United States Department of Labor
Employees' Compensation Appeals Board

Q.G., Appellant	)	
and	)	**Docket No. 11-1514**
	)	**Issued: February 13, 2012**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY SOUTHERN REGION, New Orleans, LA, Employer	)	

Appearances:
Marty Broussard, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 14, 2011 appellant, through her attorney, filed a timely appeal from the December 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her traumatic injury claim and the May 16, 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.

ISSUES

The issues are: (1) whether appellant sustained a back injury causally related to her employment on June 30, 2010; and (2) whether OWCP properly denied her request for a hearing under 5 U.S.C. § 8124(b).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 8, 2010 appellant, a 34-year-old secretary, filed a traumatic injury claim alleging that she sustained an injury to her back at work on June 30, 2010. She stated that she slipped in a pool of water and fell on her left knee, "with pain shooting to [her] back." Appellant was taken to the Tulane Hospital emergency room, where she was treated by Dr. Stephen Mallernee, a Board-certified internist, who recommended ice packs and stretches and indicated she was out of work until July 3, 2010.

The record reflects that appellant was treated by Dr. Miguel Melgar, a Board-certified neurological surgeon, for a preexisting back condition. In a June 30, 2010 report, Dr. Melgar stated that he planned to perform a "trans 1 fusion" on July 15, 2010 for her preexisting disc disease, "in order to avoid further damage to her back." In a July 5, 2010 leave recipient application, appellant requested advanced sick leave from July 5 through November 29, 2010 for disability related to her back surgery. On October 2, 2010 the employing establishment denied her request.

The employing establishment controverted appellant's claim. In a Form CA-16 dated June 30, 2010, it indicated that there was doubt whether her claimed lower back pain was due to a work-related injury sustained on that date. In a letter dated September 13, 2010, Antoinette Medley, an Injury Compensation Program Administrator, contended that appellant had filed her traumatic injury claim only after her leave had been depleted and her request for advanced annual leave had been denied, and that her claimed disability was due to a preexisting back condition.[2] On November 1, 2010 the establishment reiterated its contention that: appellant's claim should be denied, noting that it was filed two months after the alleged date of injury; that the medical evidence failed to explain how appellant injured her back by falling on her knee and that the back injury predated the claimed injury.

In an October 5, 2010 report, Dr. Melgar stated that he had treated appellant earlier in the year when she was diagnosed with L5-S1 severe discogenic lumbar spine disc disease, for which she underwent surgery. He stated:

> "It is noteworthy that [appellant] sustained a fall on June 30, 2010. This aggravated her back condition for which she remained in bed rest until the rescheduling of her surgery. [Appellant] successfully underwent L5-S1 minimally invasive spinal fusion on September 15, [20]10. Due to the delay in her surgery secondary to the fall, it is my opinion that [she] will need more time for recovery. Therefore, the original November 29, 2010 date to return to work will need to be postponed until the beginning of 2011."

In a letter dated November 5, 2010, OWCP advised appellant that the information submitted was insufficient to establish her claim and requested additional information, including a detailed account of the alleged injury and a physician's report, with a diagnosis and a rationalized opinion as to the cause of the diagnosed condition.

[2] The record contains numerous e-mails between appellant and the employing establishment relating to her requests for annual, sick and advanced leave for the period July 5 through October 2, 2010.

In a June 30, 2010 attending physician's report, Dr. Mallernee related appellant's statement that she had slipped on a wet floor on that date and hit her knee on the ground, "sending a shooting pain in [her] back." Noting a history of lumbar disc disease, he found tenderness on examination. Dr. Mallernee diagnosed acute lumbar strain and indicated by placing a checkmark in the "yes" box that he believed the diagnosed condition was caused or aggravated by the claimed employment incident. He indicated that appellant's back condition had flared due to the fall. Dr. Mallernee stated that she was disabled from June 30 to July 3, 2010, when she could return to work with restrictions.

In an undated statement, appellant indicated that, on June 30, 2010, she arrived at the employing establishment with a medical report from her treating physician regarding the leave that would be required to accommodate her upcoming back surgery and period of recuperation. As she walked in front of the employing establishment store, she allegedly slipped and fell down hard on her hands and knees in a puddle of water. Appellant was unable to move due to unbearable pain, which was shooting up her back. She was eventually transported to the emergency room. On July 7, 2010 Dr. Melgar placed appellant on bed rest until her surgery.

By decision dated December 22, 2010, OWCP denied appellant's claim, finding that the medical evidence did not establish that the claimed medical condition was causally related to the established work-related event.

On April 13, 2011 appellant requested an oral hearing.

In a May 16, 2011 decision, OWCP found that appellant's request was untimely and that she was not entitled to a hearing as a matter of right. It considered her request and denied a discretionary hearing on the grounds that she could equally well address any issues in her case by requesting reconsideration before OWCP and submitting evidence not previously considered which established that she sustained an injury in the performance of duty, as alleged.

LEGAL PRECEDENT -- ISSUE 1

FECA provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.[4]

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim, including the fact that she is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the

[3] 5 U.S.C. § 8102(a).

[4] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

employment injury.[5] When an employee claims that she sustained a traumatic injury in the performance of duty, she must establish the fact of injury, consisting of two components, which must be considered in conjunction with one another. The first is whether she actually experienced the incident that is alleged to have occurred at the time, place and in the manner alleged. The second is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[6]

An award of compensation may not be based on appellant's belief of causal relationship.[7] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[8] Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under FECA.[9]

The medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, 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 established incident or factor of employment.[10]

ANALYSIS -- ISSUE 1

OWCP accepted that the workplace incident occurred as alleged, namely, that appellant slipped and fell on her knee on June 30, 2010. The issue, therefore, is whether she has submitted sufficient medical evidence to establish that the employment incident caused an injury. The medical evidence presented does not contain a rationalized medical opinion establishing that the work-related incident caused or aggravated any particular medical condition or disability. Therefore, appellant has failed to satisfy her burden of proof.

