United States Department of Labor
Employees' Compensation Appeals Board

C.H., Appellant	)	
and	)	**Docket No. 10-521**
	)	**Issued: October 22, 2010**
DEPARTMENT OF VETERANS AFFAIRS, JAMES A. HALEY VETERANS HOSPITAL, Tampa, FL, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 14, 2009 appellant filed a timely appeal from the November 27 nonmerit and October 1, 2009 merit decisions that denied her request for an oral hearing and denied her claim. 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 established she sustained an injury in the performance of duty on February 9, 2008, causally related to her employment; and (2) whether the Office properly denied her request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On August 21, 2009 appellant, a 58-year-old nurse, filed a traumatic injury claim (Form CA-1) in which she alleged that on February 9, 2008 she sustained a "partial thickness tear of the

anterior/superior acetabular labrum" of her right hip. In a supplemental statement, she explained that she hyperabducted her right leg, with a lateral rotation, when she stood up quickly from a chair in the operating room to get supplies for the surgeon.[1]

On February 25, 2008 Dr. David Rosenbach, a Board-certified diagnostic radiologist, presented findings following x-rays of appellant's lumbosacral spine, which revealed slight thoracolumbar scoliosis, degenerative changes in the thoracic spine and thoracolumbar joint, "possible" calcified posterior disc at the L2-3 vertebrae, and slight degenerative changes in the lumbar spine. He also reported that x-rays of appellant's hip revealed no acute bony pathology.

Appellant submitted a note dated February 25, 2008 in which Dr. Eve N. Hanna, who is Board-certified in emergency medicine, reviewed appellant's history of injury. Dr. Hanna noted that appellant had pain in her right hip, which radiated to the groin after standing from the sitting position from a chair in the operating room. She stated that appellant could not recall any specific incident or injury which stimulated the pain. It was also noted that appellant had a preexisting degenerative right hip condition.

On July 31, 2009 Dr. Richard Kijowski, a Board-certified diagnostic radiologist, reported findings following a magnetic resonance imaging (MRI) scan hip arthrogram and diagnosed a partial thickness tear of the "anterior/superior" acetabular labrum and findings that "may represent tendinopathy in the appropriate clinical setting."

Appellant submitted an article concerning acetabular labral tears and a report signed by a licensed practical nurse.

By decision dated October 1, 2009, the Office denied the claim because the evidence of record did not establish that the established employment incident caused a medically-diagnosed injury.

On November 16, 2009 appellant requested an oral hearing. In a separate letter also dated November 16, 2009, she argued that her request was timely filed because although the Office issued its decision on October 1, 2009, it was not mailed until October 6, 2009. Appellant submitted a copy of the envelope bearing an October 6, 2009 postmark.

By decision dated November 27, 2009, the Office denied appellant's hearing request because it was untimely filed.

[1] While appellant had noted on her claim form that the injury occurred at the VA Hospital in Tampa, Florida, because she was employed at the VA Hospital in Madison, Wisconsin at the time the claim was filed, the employing establishment was incorrectly identified as the Madison Wisconsin VA Hospital by the Office in correspondence during the development of the claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[3] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[4] As part of his burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[5] 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]

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.[7] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on 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 employee.[9]

ANALYSIS -- ISSUE 1

Appellant's burden is to demonstrate that the established employment incident caused a medically-diagnosed injury. The medical opinion evidence of record lacks the detail and

---

[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[4] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Id.*; *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[6] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

[7] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[8] *T.H.*, 59 ECAB 388 (2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[9] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

reasoning to establish the requisite causal relationship and, accordingly, the Board finds appellant has not established she sustained an injury in the performance of duty on February 9, 2008, causally related to her employment.[10]

The reports signed by Drs. Kijowski and Rosenbach have little probative value on the issue of causal relationship.[11] Dr. Kijowski and Dr. Rosenbach presented findings based on radiologic examination and diagnoses based on those findings but neither Dr. Kijowski nor Dr. Rosenbach reviewed appellant's medical history, described the established employment incident, or explained how it caused the conditions they diagnosed. Therefore, Dr. Kijowski's and Dr. Rosenbach's reports do not establish the required causal relationship.

