United States Department of Labor
Employees' Compensation Appeals Board

S.A., Appellant	)	
and	)	**Docket No. 10-1786**
	)	**Issued: May 4, 2011**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Buffalo, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 24, 2010 appellant filed a timely appeal from a January 25, 2010 merit decision of the Office of Workers' Compensation Programs. The record also contains a June 3, 2010 decision denying merit review of the claim. Pursuant to the Federal Employees' Compensation Act[1] and 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 established an injury in the performance of duty on December 7, 2009; and (2) whether the Office properly denied appellant's application for reconsideration without merit review of the claim.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In a Form CA-1 dated December 15, 2009, appellant, an entry specialist, alleged an injury on December 7, 2009 at 9:00 a.m. The first page of the claim form is generally illegible, but she noted that she was injured when she got up out of her chair. The employer advised that notice was received on December 16, 2009 and a supervisor stated, "I do not believe that getting up from the chair and getting up is a result of a work injury [sic]." The record contains an employing establishment safety investigation data form describing an incident on December 7, 2009 as follows: "I was working at my desk, when I turned in my chair and got up, my left hip popped and now I am experiencing severe back & neck pain." With respect to the medical evidence, appellant submitted a December 21, 2009 note from Dr. John Syracuse, a chiropractor, who found that she was unable to work due to a work injury.

In a letter dated December 23, 2009, the Office requested additional evidence from appellant. It requested a detailed description of how the injury occurred, any witness statements and that she address her medical treatment. The Office noted that there was no diagnosis or physician's opinion on causal relationship with appellant's employment.

On December 29, 2009 appellant submitted a December 23, 2009 attending physician's report (Form CA-20) from Dr. Syracuse, who diagnosed lumbar segmental dysfunction (the International Classification of Diseases (ICD) code was 739.3). Dr. Syracuse provided a history that she was getting out of her chair when her back went out. He checked a box "yes" that the condition was caused or aggravated by employment, indicating that appellant stated that she was injured at work. Of record are December 28, 2009 x-rays that diagnosed L4-5 anterior spondylolisthesis and degenerative disc disease. In a January 4, 2010 note, Dr. Syracuse stated that she was unable to work for the next two weeks due to a work injury and noted that she had an emergency appendectomy that day. In a January 18, 2010 note, he again stated that appellant was unable to work the next two weeks due to the work injury.

By decision dated January 25, 2010, the Office denied the claim for compensation. It found that the evidence did not establish that an incident occurred as alleged and also found the medical evidence was insufficient to establish causal relation.

On April 21, 2010 appellant requested reconsideration of her claim. She submitted additional medical evidence, including a February 15, 2010 report from Dr. Syracuse, who provided a history of a December 7, 2009 incident as stated on the employing establishment data form. Dr. Syracuse diagnosed subluxations at L3-S1, stating that the x-rays and computerized tomography displayed a classic subluxation. He opined that appellant's injury was causally related to her work duties and also stated that not all trauma are caused by a dramatic incident. Appellant submitted the treatment notes of Dr. Syracuse commencing December 14, 2009. She did not submit any additional factual evidence.

By decision dated June 3, 2010, the Office denied appellant's request for reconsideration without merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

The Act provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[2] The phrase "sustained while in the performance of duty" in the Act is regarded as the equivalent of the commonly found requisite in workers' compensation law of "arising out of an in the course of employment."[3] An employee seeking benefits under the Act has the burden of establishing that he or she sustained an injury while in the performance of duty.[4] 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 which is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[5]

With respect to the first component of fact of injury, the employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[6] An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and her subsequent course of action.[7] An employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong and persuasive evidence.[8]

As to medical evidence, the Office's procedures recognize that a claim may be accepted without a medical report when the condition is a minor one which can be identified on visual inspection, the injury is witnessed or reported promptly and no time was lost from work.[9] In clear-cut traumatic injury claims, such as a fall resulting in a broken arm, a physician's affirmative statement is sufficient and no rationalized opinion on causal relationship is needed whose fact of injury is established. In all other traumatic injury claims, a rationalized medical opinion supporting causal relationship is required.[10] Rationalized medical opinion evidence is

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[2] 5 U.S.C. § 8102(a).

