

condition.¹ He attributed his recurrence to extensive stair climbing during a four and half week inspection from August 24 through September 23, 2008. As he attributed his condition to new work factors, the Office adjudicated the claim as an occupational disease rather than a recurrence of disability.

Appellant submitted evidence, including rehabilitation and physical therapy records dated October 7 through 27, 2008 signed by a physical therapist; work restriction forms; and an October 29, 2008 right knee magnetic resonance imaging (MRI) scan.

In medical reports dated April 25, October 6, 9 and 30, 2008, Dr. Manuel Guerrero, an emergency medicine specialist, listed the date of injury as April 15, 2008. He diagnosed lumbar spine strain and right knee strain. Dr. Guerrero indicated, by circling a number for causal relation, that the diagnosed back strain and right knee sprain were work related. He reported appellant stated that extensive mine inspections on August 15, 2008 required a lot of climbing. Dr. Guerrero noted the history of the original injury and that appellant was discharged on April 25, 2008 as his right knee strain and lumbar strain had improved. He indicated that appellant did fine until August 15, 2008 when he started extensive mine inspections with a lot of climbing. Dr. Guerrero diagnosed right knee strain and recurrent lumbar strain. He stated the diagnoses were consistent with the history appellant reported. In the October 30, 2008 report, Dr. Guerrero diagnosed lumbar-sacral spine strain and right knee fracture.

Medical reports from Dr. James Wesley Hollcroft, a family practitioner, noted a date of injury of April 15, 2008. In an October 14, 2008 report, Dr. Hollcroft noted appellant's right knee still hurt with desk work. He diagnosed persistent right knee pain and probable meniscal tear. On October 28, 2008 Dr. Hollcroft noted appellant was improving but he still wanted an MRI scan.

Dr. Robert F. Kasa, an orthopedic surgeon, submitted medical reports dated November 4 to 13, 2008. He indicated that appellant, a safety mine inspector, initially injured his knee in April 2008 when he stepped on loose ground and developed medial knee pain. Dr. Kasa noted that appellant underwent physical therapy for a week. Appellant reinjured the knee by working and climbing up and down approximately one month earlier. Dr. Kasa noted the MRI scan suggested a possible fracture. He assessed right knee pain, right knee effusion and osteoarthritis of the right knee. Dr. Kasa opined that appellant did not have a fracture of the medial femoral condyle. In a November 6, 2008 report, Dr. Kasa noted appellant still had slight effusion of the right knee with some medial tenderness. On November 13, 2008 he reported questionable effusion of the right knee with some medial tenderness.

In an April 8, 2009 report, Dr. Thomas Erickson, a Board-certified orthopedic surgeon, noted appellant still had pain in his right knee. His examination revealed mild swelling of the knee with no effusion.

¹ Appellant has an accepted claim for an April 15, 2008 employment injury. The Office assigned the claim file number xxxxxx230 and accepted a right knee sprain and lumbar sprain. On June 18, 2009 it combined this case with the present claim.

By letter dated May 28, 2009, the Office requested additional factual and medical evidence from appellant. This included a comprehensive medical report from his treating physician which provided a well-rationalized medical opinion on the cause of his condition. The Office mailed the letter to appellant's address of record. No additional evidence was submitted.

By decision dated July 20, 2009, the Office denied appellant's claim. It found that the evidence did not establish that his claimed right knee condition was related to the work-related activities during the period August 24 through September 23, 2008.

On August 5, 2009 appellant requested reconsideration. In his August 5, 2009 statement, he indicated that he only wanted continued medical treatment for his right knee as needed. Appellant advised he did not receive the May 28, 2009 letter advising him of the deficiencies in his claim. He requested that the Office contact his physicians and specifically ask them whether or not his injury was work related. No additional medical evidence was submitted.

By decision dated August 17, 2009, the Office denied appellant's request for reconsideration without a merit review finding that he did not raise substantive legal questions or include new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

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 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 employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. 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

² 5 U.S.C. §§ 8101-8193.

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

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.⁵

ANALYSIS -- ISSUE 1

The evidence establishes that appellant has a right knee condition and a back condition; but, he did not submit sufficient medical evidence to establish that either of his conditions were caused or aggravated by the climbing he performed during the period August 24 through September 23, 2008 during mine inspections.

