United States Department of Labor
Employees' Compensation Appeals Board

L.A., Appellant	)	
and	)	**Docket No. 10-628**
	)	**Issued: November 2, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Arlington, VA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 7, 2010 appellant filed a timely appeal from an August 6, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.[1]

ISSUE

The issue is whether the evidence is sufficient to establish that appellant sustained an injury on December 17, 2008 in the performance of duty.

[1] In the same appeal request form, appellant also requested an oral hearing for appeal from the Branch of Hearings and Review. The Office and the Board, however, may not exercise simultaneous jurisdiction over the same issue in the case on appeal. Following the docketing of an appeal with the Board, the Office does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. 20 C.F.R. § 501.2(c)(3).

FACTUAL HISTORY

On December 19, 2008 appellant, then a 37-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on December 17, 2008 she sustained muscle spasms in her lower and upper back while firing a shot gun and semi-automatic pistol at the range for training purposes. She stopped work on December 19, 2008 and returned to work on January 19, 2009.

In an Emergency Department Discharge Instruction form dated December 22, 2008, appellant was treated for muscle spasms by Dr. Hengameh Mesbahi, Board-certified in emergency medicine. On December 22, 2008 Dr. Subashri Reddy, Board-certified in general internal medicine, referred appellant to Marva Marsh, a licensed physical therapist.

Appellant submitted treatment records dated January 22 to June 8, 2009 from Ms. Marsh, a licensed physical therapist, who treated appellant for the thoracolumbar region of the low back and the right and left shoulders.

The Office requested additional medical information from appellant in a letter dated July 6, 2009. It requested that she submit a physician's reasoned opinion addressing the relationship of her claimed back condition and specific employment factors, not that of a physical therapist. Appellant did not submit any additional information.

In an August 6, 2009 decision, the Office denied appellant's claim finding that the evidence was insufficient to establish that she sustained an injury, as alleged. There was no medical evidence that provided a diagnosis which could be connected to the claimed incident.[2]

On January 7, 2010 appellant appealed the Office's August 6, 2009 decision to the Board.

LEGAL PRECEDENT

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[3] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such

[2] Following the Office's August 6, 2009 decision, appellant submitted new evidence to the Office. As the Office did not consider this evidence in reaching the final decision, the Board may not review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

a causal relationship.[4] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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 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. This medical opinion must include an accurate history of employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[5]

The term physician is defined under section 8101(2), as follows: "physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law."[6] Physical therapists are not physicians under the Act; therefore, their reports do not constitute probative medical evidence.[7]

ANALYSIS

The Office accepted that the December 17, 2008 firearms training incident occurred as alleged. It found that appellant did not meet her burden of proof to establish a back injury causally related to this training. Appellant submitted insufficient medical evidence to establish that the employment incident caused her muscle spasms and back pain. She provided a referral from Dr. Reddy indicating that physical therapy was prescribed and the notes of physical therapy reports. As noted, a physical therapist is not a physician as defined under the Act. Therefore, the physical therapy reports do not constitute probative medical evidence in support of her claim. Appellant has not established that she sustained a back injury resulting from the December 17, 2008 incident, as alleged.

Evidence received prior to the Office's August 6, 2009 decision does not provide any details regarding appellant's injury. Appellant failed to submit any rationalized medical opinion evidence based on a complete factual and medical background to support a causal relationship between her back condition and her employment activity of November 17, 2008. This includes failing to provide dates of examination and treatment, history of the injury given, description of the physician's findings, results of any tests performed, and diagnosis and treatment. Appellant failed to submit a physician's rationalized opinion on whether there is a causal relationship between her back condition and the firearms training accepted in this case. The referral from Dr. Reddy and a hospital discharge form do not suffice as rationalized medical opinion evidence.

[4] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[5] *James Mack*, 43 ECAB 321 (1991).

[6] 5 U.S.C. § 8101(2).

[7] *Jennifer L. Sharp*, 48 ECAB 209 (1996); *Thomas R. Horsfall*, 48 ECAB 180 (1996); *Barbara J. Williams*, 40 ECAB 649 (1988).

Therefore, appellant failed to provide the factual and medical evidence required to establish a prima facie claim.[8]

On July 6, 2009 the Office informed appellant of the evidence needed to support her claim; however, the record before the Board contains no rationalized medical opinion on causal relation. Evidence submitted by appellant after the Office's final decision cannot be considered by the Board. Appellant may submit this new evidence, along with a request for reconsideration, to the Office.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a traumatic injury on November 17, 2008, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[8] *See also Richard H. Weiss*, 47 ECAB 182 (1995).