United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 11-1925**
	)	**Issued: April 24, 2012**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Washington, DC, 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 August 23, 2011 appellant filed a timely appeal from April 28 and July 6, 2011 decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a traumatic injury in the performance of duty on October 13, 2010; and (2) whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 29, 2010 appellant, then a 34-year-old supervisory special agent, filed a traumatic injury claim alleging that she sustained a headache on October 13, 2010 after running and performing calisthenics at the employing establishment's training complex. A statement signed by Eric Kazmierski attested that appellant remained symptomatic on October 14, 2010 and was advised by health services to see her primary care physician. (The Board assumes Mr. Kazmierski is a coworker or supervisor, although he is not identified as such in the record.)

Appellant detailed in an undated statement that she sprinted and performed variations of push-ups, pull-ups and sit-ups for over an hour after conducting new agent training on October 13, 2010. She pointed out that special agents were granted three hours of physical exercise during working time. Later that evening, appellant experienced a headache and neck pain. The following morning, she dry heaved due to worsening symptoms. Appellant asserted that her condition resulted from her October 13, 2010 workout.

In an October 18, 2010 report, Dr. Pedro Steven Buarque de Macedo, a Board-certified neurologist, related that appellant sustained a headache on October 13, 2010 and thereafter experienced nausea, sound sensitivity and occipital and cervical symptoms. He noted a preexisting history of migraines since the age of 15. On physical examination, Dr. Buarque de Macedo observed cervical kyphosis, reduced cervical flexion and extension, and cervical and thoracic paraspinal muscle tenderness and spasms. He diagnosed cervicocranial syndrome and determined that appellant likely had a cervicogenic headache rather than a migraine. In a December 3, 2010 report, Dr. Buarque de Macedo added that nerve conduction studies and a needle electromyogram conducted on October 19, 2010 were unremarkable. A magnetic resonance imaging (MRI) scan of the cervical spine was also normal. Dr. Buarque de Macedo identified a positive antinuclear antibody test.

An undated note signed by Dr. Michael T. Fillat, a chiropractor, advised that appellant underwent neck and back adjustments on November 24 and December 10, 2010. Appellant also submitted October 15, 2010 treatment records signed by a physician assistant,[2] an unsigned December 3, 2010 report from an acupuncturist, and a January 5, 2011 medical appointment log containing an illegible signature.

OWCP informed appellant in a March 15, 2011 letter that additional evidence was needed to establish her claim. It gave her 30 days to submit a comprehensive report from a physician explaining how job activities on October 13, 2010 caused or contributed to a medical condition.

By decision dated April 28, 2011, OWCP denied appellant's claim, finding the medical evidence insufficient to demonstrate that the accepted October 13, 2010 employment incident caused a diagnosed medical condition.

[2] The contents of these records were incorporated into Dr. Buarque de Macedo's subsequent reports.

Appellant requested reconsideration on June 3, 2011. By decision dated July 6, 2011, OWCP denied her request on the grounds that she did not present new evidence or legal contentions warranting further merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under FECA has the burden of establishing the essential elements of her claim by the weight of reliable, probative and substantial evidence,[3] including that she is an "employee" within the meaning of FECA and that she filed her claim within the applicable time limitation.[4] The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[5]

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. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[6]

Causal relationship is a medical issue and the evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background, 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 claimant.[7]

ANALYSIS -- ISSUE 1

While the case record supports that appellant sprinted and performed calisthenics on October 13, 2010, the Board finds that she did not establish her traumatic injury claim because the medical evidence did not sufficiently demonstrate that this accepted employment incident caused or contributed to her cervicocranial syndrome or other diagnosed medical condition.

In October 18 and December 3, 2010 reports, Dr. Buarque de Macedo remarked that appellant sustained a headache on October 13, 2010 and diagnosed cervicocranial syndrome.

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[4] *R.C.*, 59 ECAB 427 (2008).

[5] *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *T.H.*, 59 ECAB 388 (2008).

[7] *I.J.*, 59 ECAB 408 (2008).

