United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	**Docket No. 13-1459**
	)	**Issued: December 5, 2013**
DEPARTMENT OF VETERANS AFFAIRS, NEBRASKA WESTERN IOWA HEALTHCARE SYSTEM, Grand Island, NE, Employer	)	

Appearances:
Gloria Kortum, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 5, 2013 appellant, through her representative, filed a timely appeal from an April 19, 2013 nonmerit decision and a March 15, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 established that she sustained a traumatic injury in the performance of duty on January 17, 2013; 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 January 29, 2013 appellant, then a 50-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that she injured her right upper arm, causing numb tingling in the fingers of her right hand, in the performance of duty on January 17, 2013. Her injury occurred as a result of lifting a patient in his bed with the assistance of another employee. Appellant experienced a sharp burning pain in her upper right arm and again when she lifted another patient in bed with assistance. The employing establishment controverted the claim stating that appellant did not follow policies regarding safe patient handling and did not report her injury until January 23, 2013.

On February 4, 2013 OWCP requested additional factual and medical evidence from appellant. It noted that she had not submitted any factual or medical evidence apart from her Form CA-1. OWCP afforded appellant 30 days to submit additional evidence.

In a report dated January 29, 2013, Dr. Philip M. Cahoy, a Board-certified orthopedic surgeon, obtained a history of right arm pain while repositioning a patient on January 17, 2013. In the course of the repositioning, appellant had pain in the anterior lateral aspect of her arm that radiated up into her shoulder and down into her hands. Dr. Cahoy related that appellant also had left medial elbow pain and mentioned the alleged work-related incident. He limited appellant to lifting only up to 10 pounds for one hour a day with her right arm. Appellant submitted two prior reports from Dr. Cahoy from 2011 regarding tingling in her right hand and a right bicep muscular injury. In a duty status report dated January 29, 2013, Dr. Cahoy listed a work restriction of pulling or pushing up to one hour per day due to right arm pain.

In a February 6, 2013 attending physician's report, Dr. Cahoy found that appellant had right arm pain. He checked a box indicating that appellant's condition was caused or aggravated by an employment activity, noting "injury caused while repositioning a patient."

On February 11, 2013 appellant advised OWCP that she and other staff "almost always" repositioned patients as alleged and that her supervisors were aware of the manner in which she repositioned patients. She described the incident in detail, noting that she did not report her condition to a supervisor until January 22, 2013 because she did not think the pain in her right arm would persist. Appellant provided physical therapy notes dated February 20, 2013 from Mary Walsh-Sterup, an occupational therapist. She was treated for right arm pain and probable carpal tunnel syndrome.

By decision dated March 15, 2013, OWCP denied appellant's claim. It accepted that the lifting incidents of January 17, 2013 occurred as alleged. It found that the medical evidence did not provide a firm medical diagnosis other than "pain." Further, appellant had not responded to its inquiries regarding previous injuries to her right arm or biceps.

On March 26, 2013 appellant requested reconsideration. She submitted a duplicate copy of Dr. Cahoy's January 29, 2013 report, physical therapy notes dated March 13 and 15, 2013 from Ms. Walsh-Sterup and a March 13, 2013 work restriction report from Dr. Cahoy.

By decision dated April 19, 2013, OWCP denied appellant's request for reconsideration. It found that she failed to provide any new argument or evidence in support of her claim. It noted that the January 29, 2013 report from Dr. Cahoy was duplicative of evidence already of

record. The physical therapy notes did not contain any diagnosis of a condition by a physician and the March 13, 2013 work restriction report from Dr. Cahoy did not provide a diagnosis. As such, the evidence did not warrant further merit review of her claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[2] 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[3] 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.[4]

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 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.[5]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence.[6] 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.[7] The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8]

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[2] 5 U.S.C. §§ 8101-8193.

[3] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events of 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).

[4] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Id*. *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

[6] *See J.Z.*, 58 ECAB 529, 531 (2007*); Paul E. Thams*, 56 ECAB 503, 511 (2005).

[7] *I.J.*, 59 ECAB 408, 415 (2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[8] *James Mack*, 43 ECAB 321, 329 (1991).