[3] *Valerie C. Boward*, 50 ECAB 126 (1998).

[4] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

[5] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[6] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[7] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[8] *Allen C. Hundley*, 53 ECAB 551, 552 (2002).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d) (June 1995).

[10] *Id.*

medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the identified employment factor.[11]

ANALYSIS -- ISSUE 1

In this case, the Office found that appellant did not establish the first component of fact of injury. Appellant described a December 7, 2009 incident occurring at 9:00 a.m., in which she injured herself while rising up from a chair. The evidence establishes that a supervisor was notified of the incident on December 16, 2009 and the December 23, 2009 CA-20 form report gave a history of injury consistent with her statement.

As noted, an employee's factual statement as to an incident is of great probative value and will stand absent strong and persuasive evidence refuting the statement. There were no inconsistent statements from appellant or other evidence refuting the occurrence of the alleged incident. The record does not contain persuasive evidence refuting her allegation of a December 7, 2009 employment incident. The Board finds that appellant has established the factual component in that the incident occurred, as alleged.

To meet her burden of proof to establish the claim, appellant must submit medical evidence on causal relationship between a diagnosed condition and the December 7, 2009 employment incident. The medical evidence submitted prior to the January 25, 2010 merit decision consisted of reports from a chiropractor, Dr. Syracuse. Section 8101(2) of the Act provides that the term '"physician' … includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[12] Dr. Syracuse did not diagnose a subluxation as demonstrated by x-ray. The December 28, 2009 x-ray report diagnosed L4-5 anterior spondylolisthesis and degenerative disc disease. Dr. Syracuse did not refer to these x-rays or state the basis on which he diagnosed subluxation. He referred to ICD-9 code 739.3 (nonallopathic lesions of the lumbar spine) and diagnosed lumbar segmental dysfunction in a December 23, 2009 report.

The Board finds that Dr. Syracuse is not a physician as defined under the Act. Dr. Syracuse reports are of no probative medical value.[13] It is appellant's burden of proof to establish that her claim and the medical evidence is not sufficient to meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[14] the Office's regulations provide that a claimant may obtain review of the merits of the

[11] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

[12] 5 U.S.C. § 8101(2).

[13] *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

[14] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(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 evidence not previously considered by the Office."[15] Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[16]

ANALYSIS -- ISSUE 2

In her application for reconsideration appellant did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. She did submit new medical evidence regarding her claim. In a February 15, 2010 report, Dr. Syracuse diagnosed subluxations based on his review of x-rays dated December 28, 2009. He is therefore a physician under 5 U.S.C. § 8101(2) and the Office's implementing regulations at 20 C.F.R. § 10.311(c). In addition, Dr. Syracuse provided a history of injury and an opinion on causal relationship with employment. This constitutes new and relevant medical evidence with respect to the medical issue presented. The previous medical evidence of record was of no probative medical value. Appellant therefore has met the requirement of 20 C.F.R. § 10.606(b)(2)(3), as she submitted evidence that constitutes relevant and pertinent evidence not previously considered by the Office.

Since appellant has met one of the requirements of 20 C.F.R. § 10.606(b)(2), the case must be remanded to the Office. After such further development as the Office deems necessary, it should issue an appropriate merit decision.

On appeal, appellant argued that the medical evidence was sufficient to establish the claim. As to the January 25, 2010 Office decision on the merits of the claim, the Board considers only the evidence that was before the Office at the time of the January 25, 2010 final decision.[17] For the reasons noted, the medical evidence of record at that time was not sufficient to establish the claim. The medical evidence submitted after January 25, 2010 Office decision is reviewed to determine if it is sufficient to require the Office to review the merits of the claim. Appellant did submit new and relevant medical evidence and the case will be remanded for a decision on the merits of the claim.

CONCLUSION

The Board finds that appellant did not establish an injury in the performance of duty on December 7, 2009. The Board further finds that the Office improperly denied the application for reconsideration without merit review of the claim and the case is remanded for a merit decision.

[15] 20 C.F.R. § 10.606(b)(2).

[16] *Id*. at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

[17] *Id*. at § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 25, 2010 is modified to reflect an employment incident on December 7, 2009 and affirmed as modified. The June 3, 2010 Office decision is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: May 4, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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