United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 10-1280**
	)	**Issued: February 1, 2011**
DEPARTMENT OF COMMERCE, U.S. CENSUS BUREAU, REGIONAL CENSUS CENTER -- DENVER, Dallas, TX, Employer	)	

Appearances:
Appellant, pro se
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 April 6, 2010 appellant filed a timely appeal from a November 16, 2009 merit decision of the Office of Workers' Compensation Programs and a March 8, 2010 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a back injury in the performance of duty on August 20, 2009, as alleged; and (2) whether the Office properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant requests that the Office pay outstanding medical bills in the amount of $1,489.30 for services rendered on August 20, 2009.

FACTUAL HISTORY

On August 26, 2009 appellant, then a 55-year-old Census Coverage Measurement (CCM) lister, filed a traumatic injury claim (Form CA-1) alleging that on August 20, 2009 he sustained a muscle strain in a motor vehicle accident. He was driving from his home in Cheyenne, WY to training in Greeley, CO on August 20, 2009 when a female driver failed to yield, their vehicles collided, and appellant's car rolled over into an irrigation ditch. Appellant was taken to the emergency room at North Colorado Medical Center by John Bredehoft, his supervisor, and treated that day. Mary Matthews, appellant's supervisor, reported that he was an intermittent employee and was injured in the performance of duty. She noted that appellant stopped work on August 20, 2009 and returned to work on August 24, 2009.

Appellant submitted an August 20, 2009 motor vehicle accident report. At 7:30 a.m. he was driving to Greeley, CO from Cheyenne, WY when he collided into another car. Appellant reported damage to his roof alignment, which was caved in from the rollover.

On September 2, 2009 the Office requested additional factual and medical information from appellant within 30 days.

The Office letter dated September 2, 2009 was returned for an incorrect mailing address and was resent on October 7, 2009 along with a request for the employing establishment to affirm travel within the performance of official duties.

In a triage assessment dated August 20, 2009 Kimberly Malone, a registered nurse, reported that appellant was involved in a rollover that day while wearing a seatbelt, had no pain and was "just here to be checked out."

A nursing assessment dated August 20, 2009 by Aries Simeon, a registered nurse, reported that appellant complained of "muscle tightness in his back and legs" and was discharged to his home with orders not to drive and prescriptions for vicodin and naproxen.

An initial assessment form dated August 20, 2009 by Rodger Anders, a certified physician assistant, reported that appellant was involved in a "MVA rollover" on August 20, 2009. He noted that appellant had mild stiffness in his back, diagnosed lumbar muscle strain and ordered an x-ray. Mr. Anders indicated that appellant would be unable to work from August 20 to 22, 2009. He reported that appellant's neck and back x-rays were negative.

By decision dated November 16, 2009, the Office denied the claim for compensation. Although the evidence was sufficient to establish that the employment incident occurred at the time, place and in the manner alleged, there was insufficient medical evidence that provided a diagnosis connected to the August 20, 2009 employment incident.

On March 4, 2010 appellant requested reconsideration and submitted a narrative statement and duplicate copies of the hospital assessment reports.

By decision dated March 8, 2010, the Office denied appellant's request for reconsideration. It found that he did not submit sufficient evidence to warrant a merit review of the November 16, 2009 Office decision, show that the Office erroneously applied or interpreted a

point of law, or advanced a point of law or fact not previously considered. Appellant did not submit relevant and pertinent new evidence not previously considered by the Office.[1]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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[3] was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[5]

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.[6]

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[1] The Board notes that, following the issuance of the March 8, 2010 Office decision and on appeal, appellant submitted new evidence. However, the Board is precluded from reviewing evidence which was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence, together with a formal written request for reconsideration to the Office, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

[2] 5 U.S.C. §§ 8101-8193.

[3] The Office's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[4] *E.K.*, 61 ECAB ___ (Docket No. 09-1827, issued April 21, 2010). *See Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Id. See John J. Carlone*, 41 ECAB 354 (1989); *Shirley A. Temple*, 48 ECAB 404 (1997).

[6] *Id. See Gary J. Watling*, 52 ECAB 278 (2001).

ANALYSIS -- ISSUE 1

There is no dispute that the motor vehicle accident occurred on August 20, 2009, as alleged. Therefore, the issue is whether appellant submitted sufficient medical evidence to establish that the employment incident caused an injury.

The August 20, 2009 triage assessment and the August 20, 2009 nursing assessment are not probative to causal relationship. The Board has held that registered nurses are not physicians under the Act.[7] Therefore, these reports are not probative medical evidence.[8]

Similarly, the assessment form from Rodger Anders, a certified physician's assistant, is not probative evidence. The Board finds that the August 20, 2009 note of Mr. Anders' opinion does not constitute medical evidence from a physician. Section 8101(2) of the Act defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.[9] The Board has found that a physician's assistant is not a physician as defined under the Act.[10] Therefore any report from such individual does not constitute competent medical evidence which, in general, can only be given by a qualified physician.[11] Thus, appellant did not meet his burden of proof to establish causal relationship.

As appellant has not submitted any rationalized medical evidence to support his claim that he sustained an injury causally related to the August 20, 2009 employment incident, he has failed to meet his burden of proof to establish a claim.