ANALYSIS -- ISSUE 1

OWCP accepted that the lifting incidents of January 17, 2013 occurred at the time, place and in the manner alleged. Appellant assisted in repositioning two bedridden patients. The issue is whether she has established that she sustained a right arm condition as a result of the January 17, 2013 employment incident. The Board finds that appellant did not meet her burden of proof to establish that she has a right arm condition causally related to the January 17, 2013 employment incident.

Appellant submitted several reports from Dr. Cahoy. On January 29, 2013 Dr. Cahoy stated that he assessed her as having right arm pain. In an attending physician's report of February 6, 2013, he reiterated that appellant had right arm pain. Dr. Cahoy checked a box indicating that appellant's condition was caused or aggravated by an employment activity, adding "injury caused while repositioning a patient." On January 29, 2013 he listed a work restriction of pulling or pushing up to one hour a day based on appellant's right arm pain.

The Board has held that pain is generally a description of a symptom and not considered a firm medical diagnosis.[9] Dr. Cahoy's description right arm pain is not sufficient to establish a firm medical diagnosis related to the accepted incident at work. His January 29, 2013 duty status report and March 13, 2013 work restriction report did not provide any diagnoses or assessment of appellant's condition. Therefore, the Board finds the reports of Dr. Cahoy insufficient to establish appellant's claim. Moreover, reports dated in 2011 note that appellant was previously treated by Dr. Cahoy for her right hand and biceps. Dr. Cahoy did not provide a full medical history of prior treatment or otherwise address how the incident of January 17, 2013 caused or aggravated any preexisting right arm condition.

Appellant submitted physical therapy notes dated February 20 to March 15, 2013 from Ms. Walsh-Sterup, an occupational therapist. An occupational therapist is not a "physician" as defined under FECA. Therefore, her medical reports do not qualify as probative medical evidence supportive of a claim for federal workers' compensation.[10] Absent approval by a physician, the therapy notes are not probative medical evidence.

The Board finds that appellant did not submit sufficient medical evidence which provided a firm diagnosis or a rationalized explanation as to how the accepted incident physiologically caused a right arm condition. Appellant therefore failed to establish that she has a right arm condition resulting from the January 17, 2013 employment incident.

Appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal.[11] 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.

[9] *B.P.*, Docket No. 12-1345 (issued November 13, 2012); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

[10] *See* 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 n.4 (2000).

[11] 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (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.[12] Section 10.608(b) of OWCP's regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[13] The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.[14]

ANALYSIS -- ISSUE 2

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

On March 26, 2013 appellant requested reconsideration of the March 15, 2013 decision denying her claim for compensation for a traumatic injury. Her request for reconsideration did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a relevant legal argument not previously considered by OWCP. Thus, she was not entitled to a review of the merits of her claim based on the first and second requirements under section 10.606(b)(2).

Appellant also did not submit relevant and pertinent new evidence not previously considered by OWCP. Dr. Cahoy's report dated January 29, 2013 was previously of record, having been first received on February 5, 2013. Submitting evidence that repeats or duplicates information already of record does not constitute a basis for reopening a claim.[15] Therefore, this report was insufficient to require a merit review of appellant's claim.

While the therapy notes dated March 13 and 15, 2013 and the work restriction report dated March 13, 2013 from Dr. Cahoy were new to the record, they are not relevant to the grounds upon which OWCP denied appellant's claim. The evidence failed to address the underlying issue of causal relationship. The documentation does not include a physician's firm medical diagnosis or a discussion of how the employment incident of January 17, 2013 caused a personal injury. As noted, therapy notes, without the countersignature of a physician, do not constitute probative medical evidence.[16] The report of Dr. Cahoy failed to provide a firm

[12] *Id*. at § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

[13] *Id*. at § 10.608(b); *K.H.*, 59 ECAB 495, 499 (2008).

[14] *See Daniel Deparini*, 44 ECAB 657, 659 (1993).

[15] *Id*.; *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

[16] *Supra* note 10.

medical diagnosis or address the issue of causal relation. Therefore, it is not relevant.[17] A claimant may be entitled to merit review by submitting new and relevant evidence, but appellant did not submit any relevant medical evidence in this case.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a right arm injury on January 17, 2013 in the performance of duty. OWCP properly denied her request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated April 19 and March 15, 2013 are affirmed.

Issued: December 5, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[17] See *K.W.*, Docket No. 12-1590 (issued December 18, 2012).