United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 14-1639**
	)	**Issued: November 17, 2014**
DEPARTMENT OF THE ARMY, ARMY MEDICAL COMMAND, Fort Gordon, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 21, 2014 appellant filed a timely appeal from a February 7, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her traumatic injury claim and a June 9, 2014 nonmerit decision denying her request for 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 and over the June 9, 2014 decision.

ISSUES

The issues are: (1) whether appellant sustained an injury on October 22, 2013 in the performance of duty, as alleged; and (2) whether OWCP properly denied her request to reopen her case for further review of the merits under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 14, 2013 appellant, then a 53-year-old practical nurse, filed a traumatic injury claim alleging that on October 22, 2013 she strained her back while moving a patient who weighed over 300 pounds. She stopped work on October 23, 2013. On the claim form, the employing establishment indicated that appellant was off work for two days.

In a report dated October 24, 2013, Dr. Timothy W. McKenzie, Board-certified in family medicine, provided a history of appellant injuring her right lower back on October 22, 2013 moving a patient. Appellant experienced back pain but no radiculopathy or weakness. Dr. McKenzie diagnosed a worsening of low back pain syndrome and a suspected strain.

On November 18, 2013 Dr. McKenzie discussed appellant's symptoms of back and right hip pain with extensive standing and occasional sharp pains radiating into the right hip and groin.[2] He noted that her complaints were "still concerning a workers' comp[ensation] issue." Dr. McKenzie diagnosed unchanged low back pain syndrome and referred appellant for a physical therapy evaluation.

By letter dated January 6, 2014, OWCP informed appellant that the evidence currently of record was insufficient to show that she sustained a traumatic injury on October 22, 2013. It requested that she submit additional factual and medical information, including a detailed report from her physician addressing the causal relationship between a diagnosed condition and the identified work incident.

On January 8, 2014 Dr. McKenzie opined that appellant should not lift over 20 pounds or stand for more than one hour without sitting for five minutes.

In a decision dated February 7, 2014, OWCP denied appellant's traumatic injury claim. It found that, although the evidence supports that the injury and/or events occurred as described, the medical evidence was insufficient to show that she sustained a diagnosed condition causally related to the accepted October 22, 2013 employment incident.

On April 25, 2014 Dr. McKenzie found that appellant should not lift over 20 pounds or stand over one hour without taking a break. He noted that she was undergoing pain management.

On May 30, 2014 appellant requested reconsideration of her claim.

By decision dated June 9, 2014, OWCP denied appellant's request for reconsideration on the grounds that she had not submitted evidence or raised an argument sufficient to warrant reopening her case for further review of the merits under section 8128(a).

On appeal appellant relates that she sustained an employment injury that has not resolved. She contends that OWCP denied her claim because the employing establishment did not submit the appropriate forms.

[2] An x-ray of the sacrum and coccyx obtained on November 18, 2013 showed no "acute fractures or dislocations."

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 filed within the applicable time limitation; that an injury was sustained while 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[7] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[8]

ANALYSIS -- ISSUE 1

Appellant alleged that she injured her back on October 22, 2013 while moving a heavy patient. On February 7, 2014 OWCP accepted that the incident occurred at the time, place and in the manner alleged. The issue, consequently, is whether the medical evidence establishes that she sustained an injury as a result of this incident.

On October 24, 2013 Dr. McKenzie related that appellant provided a history of injuring her back on October 22, 2013 moving a patient. Appellant experienced back pain without weakness or radiculopathy. Dr. McKenzie diagnosed a worsening of low back pain syndrome and a possible strain but did not specifically relate the diagnosed conditions to the October 22, 2013 work incident. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[9]

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[3] 5 U.S.C. § 8101 *et seq.*

[4] *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

[5] *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

[6] *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

[7] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[8] *Id.*

[9] *See K.W.*, 59 ECAB 271 (2007); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

On November 18, 2013 Dr. McKenzie noted that appellant experienced pain in her back and right hip with protracted standing and occasional sharp pains radiating into the right hip and groin. He indicated that her symptoms were "concerning a workers' comp[ensation] issue." Dr. McKenzie diagnosed unchanged low back pain syndrome. Again, however, while he noted that appellant's complaints related to a workers' compensation issue, he did not attribute the low back pain syndrome to the October 22, 2013 employment incident. Consequently, Dr. McKenzie's opinion is insufficient to meet her burden of proof.

On January 8, 2014 Dr. McKenzie determined that appellant should not lift over 20 pounds or stand for more than one hour without sitting for five minutes. As he did not address causation, his report is of little probative value on the issue of causal relationship.[10]

On appeal appellant asserts that her employment injury had not resolved. She indicated that the employing establishment failed to submit the proper forms. As noted, however, appellant has not submitted medical evidence sufficient to show that she sustained a diagnosed condition due to the October 22, 2013 work incident. An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between her claimed condition and her employment.[11] She must submit a physician's report which reviews the factors of employment she identified as causing her condition. The report must consider these factors, findings upon examination, medical history and explain how the employment factors caused or aggravated the diagnosed condition. The doctor must present medical rationale in support of his or her opinion.[12] Appellant failed to submit such evidence and therefore failed to discharge her burden of proof.

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 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,[13] OWCP's regulations provide that 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.[14] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year

[10] *See Michael E. Smith*, 50 ECAB 313 (1999).

[11] *See D.E.*, 58 ECAB 448 (2007); *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

[12] *See D.D.*, 57 ECAB 734 (2006); *Robert Broome*, 55 ECAB 339 (2004).

[13] 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

[14] 20 C.F.R. § 10.606(b)(3).

of the date of that decision.[15] 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.[16]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[17] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[18]

ANALYSIS -- ISSUE 2

On May 30, 2014 appellant requested reconsideration of the February 7, 2014 decision denying her traumatic injury claim. OWCP determined that she failed to submit medical evidence supporting that she sustained a medical condition resulting from the accepted work incident. On reconsideration, appellant submitted a report dated April 25, 2014 from Dr. McKenzie, who found that she should not lift over 20 pounds or stand more than one hour without sitting for five minutes. Dr. McKenzie's report, however, is substantially similar to his prior report of January 8, 2014. Evidence which is duplicative or cumulative in nature is insufficient to warrant reopening a case for further merit review.[19] Further, Dr. McKenzie did not address the relevant issue of whether appellant sustained a diagnosed condition causally related to the October 22, 2013 work incident. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[20]

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 new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.[21]

CONCLUSION

The Board finds that appellant has not established that she sustained an injury on October 22, 2013, as alleged. The Board further finds that OWCP properly denied her request to reopen her case for further review of the merits under section 8128.

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[15] *Id.* at § 10.607(a).

[16] *Id.* at § 10.608(b).

[17] *See F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

[18] *See P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[19] *See Denis M. Dupor*, 51 ECAB 482 (2000).

[20] *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

[21] Appellant submitted additional evidence on appeal. The Board, however, has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the June 9 and February 7, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 17, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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