The Office, however, did not adjudicate the issue of appellant's incurred medical expenses. On appeal, appellant requested payment of medical bills for an x-ray and emergency care services rendered on August 20, 2009 at North Colorado Medical Center. Ordinarily, the employing establishment will authorize treatment of a job-related injury by providing the employee a properly executed (Form CA-16) within four hours.[12] In this case, the record does not contain a Form CA-16 or any other authorization from the Office for medical treatment. However, under section 8103 of the Act, the Office has broad discretionary authority to approve

[7] 5 U.S.C. § 8101(2).

[8] *E.K.*, *supra* note 4. *See Joseph P. Bennett*, 38 ECAB 484 (1987); *Betty G. Myrick*, 35 ECAB 922 (1984).

[9] *Supra* note 7.

[10] *E.K.*, *supra* note 4; *Richard E. Simpson*, 57 ECAB 668 (2006); *George H. Clark*, 56 ECAB 162 (2004); *Vickey C. Randall*, 51 ECAB 357 (2000); *Curtis L. Lord*, 33 ECAB 1481 (1982); *Guadalupe Julia Sandoval*, 30 ECAB 1491 (1979).

[11] *Ricky S. Storms*, 52 ECAB 349 (2001). *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physicians assistants, nurses and physical therapists are not competent to render a medical opinion under the Act); *Charley V.B. Harley*, 2 ECAB 208 (1949) (the Board held that medical opinion, in general, can only be given by a qualified physician).

[12] *Val D. Wynn*, 40 ECAB 666 (1989); *see also* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.3(a)(3) (September 1995).

unauthorized medical care which it finds necessary and reasonable in cases of emergency or other unusual circumstances.[13]

Appellant's supervisor transported him to the emergency room at North Colorado Medical Center for examination immediately after the employment incident. The Office did not adjudicate whether emergency or unusual circumstances were present.[14]

Although the Office adjudicated and denied appellant's claim of injury, it did not adjudicate the issue of whether he should be reimbursed for medical expenses incurred. It is required to exercise its discretion to determine whether medical care has been authorized, or whether unauthorized medical care involved emergency or unusual circumstances, and is therefore reimbursable regardless of whether the underlying claim for benefits has been accepted or denied.[15] The case will be remanded for further development of this issue.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act[16] the Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or an argument that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) or constitutes relevant and pertinent new evidence not previously considered by the Office.[17] Section 10.608(b) of Office regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[18]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[19]

ANALYSIS -- ISSUE 2

In support of his March 4, 2010 reconsideration request, appellant submitted an undated narrative statement. He repeated his description of the August 20, 2009 employment incident.

[13] 5 U.S.C. § 8103; 20 C.F.R. § 10.304. *See L.B.,* Docket No. 10-469 (issued June 2, 2010); *see also* Federal (FECA) Procedure Manual Chapter 3.300.3(a)(3), *supra* note 11.

[14] *E.K.*, *supra*, note 4.

[15] *Michael L. Malone*, 46 ECAB 957 (1995). *See Herbert J. Hazard*, 40 ECAB 973 (1989).

[16] 5 U.S.C. § 8101 *et seq*. 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).

[17] 20 C.F.R. § 10.606(b)(2). *See E.K.*, *supra* note 4; *D.K.*, 59 ECAB 141 (2007).

[18] *E.K.*, *supra* note 4; *K.H.*, 59 ECAB 495 (2008).

[19] *Eugene F. Butler*, 36 ECAB 393 (1984).

Appellant stated that he was involved in a motor vehicle accident, rolled over into a water ditch, and then taken to the emergency room by his supervisor despite his insistence that he was "fine." He reported that he was x-rayed and released on August 20, 2009. Appellant did not argue that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. The Office denied his claim for compensation based on the lack of medical evidence. This is a medical question. Appellant's statement is not relevant and pertinent and thus is not sufficient to require the Office to reopen his claim for consideration of the merits.[20]

Appellant also resubmitted copies of the assessments by Ms. Malone, Mr. Simeon and Mr. Anders. The Board notes that this evidence did not require reopening his case for merit review because it had previously been considered in the Office's November 16, 2009 decision. As the reports repeat evidence already of case record, they are not relevant and pertinent new evidence. Appellant has not established a basis for reopening his case.[21]

Appellant did not submit any evidence to show that the Office erroneously applied or interpreted a specific point of law, or advances a relevant legal argument not previously considered by the Office and did submit new evidence. As he did not meet any of the necessary requirements, he is not entitled to further merit review.[22]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a traumatic injury to his back on August 20, 2009 in the performance of duty, as alleged. The Board also finds that the Office properly denied his request for reconsideration without a merit review. The case will be returned to the Office for consideration of whether appellant's medical expenses related to his treatment on August 20, 2009 should be reimbursed.

[20] *T.E.*, 108 LRP 22579 (Docket No. 07-2227, issued March 19, 2008).

[21] *D.K.*, *supra* note 17; *see also Eugene F. Butler*, *supra* note 19; (the Board has held that the submission of evidence which does not address the particular issue involved does no constitute a basis of reopening a case.

[22] *L.H.*, 59 ECAB 253 (2007).

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2010 and November 16, 2009 decisions of the Office of Workers' Compensation Programs are affirmed. The case is remanded for further development of incurred medical expenses.

Issued: February 1, 2011
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