On June 30, 2010 the emergency room physician, Dr. Mallernee, provided a history of injury, as reported by appellant, stating that she had slipped on a wet floor and hit her knee on the ground, "sending a shooting pain in [her] back." He noted a history of lumbar disc disease,

[5] *Robert Broome*, 55 ECAB 339 (2004).

[6] *Deborah L. Beatty*, 54 ECAB 340 (2003). *See also Tracey P. Spillane*, 54 ECAB 608 (2003); *Betty J. Smith*, 54 ECAB 174 (2002). The term injury as defined by FECA, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q)(ee).

[7] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[8] *Id.*

[9] 20 C.F.R. § 10.303(a).

[10] *John W. Montoya*, 54 ECAB 306 (2003).

diagnosed acute lumbar strain and indicated by placing a checkmark in the "yes" box that he believed the diagnosed condition was caused or aggravated by the claimed employment incident. Dr. Mallernee did not, however, provide detailed examination findings or a complete and accurate factual or medical background. Although he indicated that appellant's back condition had flared due to the fall, he did not explain how falling on her knee would have been competent to have caused or aggravated an injury to her back. A mere checkmark or affirmative notation in response to a form question on causal relationship is not sufficient to establish a claim.[11] The Board has also consistently held that a medical opinion not fortified by rationale is of diminished probative value.[12] Accordingly, Dr. Mallernee's reports are of diminished probative value.

Dr. Melgar treated and performed surgery on appellant for her preexisting disc disease. His June 30 and October 15, 2010 reports do not support her contention that the accepted incident caused or aggravated her claimed back condition. The June 30, 2010 report reflected Dr. Melgar's plan to perform a "trans 1 fusion" on July 15, 2010 to correct appellant's preexisting disc disease. It did not however address, and was prepared prior to, the June 30, 2010 work incident. Therefore, it is of limited probative value.

In his October 5, 2010 report, Dr. Melgar reviewed his prior treatment of appellant's L5-S1 severe discogenic lumbar spine disc disease. He stated that the June 30, 2010 fall had aggravated her back condition and caused a delay in the surgery scheduled for her preexisting condition. Dr. Melgar did not, however, provide examination findings or a complete factual and medical history. Most significantly, his opinion is not supported by an explanation of the medical process through which appellant could have sustained an aggravation of her back condition as a result of falling on her knee, or why her condition did not merely represent the natural progression of her severe discogenic lumbar spine disc disease. As noted, medical conclusions unsupported by rationale are of little probative value[13] and are insufficient to establish causal relationship.[14] Such an explanation is particularly important, given the fact that Dr. Melgar's opinion is not based upon a contemporaneous examination of appellant.[15]

The remaining medical evidence of record including disability slips, x-rays and test results, which do not contain an opinion as to the cause of appellant's back condition, are of limited probative value.

Appellant expressed her belief that her back condition was aggravated by the June 30, 2010 employment incident. The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[16] Neither the fact that the condition became apparent during a period of

[11] *See Gary J. Watling*, 52 ECAB 278 (2001).

[12] *Cecilia M. Corley*, 56 ECAB 662 (2005).

[13] *Willa M. Frazier*, 55 ECAB 379 (2004).

[14] *See Calvin E. King, Jr*., 51 ECAB 394 (2000); *see also Frederick E. Howard, Jr*., 41 ECAB 843 (1990).

[15] Medical evidence contemporaneous to the injury or disability may be afforded greater probative value in the weighing of medical evidence. *George Sevetas*, 43 ECAB 424 (1992)

[16] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

employment, nor the belief that the condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.[17]

OWCP advised appellant that it was her responsibility to provide a comprehensive medical report describing her symptoms, test results, diagnosis, treatment, and the doctor's opinion, with medical reasons, on the cause of her condition. Appellant failed to submit appropriate medical documentation in response to OWCP's request. As there is no probative, rationalized medical evidence explaining how the accepted incident caused or aggravated a diagnosed condition, she has not met her burden of proof to establish that she sustained an injury in the performance of duty on June 30, 2010.

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 dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, 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 his claim before a representative of the Secretary."[18] The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings...."[19]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for a hearing.

Pursuant to section 8124(b)(1) of FECA, appellant was entitled to a hearing upon her request within 30 days after the date of the issuance of OWCP's December 22, 2010 decision.[20] On April 13, 2011 she requested an oral hearing. As the April 13, 2011 request was made more than 30 days after the issuance of the December 22, 2010 decision, it was untimely. Therefore, appellant is not entitled to a hearing as a matter of right.

OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and it must exercise this discretionary authority in deciding whether to grant a hearing. OWCP's procedures, which require it to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper

[17] *Id.*

[18] 5 U.S.C. § 8124(b)(1).

[19] *See André Thyratron*, 54 ECAB 257 (2002). *See also Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982)

[20] *See supra* note 18 and accompanying text.

interpretation of FECA and Board precedent. OWCP exercised its discretion in this case and found that appellant's right to further proceedings could be equally well addressed by requesting reconsideration. As the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[21] There is no evidence that OWCP abused its discretion in denying appellant's request for a hearing under these circumstances.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a traumatic injury in the performance of duty on June 30, 2010. The Board also finds that OWCP properly denied appellant's request for a hearing.

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2011 and December 22, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 13, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[21] *Daniel J. Perea*, 42 ECAB 214 (1990).