Based on his examination findings, he opined that the headache was cervicogenic and ruled out migraine onset. Nonetheless, Dr. Buarque de Macedo did not offer a specific opinion explaining how the October 13, 2010 work incident pathophysiologically caused or contributed to appellant's condition.[8] The need for a rationalized opinion was particularly important here in light of her prior history of migraine headaches since age 15.

Dr. Fillat's undated note, which confirmed that appellant underwent neck and back adjustments on November 24 and December 10, 2010, cannot constitute competent medical evidence. Medical opinion, in general, can only be given by a qualified physician.[9] As defined under FECA, a "physician" includes a chiropractor only to the extent that his reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[10] Subluxation means an incomplete dislocation, off-centering, misalignment, fixation, or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[11] Because Dr. Fillat did not diagnose a spinal subluxation based on a review of x-rays, he was not a physician and his opinion regarding the cause of appellant's condition lacked evidentiary weight.[12] Likewise, because neither physician assistants[13] nor acupuncturists[14] are considered physicians as defined under section 8101(2) of FECA, the October 15 and December 3, 2010 treatment records lacked probative medical value.

Finally, a January 5, 2011 medical appointment log containing an illegible signature cannot constitute competent medical evidence because it cannot be determined that the person who signed the log was a physician as defined under section 8101(2) of FECA.[15] In the absence of rationalized medical opinion evidence, appellant failed to meet her burden of proof.

[8] *Joan R. Donovan*, 54 ECAB 615, 621 (2003); *Ern Reynolds*, 45 ECAB 690, 696 (1994). The Board notes that Dr. Buarque de Macedo did not specify the activities performed on October 13, 2010. *See John W. Montoya*, 54 ECAB 306, 309 (2003) (a physician's opinion must discuss whether the employment incident described by the claimant caused or contributed to the diagnosed medical condition). *See also M.W.*, 57 ECAB 710 (2006); *James A. Wyrick*, 31 ECAB 1805 (1980) (medical opinions based on an incomplete or inaccurate history are of diminished probative value).

[9] *Charley V.B. Harley*, 2 ECAB 208, 211 (1949).

[10] 5 U.S.C. § 8101(2); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[11] 20 C.F.R. § 10.5(bb).

[12] *Gloria J. McPherson*, 51 ECAB 441 (2000). In addition, the Board points out that Dr. Fillat failed to offer a rationalized medical opinion on causal relationship. *Theresa M. Fitzgerald*, 47 ECAB 689 (1996).

[13] *Allen C. Hundley*, 53 ECAB 551, 554 (2002).

[14] *Sheila A. Johnson*, 46 ECAB 323 (1994).

[15] *R.M.*, 59 ECAB 690, 693 (2008).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[16] OWCP regulations provide that the evidence or argument submitted by a claimant must either: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[17] Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[18]

ANALYSIS -- ISSUE 2

Appellant requested reconsideration on June 3, 2011, but did not submit any additional evidence before the issuance of the July 6, 2011 decision. Moreover, she neither contended that OWCP erroneously applied or interpreted a specific point of law nor advanced a relevant legal argument not previously considered by OWCP.[19] Since appellant did not submit evidence or argument satisfying any of the three regulatory criteria for reopening a claim, OWCP properly denied her application for reconsideration.

Appellant contends on appeal that she submitted a report from Dr. Buarque de Macedo not previously considered by OWCP as part of her reconsideration request. The case record does not contain such a report. The Board also notes that appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal.[20] However, appellant may submit new evidence or argument as part of a formal written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not establish that she sustained a traumatic injury in the performance of duty on October 13, 2010. The Board also finds that OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

[16] 5 U.S.C. § 8128(a).

[17] *E.K.*, Docket No. 09-1827 (issued April 21, 2010). *See* 20 C.F.R. § 10.606(b)(2).

[18] *L.D.*, 59 ECAB 648 (2008). *See* 20 C.F.R. § 10.608(b).

[19] *See Charles A. Jackson*, 53 ECAB 671 n.14 (2002); *Daniel O'Toole*, 1 ECAB 107 (1948) (request for reconsideration predicated on legal premise should contain at least an assertion of an adequate legal premise having some reasonable color of validity).

[20] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the July 6 and April 28, 2011 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: April 24, 2012
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