Dr. Hanna reiterated appellant's history of right hip pain while rising from a chair. She however did not present findings on examination or a medical diagnosis based on those findings. Dr. Hanna did not describe the established employment incident would have caused a medical condition. She merely reiterated that appellant felt pain following the incident. Pain, however, is a symptom not a diagnosis.[12] Furthermore, while Dr. Hanna noted appellant's history of degenerative right hip, she did not explain whether this condition was aggravated by the accepted incident. Thus, her note does not establish the requisite causal relationship.

Appellant submitted reports signed by a licensed practical nurse. Healthcare providers such as nurses, acupuncturists, physician assistants and physical therapists are not "physicians" under the Act. Therefore, their reports and opinions do not constitute probative medical evidence.[13] This evidence does not establish the requisite causal relationship.

Appellant also submitted an article concerning acetabular labral tears. Newspaper clippings, medical texts and excerpts from publications have no evidentiary value in establishing the necessary causal relationship between a claimed condition and an employment incident because such materials are of general application and are not determinative of whether the specifically-claimed condition is related to the particular employment incident.[14] This evidence does not establish the requisite causal relationship.

[10] On appeal, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB 293 (2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision).

[11] *See Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value).

[12] *C.F.*, 60 ECAB ___ (Docket No. 08-1102, issued October 10, 2008).

[13] 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (Docket No. 06-1564, issued February 27, 2007); *Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jan A. White*, 34 ECAB 515 (1983).

[14] *Eugene Van Dyk*, 53 ECAB 706 (2002); *William C. Bush*, 40 ECAB 1064, 1075 (1989).

An award of compensation may not be based on surmise, conjecture or speculation.[15] Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.[16] The fact that a condition manifests itself or worsens during a period of employment[17] or that work activities produce symptoms revelatory of an underlying condition[18] does not raise an inference of causal relationship between a claimed condition and an established employment incident.

Appellant has not submitted probative medical opinion evidence containing a reasoned discussion that explains how the established February 9, 2008 employment incident caused or aggravated a firmly-diagnosed medical condition. The Board finds appellant has not established the essential element of causal relationship.

LEGAL PRECENDENT -- ISSUE 2

Section 8124(b)(1) of the Act,[19] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection(a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.

Section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[20] When the Office revised its regulations effective January 4, 1999, the new regulations provided that a hearing was a review of an adverse decision by a hearing representative and that a claimant could choose between two formats: an oral hearing or a review of the written record.[21] These regulations also provide that the request for either type of hearing must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[22]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, including when the request is made after the 30-day

[15] *Edgar G. Maiscott*, 4 ECAB 558 (1952) (holding appellant's subjective symptoms and self-serving declarations do not, in the opinion of the Board, constitute evidence of a sufficiently substantial nature).

[16] *D.I.*, 59 ECAB ___ (Docket No. 07-1534, issued November 6, 2007)*; Ruth R. Price*, 16 ECAB 688, 691 (1965).

[17] *E.A.*, 58 ECAB 677 (2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

[18] *D.E.*, 58 ECAB 448 (2007); *Fabian Nelson*, 12 ECAB 155, 157 (1960).

[19] 5 U.S.C. § 8124(b)(1).

[20] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[21] 20 C.F.R. § 10.615.

[22] *Id.* at § 10.616. *See Leona B. Jacobs*, 55 ECAB 753 (2004).

period for requesting a hearing and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[23] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.

ANALYSIS -- ISSUE 2

The Office denied appellant's claim on October 1, 2009. Appellant's hearing request was postmarked November 16, 2009, more than 30 days after the Office issued its initial decision. She argues that the Office only mailed the denial of the claim on October 6, 2009, therefore the Office improperly calculated the 30 days commending on October 1, 2009. Appellant however did not file the request for hearing until November 16, 2009, which was also more than 30 days from October 6, 2009. Therefore, the Office properly found that she was not entitled to a hearing as a matter of right.[24]

The Office properly exercised its discretion and determined that appellant's request for an oral hearing could be equally well addressed by requesting reconsideration and submitting additional evidence. The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of her request for an oral hearing was proper under the law and the facts of this case.

CONCLUSION

The Board finds appellant did not establish she sustained an injury in the performance of duty on February 9, 2008, causally related to her employment. The Board further finds the Office properly denied appellant's request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

[23] *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

[24] *See* 5 U.S.C. § 8124(b)(1); 20 C.F.R. § 10.616(a).

ORDER

IT IS HEREBY ORDERED THAT the November 27 and October 1, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 22, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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