United States Department of Labor
Employees' Compensation Appeals Board

L.L., Appellant	)	
and	)	**Docket No. 12-309**
	)	**Issued: August 7, 2012**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Hines, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2011 appellant, through her attorney, filed a timely appeal from a September 21, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for a traumatic injury and an October 24, 2011 nonmerit decision denying her request for an oral hearing. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained a lower back injury in the performance of duty on April 22, 2011 as alleged; and (2) whether OWCP properly denied appellant's request for an oral hearing.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the October 24, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal appellant's attorney contends that OWCP's decision was contrary to fact and law.

FACTUAL HISTORY

On April 27, 2011 appellant, then a 41-year-old secretary, filed a traumatic injury claim (Form CA-1) alleging that she sustained a lower back injury as a result of lifting two cases of paper while in the performance of duty on April 22, 2011.

By letter dated May 6, 2011, OWCP notified appellant of the deficiencies of her claim and allotted 30 days for the submission of additional factual and medical evidence.

In a May 12, 2011 letter, the employing establishment controverted appellant's claim. In an e-mail correspondence dated April 28, 2011, appellant's supervisor stated that she witnessed appellant carrying boxes of folders one at a time which weighed approximately three pounds each, according to the safety officer, on April 21, 2011. The supervisor stated that there were no witnesses of appellant carrying paper on April 22, 2011.

Appellant submitted treatment notes by Dr. Robert Jusino, a chiropractor, who diagnosed low back pain. On April 23, 2011 Dr. Jusino noted that appellant had complained of gradual onset of back pain for three years and used to carry large book bags.

In an April 25, 2011 x-ray report of the lumbar spine, Dr. John A. Aikenhead, a chiropractor, diagnosed early proliferative change at L2-3 and biomechanical alterations.

Jan Wiltsie, a nurse practitioner, indicated on April 27, 2011 that appellant was complaining of back pain that started on April 22, 2011 after lifting boxes at work.

A May 20, 2011 magnetic resonance imaging (MRI) scan report by Dr. Aikenhead revealed L2-3 disc bulging with Modic changes adjacent endplates, a left focal foraminal protrusion and L5-S1 small focal central protrusion.

On May 20, 2011 Dr. Victor W. Dapkus, a chiropractor, diagnosed lumbosacral radiculitis with lumbosacral sprain/strain, thoracic pain and cervicalgia with difficulty walking and myospasm. Appellant stated that on April 22, 2011 between the hours of 8:00 a.m. and 9:00 a.m. while at work she lifted two cases of paper with the weight of 70 pounds and felt a pulling in her low back. She stated that she twisted to put the paper cases on a cart and felt a sharp pain in the low back.

By decision dated June 13, 2011, OWCP accepted that the April 22, 2011 lifting incident occurred as alleged but denied appellant's claim finding that she failed to submit medical evidence providing a medical diagnosis in connection with the injury or events. Thus, it concluded that she had not established fact of injury.

In a June 14, 2011 statement, the employing establishment indicated that a case of paper weighs 23.3 pounds each and reiterated that appellant was seen carrying boxes of folders weighing 3 pounds each, not cases of paper.

On June 23, 2011 appellant requested reconsideration and submitted a narrative statement. She submitted a June 6, 2011 report by Dr. Asok K. Ray, a Board-certified orthopedic surgeon, who stated that appellant's back problem started following a work-related accident on April 22, 2011 when she was lifting two cases of 70-pound paper rolls and twisted her body to place the material. Dr. Ray reported that appellant used to have some back problems in the past, but never so severe. He provided his findings upon examination and reviewed appellant's medical record.

By decision dated September 21, 2011, OWCP denied modification of its June 13, 2011 decision on the grounds that the evidence submitted did not establish fact of injury.

By letter received on October 5, 2011, appellant, through her attorney, requested an oral hearing by telephone.

By decision dated October 24, 2011, OWCP denied appellant's request for an oral hearing finding that she had previously requested reconsideration on the same issue and was issued a reconsideration decision on September 21, 2011. It exercised its discretion and further denied appellant's request for the reason that the relevant issue of the case could be addressed by requesting reconsideration and submitting evidence not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[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 FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury[4] 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.[5]

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

[3] 5 U.S.C. §§ 8101-8193.

[4] OWCP'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).

[5] *T.H.*, 59 ECAB 388 (2008). *See Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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.[6]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[7] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.[8] An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. 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.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof to establish that on April 22, 2011 she sustained a lower back injury as a result of lifting two cases of paper. OWCP accepted that the incident occurred as alleged. However, appellant has failed to submit rationalized medical evidence establishing that she sustained an employment-related injury.

