United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 10-1217**
	)	**Issued: March 2, 2011**
SMITHSONIAN INSTITUTION, NATIONAL ZOOLOGICAL PARK, Washington, DC, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 22, 2010 appellant filed a timely appeal from a September 28, 2009 decision of the Office of Workers' Compensation Programs which denied his claim for traumatic injury and a November 17, 2009 decision which denied 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.[1]

ISSUES

The issues are: (1) whether appellant sustained a back injury on May 28, 2009 in the performance of duty; and (2) whether the Office properly denied appellant's October 14, 2009 request for reconsideration.

[1] For final adverse Office decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse Office decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On June 9, 2009 appellant, then a 56-year-old pipe fitter, submitted a claim for traumatic injury alleging that on May 28, 2009 he felt something pull in his back while digging up a yard hydrant and experienced back pain. To support his claim, he submitted medical notes in illegible handwriting dated June 3 and 17, 2009. The notes appeared to reference appellant's back pain and had notations regarding radiculopathy.

Appellant also submitted a medical note dated July 1, 2009 with an illegible signature. According to this note, he experienced low back pain, radiating into his legs, as a result of digging out a hydrant at work on May 28, 2009. The note related that appellant had low back pain with lumbar radiculopathy and recommended that he not work for two weeks.

The Office also received June 3 and 6, 2009 prescriptions for physical therapy, as well as physical therapy notes dated June 18, 23 and 29, 2009 from Amber Hill Physical Therapy, Inc.

On July 24, 2009 the Office advised appellant that the evidence submitted was insufficient to support his claim because he failed to provide medical evidence of a diagnosis of any condition resulting from his May 28, 2009 employment incident. It pointed out that back pain was a symptom, not a diagnosis. The Office specifically requested that appellant provide a detailed description of the employment incident and his medical condition, including what he was doing, how the injury occurred, immediate effects of the injury, and his condition between the date of the injury and the date he first received medical attention. Appellant was also asked to submit a detailed, narrative medical report from his physician which should include a history of the injury, examination and treatments received, results of examinations and tests, medical diagnosis, and his physician's opinion, supported by medical rationale, explaining how the May 28, 2009 employment incident caused or aggravated the alleged injury.

On July 29, 2009 appellant responded to the Office's request for additional information. He stated that on May 28, 2009 he was working at the Kids Farm at the National Zoo. Appellant explained that he was digging up an outside water hydrant when he lifted a boulder weighing about 10 to 15 pounds with his shovel and felt his back give out, resulting in pain in his lower back and legs. He further noted that he was unable to get up out of bed the next day and continued to experience pain until May 31, 2009. Appellant reported that he returned to work on June 2, 2009 but went to see the Smithsonian nurse since he still had pain.

Appellant also submitted several medical reports signed by Dr. J. Lee Krantz, a Board-certified family practitioner. On July 29, 2009 he related appellant's May 28, 2009 employment incident and his previous office visits on June 3 and 17, and July 1, 2009. This report noted that appellant's x-rays revealed some degenerative disc disease, but no acute bony problem. Dr. Krantz observed that appellant could bend but his flexion was limited to about 70 degrees. Appellant's deep tendon reflexes were zero but symmetrical and his straight leg test was weakly positive at 90 degrees on the left. He was assessed as having low back pain with lumbar radiculopathy that was believed to be the "direct result" of his work injury since he did not have back problems prior to that incident. The note further described that the mechanism of the injury was consistent with the symptoms appellant described.

In an August 13, 2009 medical report, Dr. Krantz reiterated the May 28, 2009 employment incident where appellant lifted a large stone while digging out a hydrant, resulting in back and leg pain. He reported appellant's examination findings. Dr. Krantz ultimately assessed that appellant suffered from low back pain with lumbar radiculopathy. He opined that his back condition was a direct result of the May 28, 2009 work incident since appellant did not have previous back problems and the mechanism of injury was consistent with his symptoms. Dr. Krantz also signed an August 13, 2009 work excuse note stating that appellant had not worked since July 29, 2009 due to a back injury.

In an almost identical August 26, 2009 medical report, Dr. Krantz again noted appellant's back pain and the May 28, 2009 employment incident.

On August 31, 2009 appellant submitted three CA-7 forms requesting compensation for leave without pay from July 29 to 31, August 1 to 15 and August 15 to 29, 2009.

On September 28, 2009 the Office issued a decision denying appellant's claim for compensation. It accepted that the May 28, 2009 employment incident occurred as he alleged, but determined that the medical evidence submitted failed to provide a medical diagnosis that could be connected to such incident. The Office determined that the medical evidence only stated that appellant experienced back pain with radiculopathy and, thus, failed to establish that he sustained an injury as defined under the Act. It again pointed out that pain is not considered a diagnosis under the Act.

