrome and exogenous obesity. On July 30, 2008 he stated that appellant's pain in her abdomen, groin and upper thigh were related to her back and not intra-abdominal problems "as best I can tell from reading the record at this point." Dr. Dyer opined that her condition was an aggravation of a preexisting problem. For 10 years appellant had performed a job that required repetitive bending, lifting, stooping, pulling and tugging. Dr. Dyer stated that this was a repetitive usage problem that was directly related to her employment.

By letter dated June 26, 2008, Kristina Smith, an employing establishment health and resource management nurse, noted that appellant filed a claim for an abdominal injury on May 15, 2008 when she lifted a mail tray. However, on June 17, 2008 Dr. Dyer indicated that appellant had degenerative disc disease of the lumbar spine. The employing establishment challenged her claim for a traumatic injury on May 15, 2008.

By letter dated July 14, 2008, the Office advised appellant that her claim was initially handled administratively as a simple, uncontroverted case with minimal or no time lost from work and approval of up to \$1,500.00 for medical payments. However, the employing establishment had challenged the claim because of a request for additional medical treatment that did not seem to be related to the claimed May 15, 2008 injury. Further, the medical evidence indicated that appellant had extensive preexisting conditions. The Office asked her to submit a detailed narrative report from her attending physician including a thorough history, test results, examination findings, a diagnosis and an opinion on the relationship of the diagnosed conditions to her employment.

By decision dated August 28, 2008, the Office denied appellant's claim on the grounds that the evidence did not establish that she sustained a traumatic injury on May 15, 2008 causally related to factors of her employment.

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<sup>1</sup> Dr. Dyer originally indicated that the date was May 28, 2008 but he later corrected the date to May 29, 2008.

Appellant requested a telephone hearing that was held on December 10, 2008. By decision dated February 23, 2009, an Office hearing representative affirmed the August 28, 2008 decision.

On March 15, 2009 appellant requested reconsideration. In a March 3, 2009 report, Dr. Dyer stated that appellant's diagnoses, excluding her obesity, were caused or aggravated by "the injury."

By decision dated March 30, 2009, the Office denied appellant's request for reconsideration on the grounds that the evidence was not sufficient to warrant further merit review.<sup>2</sup>

### **LEGAL PRECEDENT**

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.<sup>3</sup> Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.<sup>4</sup> An employee may establish that the employment incident occurred as alleged but fail to show that his or her disability or condition relates to the employment incident.

To establish a causal relationship between an employee's condition and any disability claimed and the employment event or incident, he or she must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of 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 claimant.<sup>5</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that an employee's claimed condition became apparent during a period of

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<sup>2</sup> Subsequent to the March 30, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

<sup>3</sup> *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

<sup>4</sup> *T.H.*, 59 ECAB \_\_\_\_ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

<sup>5</sup> *I.J.*, 59 ECAB \_\_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.<sup>6</sup>

### ANALYSIS

The Board finds that the evidence is insufficient to establish that appellant sustained an abdominal or back injury on May 15, 2008 while in the performance of duty.

Dr. King provided a history that on May 15, 2008 appellant twisted her body while loading mail at work and felt something pull in her abdomen. She provided findings on physical examination and indicated that she had low back pain and spasm of the lower abdominal muscles. On May 28, 2008 Dr. King noted that appellant's lower back tenderness had resolved. On May 30, 2008 she stated that appellant lifted 25 pounds the previous day and her back pain worsened. On June 4, 2008 Dr. King recommended that appellant consult a back specialist. She did not provide a specific diagnosis for the May 15, 2008 injury or explain how the lifting incident caused an injury. Therefore, her reports are not sufficient to establish that appellant sustained an injury on May 15, 2008 causally related to her employment.

Dr. Dyer noted that appellant had a long history of back problems. He indicated that on May 15, 2008 she experienced abdominal pain. Appellant injured her back on May 29, 2008 when she lifted a mail tub weighing 20 to 25 pounds. Lumbar spine x-rays revealed degenerative disc disease. Dr. Dyer diagnosed degenerative disc disease of the lumbar spine, a lumbar strain, lumbar lordosis, radiculopathy involving the sciatic nerve, atrophy of the paraspinous muscles, myofascial contracture, myofascial pain syndrome and exogenous obesity. On July 30, 2008 he stated that appellant's pain in her abdomen, groin and upper thigh were related to her back conditions. Dr. Dyer opined that her condition was an aggravation of a preexisting problem. For 10 years appellant had performed a job that required repetitive bending, lifting, stooping, pulling and tugging. Dr. Dyer stated that her condition was due to repetitive actions and was directly related to her employment. However, he did not provide a specific diagnosis for the May 15, 2008 injury or a medical rationale explaining how the lifting incident on May 15, 2008 caused an injury. Lacking a specific diagnosis and medical rationale explaining causal relationship, Dr. Dyer's reports are not sufficient to establish that appellant sustained a work-related injury on May 15, 2008.

The Office advised appellant of the medical evidence needed to establish that she sustained an injury on May 15, 2008 causally related to her employment. Appellant did not provide such medical evidence. There is no medical evidence of record containing a complete and accurate factual and medical background, physical findings on examination and medical rationale explaining how she sustained an injury on May 15, 2008 causally related to the lifting incident or any other factors of her employment. Therefore, the Office properly denied appellant's claim.

On appeal, appellant contends that the Office's decisions are contrary to fact and law. As noted, however, the medical evidence of record is not sufficient to establish a back injury related to her employment injury.

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<sup>6</sup> *D.I.*, 59 ECAB \_\_\_ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

## LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act<sup>7</sup> does not entitle a claimant to a review of an Office decision as a matter of right. This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>8</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>9</sup>

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>10</sup> the Office's 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

## ANALYSIS -- ISSUE 2

On reconsideration, appellant submitted a March 3, 2009 report in which Dr. Dyer stated that appellant's diagnoses, excluding her obesity, were caused or aggravated "by the injury." Dr. Dyer did not mention the May 15, 2008 lifting incident or provide medical rationale explaining how the diagnosed conditions were related to that incident. The issue in this case is whether appellant sustained an injury on May 15, 2008 when she lifted a tray of mail and twisted her upper body. Dr. Dyer's March 3, 2009 report did not address this issue. Therefore his report did not constitute relevant and pertinent evidence not previously considered by the Office. Because appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by the Office, it properly denied her request for reconsideration.

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<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> *Id.* at § 8128(a).

<sup>9</sup> *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>10</sup> Under section 8128(a) of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his or her] own motion or on application." 5 U.S.C. § 8128(a).

<sup>11</sup> 20 C.F.R. § 10.606(b)(2).

<sup>12</sup> *Id.* at § 10.607(a).

<sup>13</sup> *Id.* at § 10.608(b).

**CONCLUSION**

The Board finds that appellant failed to establish that she sustained an injury on May 15, 2008 while in the performance of duty. The Board further finds that the Office did not abuse its discretion in denying appellant's request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 30 and February 23, 2009 and August 28, 2008 are affirmed.

Issued: February 2, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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