The Board finds that there are inconsistencies in the factual history presented in the medical evidence of record. On May 20, 2011 Dr. Dapkus reported that appellant lifted two cases of paper with the weight of 70 pounds on April 22, 2011 between the hours of 8:00 a.m. and 9:00 a.m. while at work. Dr. Jusino noted a history of a gradual onset of back pain. On June 6, 2011 Dr. Ray indicated that appellant's back problem started following a work-related accident on April 22, 2011 when she was lifting two cases of 70-pound paper rolls and twisted her body to place the material. However, on June 14, 2011, the employing establishment noted that a single case of paper weighs 23.3 pounds. The Board finds that it is not clear whether appellant was lifting 70 pounds or 46.6 pounds of paper on April 22, 2011. Furthermore, the June 6, 2011 report by Dr. Ray failed to provide a firm diagnosis and medical rationale explaining the causal relationship between appellant's back problems and the April 22, 2011 employment incident. Thus, the Board finds that the probative value of these medical reports is diminished due to the inconsistent factual histories presented and the failure to provide a diagnosis in connection with the employment incident.

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

[7] *See Mary Jo Coppolino*, 43 ECAB 988 (1992).

[8] *See R.T.*, Docket No. 08-408 (issued December 16, 2008).

[9] *See Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

The reports by Drs. Dapkus, Aikenhead and Jusino, chiropractors, are of no probative value. The Board has held that a chiropractor is a physician as defined under FECA to the extent that the 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] In the submitted reports, no chiropractor diagnosed a subluxation as demonstrated by x-ray to exist. Drs. Dapkus, Aikenhead and Jusino are not physicians as defined under FECA and their reports do not constitute competent medical opinion evidence.

Similarly, the April 27, 2011 report from Ms. Wiltsie, a nurse practitioner, is of no probative value as she is not a physician under FECA.[11] As such, the Board finds that appellant did not meet her burden of proof with this submission.

Accordingly, the Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty.

On appeal appellant's attorney contends that OWCP's decision was contrary to fact and law. For the reasons stated, the Board finds that appellant did not submit sufficient evidence to establish her claim.

Appellant may submit new evidence or argument with a 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.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."[12]

Section 10.615 of Title 20 of the Code of Federal Regulations provide, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[13] The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[14] OWCP has discretion, however, to grant or

[10] 20 C.F.R. § 10.311(a). *Cf., D.S.,* Docket No. 09-860 (issued November 2, 2009).

[11] 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law." *See also Paul Foster,* 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi,* 42 ECAB 677 (1991); *Barbara J. Williams,* 40 ECAB 649 (1989).

[12] 5 U.S.C. § 8124(b)(1).

[13] 20 C.F.R. § 10.615.

[14] *Id*. at § 10.616(a).

deny a request that is made after this 30-day period.[15] In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.[16]

ANALYSIS -- ISSUE 2

On October 5, 2011 appellant requested an oral hearing. However, she had previously requested reconsideration on June 23, 2011. OWCP denied appellant's request for reconsideration in a merit decision dated September 21, 2011. Because she previously sought reconsideration under section 8128 of FECA, the Board finds that she was not entitled to a hearing as a matter of right under section 8124(b)(1) and OWCP properly denied her request on this basis.[17]

Exercising its discretion to grant an oral hearing, OWCP denied appellant's request on the grounds that she had previously requested reconsideration on the same issue and was issued a reconsideration decision on September 21, 2011. It noted that she could equally well address any issues in her case by requesting reconsideration and submitting evidence not previously considered by OWCP. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[18] Because reconsideration exists as an alternative appeal right to address the issues raised by OWCP's September 21, 2011 decision, the Board finds that OWCP did not abuse its discretion in denying appellant's request for an oral hearing**.**[19]

CONCLUSION

The Board finds that appellant has not established that she sustained an injury in the performance of duty on April 22, 2011, as alleged. The Board further finds that OWCP properly denied her request for an oral hearing.

[15] *G.W.*, Docket No. 10-782 (issued April 23, 2010). *See also Herbert C. Holley*, 33 ECAB 140 (1981).

[16] *Id. See also Rudolph Bermann*, 26 ECAB 354 (1975).

[17] *See* 5 U.S.C. § 8124(b)(1) ("[b]efore review under section 8128(a) ... a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days ... to a hearing ...").

[18] *See Samuel R. Johnson*, 51 ECAB 612 (2000).

[19] *See Gerard F. Workinger*, 56 ECAB 259 (2005).

ORDER

IT IS HEREBY ORDERED THAT the October 24 and September 21, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 7, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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