On October 14, 2009 appellant submitted a request for reconsideration. He submitted as additional evidence to support his request a copy of Dr. Krantz's August 26, 2009 medical note, a September 25, 2009 medical report from Dr. John T. Stinson, a Board-certified orthopedic surgeon, October 2, 2009 lumbar magnetic resonance imaging (MRI) scan results conducted by Dr. Robert Soto, a Board-certified radiologist, and an October 13, 2009 witness statement from Keith Williams, a coworker.

In his September 25, 2009 medical report, Dr. Stinson reported appellant's incident of experiencing back pain after digging a hole for a fire hydrant and lifting heavy rocks. He also mentioned appellant's medical and social history. Dr. Stinson related appellant's physical examination findings. He ultimately opined that appellant suffered from persistent moderate to severe back pain and leg pain of indeterminate cause and recommended a lumbar MRI scan.

In the October 2, 2009 lumbar MRI scan report, Dr. Soto described appellant as a 56-year-old male with back pain. He noted that the lumbar MRI scan revealed a 17 millimeter disc herniation spondylosis and congenital canal narrowing contributing to marked spinal stenosis. Dr. Soto also observed L4-L5 spondylosis without disc herniation contributing to marked bilateral stenosis, as well as spondylosis at other levels with milder stenosis.

In the October 13, 2009 witness statement signed by Mr. Williams, he recalled the May 28, 2009 employment incident as appellant described that he was digging up a hydrant with appellant when appellant's back began to hurt.

On November 17, 2009 the Office issued a decision denying appellant's request for reconsideration on the grounds that the evidence submitted by him was either duplicative or

immaterial. Regarding Dr. Krantz's August 26, 2009 report, it determined that this evidence was previously considered in its September 28, 2009 decision, and thus, was not new evidence. The Office also addressed the October 13, 2009 statement from Mr. Williams and found that this evidence was not new evidence because the basis of denial was a lack of medical evidence establishing an injury, not that the May 28, 2009 employment incident did not occur. Thus, the statement was immaterial and not pertinent to his claim. Furthermore, the Office found that the additional medical evidence submitted lacked a firm diagnosis for appellant's claimed back condition, and therefore, he still failed to establish that he sustained an injury resulting from the May 28, 2009 employment incident. As appellant did not submit any new pertinent evidence not previously considered, the Office denied review on the merits.

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 reliable, probative, and substantial 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]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.[5] 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.[6] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[7] An employee may establish that the employment incident occurred as alleged but fail to show that his disability or condition relates to the employment incident.[8]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or opinion as to causal relationship.[9] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the

[2] 5 U.S.C. §§ 8101-8193.

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

[4] *M.M.*, 60 ECAB __ (Docket No. 08-1510, issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

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

[7] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[8] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[9] *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

employee's diagnosed condition and the specified employment factors or incident.[10] 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.[11]

ANALYSIS – ISSUE 1

The Office accepted that the May 28, 2009 employment incident occurred as alleged. It denied the claim, finding that appellant had not established that he sustained an injury as appellant had not submitted sufficient evidence substantiating a firm diagnosis of his condition, and a rationalized medical opinion causally relating the diagnosis to the accepted incident.

The Board finds that appellant has submitted medical evidence substantiating a diagnosis of lumbar radiculopathy, but has not established that his lumbar radiculopathy was causally related to the May 28, 2009 incident. Appellant has therefore failed to establish that he sustained an injury as defined under the Act.

Appellant submitted medical reports dated August 13 and 26, 2009 signed by Dr. Krantz. In both reports, Dr. Krantz referred to the May 28, 2009 employment incident when appellant felt a pull in his back while digging up a yard hydrant. He ultimately assessed that appellant suffered from low back pain with radiculopathy. While the Office found that Dr. Krantz had only diagnosed pain, which is a symptom, not a compensable medical diagnosis recognized under the Act,[12] he did consistently diagnose lumbar radiculopathy. However, Dr. Krantz did not provide a rationalized medical opinion explaining how the May 28, 2009 employment incident caused or contributed to the lumbar radiculopathy. He stated a conclusion: that the mechanism of injury was consistent with appellant's symptoms. Dr. Krantz did not explain however how the accepted incident of digging a yard hydrant would have physiologically caused the diagnosed lumbar radiculopathy. Lacking this medical explanation, Dr. Krantz's report is insufficient to establish appellant's claim.[13]

Appellant also submitted three medical slips dated June 3, 17, July 1 and 29, 2009, which did not contain a physician's letterhead, signature, or other proper identification. The Board has held that a medical report with no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8102(2) or without proper identification of who provided the

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

[11] *D.S.*, 61 ECAB __ (Docket No. 09-860, issued November 2, 2009); *B.B.*, 59 ECAB 234 (2007); *Victor J. Woodhams*, *supra* note 10.

