United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 12-1657**
	)	**Issued: January 17, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, NEW MEXICO HEALTH CARE SYSTEM, Albuquerque, NM, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 1, 2012 appellant filed a timely appeal of the February 15 and May 23, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP) denying his claim for compensation. He also filed a timely appeal from the June 26, 2012 decision denying reconsideration. 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 he sustained an injury in the performance of duty on November 28, 2011, as alleged; and (2) whether OWCP properly denied his request for reconsideration pursuant to 20 C.F.R. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends that he was injured while packing fluid bags at the employing establishment. He submitted new evidence in support of his claim on appeal.[2]

FACTUAL HISTORY

On January 9, 2012 appellant, then a 50-year-old inventory management specialist, filed a traumatic injury claim alleging a back condition on November 28, 2011, while boxing two pallets full of fluids and placing them in carts. He did not submit any evidence with his claim.

By letter dated January 13, 2012, OWCP informed appellant of the evidence needed to support his claim.

In a January 9, 2012 report, Dr. Michael F. Hartshorne, a Board-certified radiologist, noted that appellant's x-rays of his chest, left wrist and knees were normal.

In a January 9, 2012 progress report, Dr. Elizabeth Toman, a Board-certified internist, noted that in the last week of November, appellant did some warehouse work for his job and had increased lumbar and thoracic spine pain. She assessed him with chronic low back pain, much worse in the past one to two months since he was doing heavy labor at work in November. Dr. Toman noted that appellant had pain in chest, chronic abdominal and scrotal pain, knee pain, ankle pain, impaired glucose tolerance and hyperlipidemia. In a January 18, 2012 progress report, she assessed him with chronic low back pain with work-related exacerbation. In a January 27, 2012 report, Dr. Toman stated that appellant was being followed for the following problems: chronic back pain, abdominal pain of unspecified site; impaired fasting glucose; knee: arthralgia; hyperlipidemia and gastroesophageal reflux disease. She noted that in the last week of November he did some warehouse work for his employment, including, heaving lifting. Appellant had an increase in lumbar and thoracic spine pain since that time. Dr. Toman noted that he stopped working prior to his January 9, 2012 evaluation and that she advised him to continue to remain off work.

By decision dated February 15, 2012, OWCP denied appellant's claim. It accepted that the November 28, 2011 incident occurred as alleged. The claim was denied because appellant did not submit sufficient medical evidence to establish causal relation.

On March 8, 2012 appellant requested reconsideration.

On January 18 and February 27, 2012 Dr. Toman completed work slips excusing appellant from work.

On February 22, 2012 Dr. Brad W. Cushnyr, a Board-certified radiologist, interpreted two magnetic resonance imaging (MRI) scans. The lumbar spine MRI scan was negative for moderate or severe neural foraminal or spinal canal stenosis. Dr. Cushnyr noted mild multilevel degenerative changes of the lumbar spine. With regard to the thoracic spine, he noted no significant findings.

[2] The Board lacks jurisdiction to review evidence that was not before OWCP, for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

By decision dated May 23, 2012, OWCP determined that the new evidence was not sufficient to warrant modification of its February 15, 2012 decision.

On June 15, 2012 appellant again requested reconsideration. In support of his request, he submitted medical records from his physical therapist.

By decision dated June 26, 2012, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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.[3] An employee seeking benefits under FECA 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 the FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP 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 or exposure, which is alleged to have occurred.[5] In order to meet his or her burden of proof to establish the fact that he or she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that he or she actually experienced the employment injury or exposure at the time, place and in the manner alleged.[6]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[7] The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized 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

[3] 20 C.F.R. § 10.5(ee).

[4] *Jussara L. Arcanjo*, 55 ECAB 281, 283 (2004).

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

[6] *Linda S. Jackson*, 49 ECAB 486 (1998).

[7] *John J. Carlone*, 41 ECAB 354 (1989).

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 specific employment factors identified by the claimant.[8]

ANALYSIS -- ISSUE 1

OWCP accepted that the November 28, 2011 an employment incident occurred as alleged. Appellant packed fluid bags for his employer. However, it found that the medical evidence failed to establish that he sustained a back condition as a result of the accepted incident. The Board finds that appellant has failed to provide sufficient medical evidence to establish that he sustained a back condition causally related to the November 28, 2011 employment incident.

On January 9, 2012 Dr. Hartshorne reviewed appellant's x-rays of his chest, left wrist and knees and determined that they were normal. Dr. Cushnyr reviewed appellant's MRI scans of February 22, 2012 and noted mild multilevel degenerative changes of the lumbar spine, but indicated that there were no other significant findings. Neither Dr. Hartshorne nor Dr. Cushnyr discussed the accepted employment incident. The reports are not sufficient to establish a medical condition causally related to the accepted November 28, 2011 employment incident. Dr. Toman noted that appellant had chronic pain in his lumbar and thoracic spine since the last week of November 2011 when he performed some warehouse work at the employing establishment. The Board has held that pain is generally considered a symptom, not a firm medical diagnosis.[9] Dr. Toman did not provide sufficient rationale explaining how appellant's back pain or disability were causally related to the employment incident. Accordingly, the Board finds that there is insufficient rationalized probative medical evidence of record to establish that appellant sustained a back injury causally related to the accepted November 28, 2011 employment incident.

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[10] 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.[11] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her

[8] *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

[9] *Robert Broome*, 55 ECAB 339 (2004); *see also N.C.*, Docket No. 12-761 (issued November 1, 2012).

[10] 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(3).

application for review within one year of the date of that decision.[12] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[13]

ANALYSIS -- ISSUE 2

Appellant did not contend that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered. In support of his request for reconsideration, appellant submitted physical therapy progress notes. However, while the underlying issue is medical in nature, reports from a physical therapist are not relevant because a physical therapist is not a physician under FECA.[14] Accordingly, appellant has not submitted evidence sufficient to require OWCP to reopen the case for further merit review.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on November 28, 2011, as alleged. The Board further finds that OWCP properly denied his request for reconsideration pursuant to 20 C.F.R. § 8128(a).

[12] *Id*. at § 10.607(a).

[13] *Id*. at § 10.608(b).

[14] *See* 5 U.S.C. § 8101(2); *A.C.*, Docket No. 08-1453 (issued November 18, 2008) (records from a physical therapist do not constitute competent medical opinion in support of causal relation; a physical therapist is not a physician as defined under FECA).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 26, May 23 and February 15, 2012 are affirmed.

Issued: January 17, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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