United States Department of Labor
Employees' Compensation Appeals Board

M.M., Appellant	)	
and	)	**Docket No. 09-1251**
	)	**Issued: January 22, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Jackson, MS, Employer	)	

Appearances:
Anthony Puckett, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 16, 2009 appellant filed a timely appeal from an October 29, 2008 merit decision of the Office of Workers' Compensation Programs denying her occupational disease claim, and the February 10, 2009 nonmerit decision denying her request for reconsideration. 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 met her burden of proof to establish that she sustained an injury causally related to factors of her federal employment; and (2) whether the Office properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 29, 2008 appellant, a 51-year-old sales and service associate, filed an occupational disease claim alleging that she developed swelling, muscle spasms and knots in both feet, as well as severe pain in all toes, as a result of prolonged standing at work. She stated

that her condition worsened when her supervisor restricted her ability to use a stool. The supervisor's statement reflected that, when appellant returned to work on May 12, 2008 following bilateral foot surgery, her restrictions included standing no longer than two and a half hours at a time and using a stool to relieve pressure on her feet.

In a September 3, 2008 statement, appellant alleged that, when she returned to work following her May 12, 2008 surgery for plantar fasciitis, the employing establishment failed to comply with her physician's work restrictions. Although she experienced sharp pain in both feet while standing, she was not given a stool until June 5, 2008, when her union steward obtained it for her. Appellant's pain and muscle spasms allegedly increased after her supervisor informed her on August 12, 2008 that she could no longer use the stool while servicing customers at the window.

In an August 18, 2008 statement, Sisa Sorelel, a coworker, observed that appellant's foot condition seemed to have worsened since her return to work following the May 12, 2008 surgery. She noted that appellant was not initially provided with a stool and was subsequently prohibited from using it.

In a June 8, 2008 report, Dr. Stephanie M. Thomas, a podiatrist noted appellant's complaints of left foot pain and burning with weight bearing around the fourth metatarsal, as well as tightness across the foot. She referenced appellant's report that she did not have a proper stool to sit on when working. On August 15, 2008 Dr. Thomas excused appellant from work until the following day. She reported that appellant's foot was inflamed, and advised that she refrain from any weight bearing for the following day and night. Dr. Thomas stated that appellant could return to work the following day.

Appellant submitted progress notes dated July 22 and August 15, 2008 from Brian Wilkinson, a physical therapist, reflecting a diagnosis of bilateral plantar fasciitis. Dr. Wilkinson noted appellant's complaints of increased bilateral foot pain, mostly from standing in one spot all day.

In a letter dated September 9, 2008, the Office informed appellant that the evidence and information submitted was insufficient to establish her claim. It advised her to provide additional details regarding the employment activities that allegedly caused her claimed condition, as well as a comprehensive medical report with a diagnosis, examination findings and an opinion with an explanation as to the cause of the diagnosed condition.

Appellant submitted a May 16, 2008 statement from Jerry Moore, a union representative, who stated that the employing establishment had failed to provide appellant with a proper stool for her use at the window, pursuant to her medical restrictions. Although she had a stool, it was "short in height compared to other stools." Eventually, Mr. Moore provided a proper stool.

In a narrative report dated September 29, 2008, Dr. Thomas stated that appellant had undergone bilateral foot surgery on May 12, 2008, and returned to work with restrictions, which included sitting on a stool and limited standing. Appellant informed him that she was required to work without these restrictions for several weeks, during which time she experienced pain, tingling and burning in both feet. Dr. Thomas' physical examination revealed mild discomfort

from her prior surgery. A nerve conduction study revealed negative results of any concrete neurological component. Dr. Thomas noted that he originally thought that "perhaps she was suffering from a mild cause of RSD [reflex sympathetic disorder] or peripheral neuropathy." He opined that "a lot of her pain was also stress-induced. [Appellant] appeared to have problems with her immediate supervisor."

In a decision dated October 29, 2008, the Office denied appellant's claim on the grounds that the medical evidence of record was insufficient to establish causal relationship.

On January 5, 2009 appellant requested reconsideration. In support of her request, she contended that the employing establishment had failed to accommodate her medical restrictions following the May 12, 2008 surgery. Specifically, appellant was to take breaks every two and one-half hours, and was to sit on a stool to alleviate pressure on her feet. Appellant stated that she was enclosing additional documents from her physician; however, no additional evidence was enclosed.

By decision dated February 10, 2009, the Office denied appellant's request for reconsideration, finding that the evidence submitted did not warrant merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of her claim, including the fact that an injury was sustained in the performance of duty as alleged,[2] and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[4] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence, *i.e.*, medical evidence presenting a physician's well-reasoned opinion on how the established factor of employment caused or contributed to the claimant's diagnosed condition. To be of probative value, the opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty,

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joseph W. Kripp*, 55 ECAB 121 (2003); *see also Leon Thomas*, 52 ECAB 202, 203 (2001). "When an employee claims that he sustained injury in the performance of duty he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury." *See also* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. § 10.5(q) and (ee) (2002) ("Occupational disease or Illness" and "Traumatic injury" defined).