In an April 25, 2008 report, Dr. Guerrero stated that appellant's right knee strain should be considered a work-related injury, but this report predated the work factors alleged from August 24 through September 23, 2008 and is not relevant to the present claim. In October 2008, he reported that appellant engaged in extensive mine inspections which required a lot of climbing. Dr. Guerrero diagnosed a lumbar strain and a right knee strain and a subsequent right knee fracture; but he did not adequately address how the climbing required during mine inspections would cause or contribute to appellant's right knee condition. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of diminished probative value.⁶ Dr. Guerrero did not explain how climbing from August 24 to September 23, 2008 caused or aggravated appellant's knee condition. Thus, his reports are of limited probative value.

In an October 14, 2008 report, Dr. Hollcroft noted appellant reported pain while doing desk work. He diagnosed persistent right knee pain and a probable meniscal tear, which he later noted was improving. Dr. Hollcroft did not address appellant's work activities or offer any opinion regarding the cause of appellant's right knee condition.⁷ His reports are of limited probative value.

In a November 4, 2008 report, Dr. Kasa reported that appellant reinjured his right knee by working and climbing up and down a month prior. He noted right knee pain, effusion and osteoarthritis, but did not address causal relation. In his subsequent reports, Dr. Kasa noted appellant's right knee condition but did not specifically address causal relationship.⁸ These reports are of diminished probative value. On April 8, 2009 Dr. Erickson noted that appellant was still experiencing pain in the right knee and reported mild swelling without effusion. He did not offer any opinion on causal relationship.

⁵ *Id.*

⁶ *S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009).

⁷ *Id.*

⁸ *Id.*

The remainder of the medical evidence, including an October 29, 2008 MRI scan of the right knee and work restriction forms, fails to address causal relationship between appellant's right knee condition and the work activities performed during the period claimed.

Appellant submitted occupational and physical therapy records, signed by a physical therapist. The Board has held that a physical therapist is not a physician as defined under the Act.⁹ Therefore, these records are not probative medical evidence.

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.¹⁰ 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.¹¹ Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to submit.

The medical evidence of record fails to provide a full and accurate factual history explaining how appellant's employment duties from August 24 to September 23, 2008 caused or aggravated his right knee or back conditions. Appellant has not met his burden of proof to establish that he sustained an occupational disease in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Federal Employees' Compensation Act,¹² the Office's regulations provide that 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.¹³ 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 of the merits.¹⁴

⁹ See *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician s assistants, nurses and physical therapists are not competent to render a medical opinion under the Act); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

¹⁰ See *Joe T. Williams*, 44 ECAB 518, 521 (1993).

¹¹ *Id.*

¹² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the 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).

¹³ 20 C.F.R. § 10.606(b)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁴ 20 C.F.R. § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements the Office will deny the application for review without reviewing the merits of the claim).

ANALYSIS -- ISSUE 2

In an August 5, 2009 statement, appellant noted that he did not receive the Office's May 28, 2009 letter advising him of the deficiencies in his claim. He requested that the Office directly contact his physicians to inquire whether his claimed conditions were work related. The Board finds that appellant's argument does not show that the Office erroneously applied point of law or advance a relevant legal argument. The Board has held that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have been received.¹⁵ The record reflects that the Office mailed the May 28, 2009 letter, as well as its decisions, to appellant's address of record. It is appellant's responsibility to submit rationalized medical evidence in support of his claim.¹⁶ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁷ Consequently, appellant's contention that the Office should have contacted his physician does not warrant reopening his case for merit review. Appellant did not submit any new or relevant medical evidence with his reconsideration request.

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

On appeal, appellant contends his right knee condition is work related and he submitted new evidence. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision.¹⁸

CONCLUSION

The Board finds appellant did not establish that he sustained a back or a right knee condition in the performance of duty. The Board finds that the Office properly denied his request for review of the merits of his claim under section 8128(a).

¹⁵ *Shakeer Davis*, 52 ECAB 448 (2001). In this case, the Office mailed a copy of the preliminary decision to both appellant and her attorney at their address of record. No evidence had been presented to rebut the presumption of receipt. Thus, it is presumed that the preliminary decision reached both appellant and her attorney.

¹⁶ *See supra* note 4.

¹⁷ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹⁸ 20 C.F.R. § 501.2(c). Appellant can submit new evidence to the Office as part of a request for reconsideration under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 17 and July 20, 2009 are affirmed.

Issued: October 25, 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