United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 10-1098**
	)	**Issued: November 8, 2010**
DEPARTMENT OF COMMERCE, CENSUS BUREAU, Seattle, WA Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 8, 2010 appellant filed a timely appeal from an October 14, 2009 merit decision of the Office of Workers' Compensation Programs and a January 22, 2010 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on December 19, 2008; and (2) whether the Office properly denied appellant's reconsideration request without further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 4, 2009 appellant, then a 53-year-old survey clerk, filed a claim for traumatic injury alleging that, on December 19, 2008, she sustained a back and neck strain as a result of preparing heavy boxes of survey materials for mailing.[1]

Appellant submitted medical reports to the record on September 14, 2009, documenting that she had sustained a number of back injuries since 1976, which did not occur in the course of her federal employment.

The initial evidence addressing appellant's medical condition after December 19, 2008 was a January 22, 2009 report, which diagnosed lumbar strain. It was prepared by a registered nurse. Appellant also submitted progress notes from a physician's assistant, Sergey Kukhotsky, which noted her complaints of back pain. These progress notes were dated from April 14 to July 7, 2009.

In a report dated May 13, 2009, Dr. Marvin Jay Hoffert, a Board-certified neurologist, noted that appellant had an 11-year history of back pain. He stated that she had been an administrative assistant at Boeing but had stopped working 12 years ago because of her "disability." Dr. Hoffert noted that previous magnetic resonance imaging (MRI) scan evaluations had shown a disc protrusion at C6-7 and disc bulging at L5-S1 but that her current physical examination was "nonphysiologic." He recommended repeat MRI scans of the cervical and lumbar spine.

Medical records were received from the Providence Physician Group dated July 16, 2009.[2] They note that appellant was seen that day for back pain after waking up that morning. A January 22, 2009 fall at work was also referenced.

In a progress note dated July 31, 2009, Physician's Assistant Lisa Galbreath noted that appellant had been seen for low back pain.

By decision dated October 14, 2009, the Office denied appellant's claim. It found that appellant had established the employment factor of preparing survey materials on December 19, 2008; however, the medical evidence did not provide a diagnosed condition causally related to this employment factor.

On December 9, 2009 appellant requested reconsideration and submitted two medical reports dated April 3, 2009 relating to epigastric pain.

By decision dated January 22, 2010, the Office denied appellant's request for reconsideration.

[1] In a supplemental statement dated August 3, 2009, appellant explained other incidents of December 8 and 29, 2008, as well as January 19 and 21, 2009 during which she experienced back pain.

[2] The signature is illegible.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing that he or she sustained an injury while in the performance of duty.[4] 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. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[5]

Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the identified employment factor. The opinion of the physician must be based on a complete factual and medical background, must be 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. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant was preparing boxes of survey materials for mailing on December 19, 2008; however, the Board finds that she has not established an injury resulting from this accepted factor of employment based on the medical evidence of record.

In a May 13, 2009 report, Dr. Hoffert did not provide a history of appellant's December 19, 2008 incident or any acknowledgement of her federal employment duties. His report did not present an accurate history of the incident alleged. Dr. Hoffert presented only a provisional diagnosis of cervical disc protrusion at C6-7 and disc bulge of L5-S1, based upon previous MRI scan workups of unknown date. He noted that appellant's physical examination resulted in nonphysiologic findings. The medical evidence of record therefore does not substantiate a current medical diagnosis pertaining to her lumbar or cervical spine. Further, the Board finds that Dr. Hoffert offered no medical opinion causally relating any diagnosed condition to the accepted employment factor. Dr. Hoffert's report does not present a rationalized medical opinion on the conditions claimed.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

[5] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[6] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

Appellant also submitted reports from physicians' assistants and a registered nurse. 5 U.S.C. § 8101(2) of the Act provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. As nurses and physicians' assistants are not physicians as defined by the Act, their opinions regarding diagnosis and causal relationship are of no probative medical value.[7]

Appellant did not submit sufficient medical evidence to meet her burden of proof. The Board finds that the Office properly denied the claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[8] 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) submit relevant and pertinent new evidence not previously considered by the Office.[9] If a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for merit review.[10]

ANALYSIS -- ISSUE 2

In support of her request for reconsideration, appellant submitted two medical reports pertaining to epigastric pain following possible food poisoning in April 2009. These reports are not relevant and have no bearing on appellant's claimed lumbar or cervical injury of December 19, 2008.[11] Appellant's reconsideration request did not meet the standard for merit review.

The Board finds that the Office properly denied appellant's request for merit review.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish an injury in the performance of duty on December 19, 2008. The Board also finds that the Office properly denied appellant's request for reconsideration.

[7] *See Roy L. Humphrey*, 57 ECAB 238 (2005).

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606.

[10] *Id*. at § 10.608 (b).

[11] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case. *See Freddie Mosley*, 54 ECAB 255 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 22, 2010 and October 14, 2009 are affirmed.

Issued: November 8, 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