[3] *Dennis M. Mascarenas*, 49 ECAB 215, 217 (1997).

[4] *Michael R. Shaffer*, 55 ECAB 386 (2004). *See also Solomon Polen*, 51 ECAB 341, 343 (2000).

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.[5] Additionally, the Board has consistently held that unsigned medical reports are of no probative value[6] and that any medical evidence upon which the Office relies to resolve an issue must be in writing and signed by a qualified physician.[7] Lay individuals such as physician assistants, nurse practitioners and social workers are not competent to render a medical opinion.[8] An award of compensation may not be based on appellant's belief of causal relationship. 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.[9]

ANALYSIS -- ISSUE 1

Appellant alleged that prolonged standing at work, combined with the Office's failure to provide her with a proper stool, contributed to, and exacerbated, her bilateral foot condition. The Office accepted that appellant had identified employment factors alleged to have caused or contributed to her claimed condition. The issue is whether the medical evidence establishes that appellant sustained a diagnosed condition that was causally related to established employment activities.

The medical evidence of record consists of reports dated June 8, August 15 and September 29, 2008 from Dr. Thomas, appellant's podiatrist, and progress notes dated July 22 and August 15, 2008 from Brian Wilkinson, a physical therapist. The Board finds that the medical evidence of record is insufficient to establish appellant's claim.

On June 8, 2008 Dr. Thomas noted appellant's complaints of left foot pain and burning with weight bearing around the fourth metatarsal, as well as tightness across the foot, and referenced appellant's report that she did not have a proper stool to sit on when working. On August 15, 2008 Dr. Thomas reported that appellant's foot was inflamed, and advised that she refrain from any weight bearing for the following day and night. Neither report contained a diagnosis or an opinion as to the cause of appellant's condition. Therefore, they are of limited probative value.[10] On September 29, 2008 Dr. Thomas stated that he originally thought that "perhaps [appellant] was suffering from a mild cause of RSD or peripheral neuropathy," and opined that "a lot of her pain was also stress-induced." His thoughts on possible diagnoses are, by definition, vague and equivocal. The Board has also held that a diagnosis of pain does not

[5] *Leslie C. Moore*, 52 ECAB 132, 134 (2000); *see also Ern Reynolds*, 45 ECAB 690, 695 (1994).

[6] *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[7] *James A. Long*, 40 ECAB 538, 541 (1989).

[8] *Janet L. Terry*, 53 ECAB 570 (2002).

[9] *Phillip L. Barnes*, 55 ECAB 426 (2004); *see also Dennis M. Mascarenas*, *supra* note 3 at 218.

[10] 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. *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

constitute a basis of payment for compensation, as pain is considered to be a symptom rather than a specific diagnosis.[11] Moreover, Dr. Thomas did not explain the medical process through which appellant's job duties would have been competent to cause her claimed condition. Medical conclusions unsupported by rationale are of little probative value.[12]

Appellant also submitted progress notes from her physical therapist. As a physical therapist is not a physician under the Act, these reports lack probative value.[13]

Appellant expressed her belief that her foot condition was exacerbated by prolonged standing at work and the establishment's failure to provide her with a proper stool. 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.[14] 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.[15] Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to submit. Therefore, appellant's belief that her condition was caused or aggravated by identified work events is not determinative.

On appeal, appellant reiterated her claim that her foot condition worsened after she returned to work following her May 12, 2008 surgery, as a result of prolonged standing. For reasons stated, the Board finds that she has failed to meet her burden of proof to establish that her foot condition was aggravated by identified employment activities.

The Office advised appellant that it was her responsibility to provide a comprehensive medical report which described her symptoms, test results, diagnosis, treatment and the doctor's opinion, with medical reasons, on the cause of her condition. Appellant failed to do so. As there is no probative, rationalized medical evidence addressing how appellant's claimed condition was caused or aggravated by her employment, she has not met her burden of proof in establishing that she sustained an occupational disease in the performance of duty causally related to factors of employment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[16] the Office regulations provide that the evidence or

[11] *Robert Broom*, 55 ECAB 339 (2004).

[12] *Willa M. Frazier*, 55 ECAB 379 (2004).

[13] Physical therapists do not qualify as "physicians" under the Act. 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."

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

[15] *Id.*

[16] 5 U.S.C. §§ 8101-8193. 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).

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.[17] 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.[18] 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.[19] 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.[20]

ANALYSIS -- ISSUE 2

Appellant's January 5, 2009 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Appellant merely reiterated arguments previously made. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant did not submit relevant and pertinent new evidence not previously considered by the Office.[21] In fact, she submitted no additional evidence in support of her request for reconsideration. Although appellant represented that she was enclosing additional documents from her physician, the record contains no evidence that she submitted any additional medical reports.

The Board finds that the Office properly determined that appellant was not entitled to further review of the merits pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her January 5, 2009 request for reconsideration.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained an injury causally related to factors of her federal employment. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[17] 20 C.F.R. § 10.606(b)(2).

[18] *Id.* at § 10.607(a).

[19] *Id.* at § 10.608(b).

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

[21] 20 C.F.R. § 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 10, 2009 and October 29, 2008 are affirmed

Issued: January 22, 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