United States Department of Labor
Employees' Compensation Appeals Board

R.O., Appellant	)	
and	)	**Docket No. 10-1176**
	)	**Issued: January 24, 2011**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Kenner, LA, 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 March 16, 2010[1] appellant filed a timely appeal of the Office of Workers' Compensation Programs' September 24, 2009 merit decision finding that she did not sustain an injury and November 13, 2009 nonmerit decision denying her request for review of the written record as it was untimely filed. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] Under the Board's Rules of Procedure, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of the Office's decision. *See* 20 C.F.R. § 501.3(f)(2). As the Office's decision was issued September 24, 2009, the 180-day computation begins September 25, 2009. One hundred and eighty days from September 25, 2009 was March 23, 2010. Since using March 24, 2010, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service's postmark is March 16, 2010 which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

ISSUES

The issues are: (1) whether appellant established that she sustained a back injury on March 19, 2009, as alleged; and (2) whether the Office properly denied her request for a review of the written record as untimely under 5 U.S.C. § 8124.

On appeal, appellant contends that she sustained a back injury on March 19, 2009 in the performance of duty.

FACTUAL HISTORY

On March 24, 2009 appellant, then a 43-year-old transportation security officer (screener), filed a traumatic injury claim alleging that on March 19, 2009 she sustained a lumbar strain as a result of repetitive lifting at work. In a March 23, 2009 medical report, Dr. Rhoda R. Jones, an attending physician,[2] obtained a history that on March 19, 2009 appellant was lifting bags when she experienced extreme lower back pain. She listed findings on physical and x-ray examination. Dr. Jones diagnosed lumbar strain and listed appellant's physical restrictions. In a March 30, 2009 report, she stated that appellant's medication was changed to treat her irretraceable back pain. In an April 8, 2009 report, Dr. Jones listed findings on physical examination and diagnosed lumbar pain. In an April 16, 2009 report, she obtained a history that appellant experienced increased pain after bending to pick up a bag at work a few days ago. In an April 22, 2009 report, Dr. Jones obtained a history that appellant experienced pain which she rated pain as 10 out of 10 as a result of waving a wand over a passenger at a security checkpoint. In both the April 16 and 22, 2009 reports, she listed findings on physical examination and diagnosed a history of significant lumbar pain.

Treatment notes from appellant's physical therapists addressed the treatment of her lower back pain from March 23 to April 21, 2009.

By letter dated May 7, 2009, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she submit factual and medical evidence, including a rationalized medical report from an attending physician which described symptoms, examination and test results, diagnosis and treatment provided and an opinion with medical reasons on how the claimed incident contributed to the diagnosed condition.

In a May 5, 2009 magnetic resonance imaging (MRI) scan report of appellant's lumbar spine, Dr. Thompson M. Dietz, a Board-certified radiologist, diagnosed mild thoracolumbar levoscoliosis, transitional sacralized lumbosacral vertebra and disc considered to represent S1, S1-2, respectively, mild narrowing and dehydration of the L3-4 disc and minimal disc dehydration. He also diagnosed bilateral ovarian cysts; the larger cyst was on the left and measured approximately 2.6 centimeters by 3.6 centimeters in size.

[2] The Board notes that Dr. Jones' professional qualifications are not contained in the case record.

In a May 6, 2009 report, Dr. Jones listed findings on physical examination and reviewed Dr. Dietz's May 5, 2009 lumbar MRI scan. She diagnosed very mild thoracic scoliosis, mild narrowing and dehydration at L3-4 and significant abnormality. Dr. Jones advised that one of the bilateral enlarged ovarian cyst was hemorrhagic. She stated that, since appellant's spine had only mild narrowing, her pain probably came from her bilateral ovarian cysts. Dr. Jones related that bilateral ovarian cysts often left patients with referred back pain.

In a September 24, 2009 decision, the Office denied appellant's claim. The medical evidence was found to be insufficient to establish that she sustained a back injury causally related to the accepted March 19, 2009 employment incident.

In an undated form postmarked October 29, 2009, appellant requested review of the written record by an Office hearing representative regarding the Office's September 24, 2009 decision.

In a November 13, 2009 decision, the Office's Branch of Hearings and Review denied appellant's request for review of the written record as untimely. It found that she was not, as a matter of right, entitled to a review of the written record because her request, postmarked October 29, 2009, was not made within 30 days of the September 24, 2009 decision. The Office considered appellant's request under its discretionary authority and found that the issue in the case could equally well be addressed by requesting reconsideration and submitting new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[3] 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 filed within applicable time limitation; that an injury was sustained while 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury of an occupational disease.[5]

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 or exposure, which is alleged to have occurred.[6]

[3] 5 U.S.C. §§ 8101-8193.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 4.