[12] *C.B.*, 61 ECAB __ (Docket No. 09-2027, issued May 12, 2010); *Robert Broome,* 55 ECAB 339, 342, (2004).

[13] *S.E.*, 60 ECAB __ (Docket No. 08-2214, issued May 6, 2009); *see also Deborah L. Beatty,* 54 ECAB 340 (2003) (where the Board determined that a treatment note without a firm diagnosis was of insufficient probative value).

signature does not constitute probative medical evidence.[14] These reports did not contain any information from which it could be inferred that a physician completed the report and signed the paper. Thus, they are of no probative value to establish that appellant sustained an injury in the performance of duty.

Furthermore, appellant submitted physical therapy notes dated June 18, 23 and 29, 2009. Section 8101(2) of the Act provides, however, 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.[15] As a physical therapist is not a physician as defined under the Act, their reports do not constitute competent medical opinion in support of causal relation.[16] The Office, therefore, properly found that the medical evidence submitted failed to establish that appellant sustained an injury as defined under the Act in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether to review an award for or against compensation.[17] The Office's regulations provide that the Office may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district Office.[18]

To require the Office to reopen a case for merit review pursuant to the Act, the claimant must provide evidence or an argument that: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[19]

A request for reconsideration must also be submitted within one year of the date of the Office decision for which review is sought.[20] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or provided an

[14] *E.K.*, 61 ECAB __ (Docket No. 09-1827, issued April 21, 2010); *D.D.*, 57 ECAB 734 (2006); *Richard J. Charot*, 43 ECAB 357 (1991).

[15] *Roy L. Humphrey*, 57 ECAB 238 (2005); 5 U.S.C. § 8101(2).

[16] *A.C.*, 60 ECAB __ (Docket No. 08-1453, issued November 18, 2008); *David P. Sawchuk*, 57 ECAB 316 (2006).

[17] 5 U.S.C. § 8128(a); *see also D.L.*, 61 ECAB __ (Docket No. 09-1549, issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

[18] 20 C.F.R. § 10.605; *see also R.B.*, 61 ECAB __ (Docket No. 09-1241, issued January 4, 2010); *A.L.*, 60 ECAB __ (Docket No. 08-1730, issued March 16, 2009).

[19] 20 C.F.R. § 10.606(b); *see also L.G.*, 61 ECAB __ (Docket No. 09-1517, issued March 3, 2010); *C.N.*, 60 ECAB __ (Docket No. 08-1569, issued December 9, 2008).

[20] 20 C.F.R. § 10.607(a).

argument that meets at least one of the requirements for reconsideration. If the Office chooses to grant reconsideration, it reopens and reviews the case on its merits.[21] If the request is timely but fails to meet at least one of the requirements for reconsideration, the Office will deny the request for reconsideration without reopening the case for review on the merits.[22]

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision.

On November 17, 2009 the Office denied merit review on the grounds that the evidence submitted by appellant was duplicative and immaterial, as it did not address the particular issue in this case. The underlying issue in this case is whether appellant sustained an injury while digging the yard hydrant on May 28, 2009.

In support of his request for reconsideration, appellant submitted some duplicative medical evidence including Dr. Krantz's August 26, 2009 medical note, which was previously considered in the September 28, 2009 merit decision.

Appellant also submitted new medical evidence which had not been previously considered by the Office. Dr. Stinson's September 25, 2009 medical report noted appellant's past medical history, accurately stated his history of injury on May 28, 2009 and opined that he suffered from persistent to moderate severe back and leg pain. The October 2, 2009 lumbar MRI scan spine report diagnosed lumbar disc herniation, spondylosis and spinal stenosis. These medical reports are relevant, pertinent and new evidence pertaining to appellant's claim of back injury on May 28, 2009. Whether or not this evidence is sufficient to establish causal relationship goes to the weight of the evidence, and therefore goes beyond the standard to be applied to reopen a case for further review of the merits. The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge his burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.[23] Accordingly, the Office should have reviewed appellant's case on the merits.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).[24]

[21] *Id*. at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[22] *Id*. at § 10.608(b); *E.R.*, 61 ECAB __ (Docket No. 09-1655, issued March 18, 2010).

[23] *Billy B. Scoles*, 57 ECAB 258 (2005).

[24] The Board notes that appellant submitted additional evidence following the November 17, 2009 nonmerit decision. Since the Board's jurisdiction is limited to evidence that was before the Office at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 28, 2009 be affirmed and the decision dated November 17, 2009 be set aside and the case remanded for further review consistent with this decision.

Issued: March 2, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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