

**United States Department of Labor
Employees' Compensation Appeals Board**

M.V., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. ARMY
MEDICAL COMMAND, Fort Bliss, TX,
Employer**

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**Docket No. 13-1502
Issued: November 18, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 11, 2013 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decision dated February 5, 2013 that denied her claim. The record also contains an OWCP decision dated March 20, 2013 denying appellant's request for reconsideration, without a merit review, pursuant to 5 U.S.C. § 8128(a). Pursuant to the Federal Employees' Compensation Act¹ (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 has met her burden of proof to establish an injury in the performance of duty; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 29, 2012 appellant, then a 60-year-old patient administration clerk, filed an occupational disease claim alleging that she had pain in both hands and arms due to repetitive use of the hands due to typing and filing patient medical reports. She indicated that she first realized the disease or illness was caused or aggravated by her employment on October 1, 2012. Appellant did not stop work.

In support of her claim, appellant submitted a statement in which she described her duties, which included repetitive typing, filling out numerous forms and filling out records. Her supervisor concurred with her statement describing her duties.

OWCP received a follow-up appointment slip and an October 23, 2012 disability certificate from a physician's assistant.

In letters dated November 16, 2012, OWCP requested additional factual and medical evidence from appellant and the employing establishment.

In a December 7, 2012 statement, appellant described her duties and indicated that she believed that the repetitive nature of her duties was the cause of her arm pain. She also noted that her outside duties included reading, walking outside and using the elliptical depending upon the weather. Appellant indicated that her husband did the cooking; she did not do sports or play any musical instruments.

In a January 14, 2013 progress note, Virginia Lopez, a physical therapist, noted that appellant was having pain in her right shoulder and elbow and bilateral wrists. She indicated that appellant fell a few years earlier on her outstretched arm, previously had elbow pain and was diagnosed with epicondylitis. Ms. Lopez noted that appellant received physical therapy and was having increasing symptoms in her arms.

By decision dated February 5, 2013, OWCP denied appellant's claim finding that she failed to submit the necessary medical evidence in support of her claim. It noted that she did not submit any medical evidence that gave a complete history, a definitive diagnosis and the cause of the injury in connection with the injury and/or events.

Appellant requested reconsideration of OWCP's February 5, 2013 decision on March 11, 2013. OWCP received a copy of the January 14, 2013 progress notes from a physical therapist.

In a February 26, 2013 report, Dr. Phillip J. Lavalley, Board-certified in occupational medicine noted that appellant initially started having pain in October 2012 and that she worked as a patient administration clerk and data transcriber. He explained that she was initially seen on October 23, 2012 for her complaints of pain in the right shoulder, elbow wrist and hand and explained that her workload had increased. Dr. Lavalley advised that appellant complained of right hand, wrist, and elbow pain and her pain progressively worsened. He indicated that her pain was worse with typing, writing and filing. Dr. Lavalley noted that appellant had a previous claim in 2002 for similar symptoms and occupational therapy was helpful. He examined her and provided findings. Dr. Lavalley diagnosed wrist pain, hand pain and lateral epicondylitis. He

noted that the therapist recommended continued therapy. Dr. Lavallee opined “I believe this condition is work related. The symptoms began with the added workload. The [patient] has continued to work and although the workload has remained the same, the changes to her workstations and therapy have helped.” Dr. Lavallee recommended continued therapy.²

By decision dated March 20, 2013, OWCP denied appellant’s request for reconsideration finding that she failed to submit either new and relevant evidence or legal contentions not previously considered. It noted that the February 26, 2013 report came from a physician’s assistant and was not relevant unless countersigned by a physician.

LEGAL PRECEDENT -- ISSUE 1

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 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.³ 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

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion 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 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.⁵

² The report was also signed by a physical therapist.

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *Id.*

ANALYSIS -- ISSUE 1

In the instant case, appellant alleged that her bilateral upper extremity was caused by the repetitive use of her hands in the performance of duty. The Board initially notes that there is no evidence refuting that the claimed employment factor, that her position required her to repetitively use her hands in the performance of duties, which included typing and filling out forms. Consequently, the Board finds that appellant has established that she used her hands on a repetitive basis. However, OWCP denied the claim finding that she did not provide any medical evidence to establish that a medical condition was diagnosed in connection with the claimed event or work factors.

The Board finds that appellant has not submitted any medical evidence to establish that her bilateral upper extremity condition was caused or aggravated by typing and filling out forms at work or any other specific factors of her federal employment. The Board notes that there were no medical records submitted by a physician which contained a rationalized medical opinion explaining the cause of appellant's bilateral upper extremity condition.⁶ OWCP informed appellant of the deficiencies in the medical evidence and what was needed to establish her claim in a letter dated November 16, 2012. However, the only evidence received was a January 14, 2013 progress note from a physical therapist. Health care providers such as nurses, acupuncturists, physician's assistants and physical therapists are not physicians under FECA. Thus, their opinions on causal relationship do not constitute rationalized medical opinions and have no weight or probative value.⁷

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.⁸ Neither the fact that the condition became apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁹ Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to submit.

As there is no probative, rationalized medical evidence addressing and explaining why appellant's bilateral upper extremity condition was caused and/or aggravated by factors of her employment, appellant has not met her burden of proof in establishing that she sustained a medical condition in the performance of duty causally related to factors of employment.

⁶ See 5 U.S.C. § 8101(2). This subsection defines the term "physician." See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

⁷ *Jane A. White*, 34 ECAB 515, 518 (1983).

⁸ See *Joe T. Williams*, 44 ECAB 518, 521 (1993).

⁹ *Id.*

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 a claimant's application for reconsideration must be submitted in writing and set forth arguments or contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹¹ To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her 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 requested reconsideration on March 11, 2013. In support of her claim for an occupational disease, she submitted a February 26, 2013 report, from Dr. Lavallee. OWCP specifically noted that the February 26, 2013 report came from a physician's assistant and was not relevant unless countersigned by a physician. However, this report is relevant as it was signed by Dr. Lavallee, a physician, Board-certified in occupational medicine, and he supported that appellant's medical condition was employment related. The Board finds that this new evidence is relevant to the medical causation issue in the present case. As appellant provided relevant and pertinent new evidence not previously considered, OWCP improperly denied her reconsideration request. Therefore, OWCP was obligated to conduct a merit review of the claim.¹⁴

Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his burden of proof.¹⁵ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹⁶ On remand OWCP shall conduct a merit review of the case and issue an appropriate merit decision.

¹⁰ 5 U.S.C. § 8128(a). Under section 8128(a) of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹¹ 20 C.F.R. §§ 10.609(a) and 10.606(b).

¹² *Id.* at § 10.607(a).

¹³ *Id.* at § 10.608(b).

¹⁴ *D.M.*, Docket No. 10-1844 (issued May 10, 2011).

¹⁵ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁶ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).

On appeal, appellant argued that her report was signed by a physician. The Board has noted that the report was signed by a physician and the case is being remanded for further development.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty. The Board further finds that OWCP improperly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed. The March 20, 2013 decision is remanded for a merit review.

Issued: November 18, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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