[6] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

In order to meet her burden of proof to establish the fact that she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that she actually experienced the employment injury or exposure at the time, place and in the manner alleged.[7]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[8] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[9] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[10]

ANALYSIS -- ISSUE 1

The Office accepted that appellant engaged in repetitive lifting at work on March 19, 2009 while working as a transportation security officer (screener) at the employing establishment. The Board finds, however, that the medical evidence submitted is insufficient to establish that appellant's back condition was caused or aggravated by the March 19, 2009 employment incident.

Dr. Jones' May 6, 2009 report found that appellant had very mild thoracic scoliosis, mild narrowing and dehydration at L3-4, significant abnormality and bilateral enlarged ovarian cysts, one of which was hemorrhagic. However, she attributed appellant's back pain to her bilateral ovarian cysts and not to the accepted March 19, 2009 employment incident. Dr. Jones stated that, since appellant's lumbar spine only had mild narrowing, her back pain was probably due to her bilateral ovarian cysts. She further stated that bilateral ovarian cysts often left patients with referred back pain. As the cause of the pain related to a condition unrelated to lifting, the Board finds that Dr. Jones' report is insufficient to establish appellant's claim.

Dr. Jones' other reports found that appellant suffered from lumbar strain and pain, but did not provide an opinion on the causal relationship between the diagnosed conditions and the accepted employment incident. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value.[11] Further, the Board has held that a physician's mere diagnosis of pain does not constitute a basis for payment of compensation as pain is a symptom, not a medical condition.[12] The Board finds that Dr. Jones' additional reports are insufficient to establish appellant's claim.

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[7] *Linda S. Jackson*, 49 ECAB 486 (1998).

[8] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

[9] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[10] *Charles E. Evans*, 48 ECAB 692 (1997).

[11] *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

[12] *See C.F.*, 60 ECAB ___ (Docket No. 08-1102, issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

Dr. Dietz's diagnostic test results which addressed appellant's lumbar and ovarian conditions are similarly insufficient to establish her claim. He did not provide an opinion on the causal relationship between the March 19, 2009 employment incident and the diagnosed conditions.[13]

The treatment notes from appellant's physical therapists are of no probative medical value as a physical therapist is not a physician under the Act.[14]

The Board finds that there is insufficient rationalized medical evidence of record to establish that appellant sustained a back injury causally related to the accepted March 19, 2009 employment incident. Appellant did not meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on her claim before a representative of the Secretary.[15] Sections 10.817 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[16]

The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days.[17] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise that discretion.[18]

[13] *See* cases cited *supra* note 11.

[14] 5 U.S.C. § 8102(2). This subsection defines the term physician. *See Roy L. Humphrey*, 57 ECAB 238 (2005) (Medical opinion, in general, can only be given by a qualified physician); *see also 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).

[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. §§ 10.616, 10.617.

[17] *D.M.*, 60 ECAB __ (Docket No. 08-1814, issued January 16, 2009); *Joseph R. Giallanz*, 55 ECAB 186 (2003).

[18] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

ANALYSIS -- ISSUE 2

Appellant's October 29, 2009 request for a review of the written record was made more than 30 days after issuance of the Office's September 24, 2009 decision.[19] Therefore, her request was not timely and she was not entitled to a review of the written record as a matter of right.[20]

The Office, in its November 13, 2009 decision, properly exercised its discretion in determining whether to grant appellant's review of the written record and found that the issue involved in her claim could be equally addressed by requesting reconsideration and submitting additional new evidence. There is no evidence of record to establish that the Office abused its discretion. Accordingly, the Board finds that the denial of appellant's untimely request for review of the written record was proper.

CONCLUSION

The Board finds that appellant has failed to establish that she sustained a lumbar strain on March 19, 2009 in the performance of duty, as alleged. The Board further finds that the Office properly denied her request for a review of the written record as untimely under 5 U.S.C. § 8124.

[19] Appellant's request form was undated, but the form was sent to the Office in an envelope postmarked October 29, 2009. *See* 20 C.F.R. § 10.616(a) regarding the fixing of the date of such a request.

[20] 20 C.F.R. § 10.616(a).

ORDER

IT IS HEREBY ORDERED THAT the November 13 and September 24, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 24, 2011
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