United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
and	)	**Docket No. 15-142**
	)	**Issued: March 2, 2015**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Omaha, NE, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 23, 2014 appellant filed a timely appeal from a June 24, 2014 merit decision and a September 29, 2014 nonmerit 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 has established an injury in the performance of duty on December 16, 2013; and (2) whether OWCP properly denied appellant's application for reconsideration without reviewing the merits of the claim.

FACTUAL HISTORY

On December 20, 2013 appellant, then a 55-year-old chief of police, completed a traumatic injury claim (Form CA-1) alleging that on December 16, 2013 he was picking up a

[1] 5 U.S.C. § 8101 *et seq.*

paper towel and was startled by a mouse trap underneath. He indicated that as he stood up, he struck a microwave cart. As to the nature of the injuries, appellant reported that he hit his head, right shoulder, and sustained a cut on his left hand.

The factual evidence included a January 23, 2014 statement from appellant describing the incident. He stated that he was startled by the mouse trap, bolted upright, and struck the back top of his head on the microwave cart. Appellant also stated that he scraped his right shoulder on the cart and that his left hand was cut, although he was not sure whether it was from the mouse trap or the edge of the cart. In a letter dated January 27, 2014, an employing establishment associate director stated that appellant did not immediately report the incident to his supervisor or immediately seek treatment at the employing establishment health facility. The associate director stated that an investigation by an industrial hygienist of the alleged incident indicated that the force of any impact would be minimal.

As to medical evidence, appellant submitted a treatment report from Dr. Kevin Jones, a Board-certified family practitioner, dated December 18, 2013. The history stated that appellant had bumped his head and right shoulder on a microwave cart three days earlier. Appellant was reported to have noticed a mild vertigo over the next hour that had persisted intermittently, and his headache had almost resolved. Dr. Jones provided results on examination, noting minimal tenderness over the left parietal area of the scalp. He diagnosed vertigo and headache. In a note dated December 18, 2013, Dr. Jones stated that appellant should be excused from work this week for medical reasons. The record also contains a December 19, 2013 report from a nurse, Shawna Ziegler,[2] with a history of injury and a diagnosis of mild head injury and postconcussive syndrome. Ms. Ziegler also completed a Form CA-20 attending physician's form report dated January 20, 2014.

By decision dated February 14, 2014, OWCP denied the claim for compensation. It found the factual evidence was insufficient to establish an incident as alleged. In addition, OWCP found the medical evidence insufficient to establish the claim.

On May 2, 2014 appellant requested reconsideration of his claim. He stated that he had advised his supervisor of the incident on December 17, 2013. Appellant stated that no investigation could recreate the exact incident he had experienced. He submitted a February 14, 2014 unsigned note indicating that he was treated for a recheck of a head contusion.

By decision dated June 24, 2014, OWCP found that a December 16, 2013 employment incident had been established. The claim was denied as the medical evidence was not sufficient to establish a diagnosed condition causally related to the employment incident.

On July 21, 2014 appellant requested reconsideration of his claim. He submitted medical evidence previously of record and argued that the evidence was sufficient to establish his claim. Appellant stated that Dr. Jones did not have a computerized tomography (CT) scan but was concerned about the possibility of a concussion. He disputed that the report from a nurse was of diminished probative value. Appellant also stated that he consulted with a Dr. Martinak on February 14, 2014.

[2] The credentials noted on the report are advanced practice registered nurse (APRN).

By decision dated September 29, 2014, OWCP found the request for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

FECA provides for the payment of compensation for "the 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" in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment."[4] An employee seeking benefits under FECA has the burden of establishing that he or she sustained an injury while in the performance of duty.[5] 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 which is alleged to have occurred. The second component is whether the employment incident caused a personal injury, and generally this can be established only by medical evidence.[6]

OWCP's procedures recognize that a claim may be accepted without a medical report when the condition is a minor one which can be identified on visual inspection.[7] In clear-cut traumatic injury claims, such as a fall resulting in a broken arm, a physician's affirmative statement is sufficient and no rationalized opinion on causal relationship is needed. In all other traumatic injury claims, a rationalized medical opinion supporting causal relationship is required.[8]

Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background, of reasonable medical certainty, and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[9]

ANALYSIS -- ISSUE 1

OWCP accepted that an employment incident occurred on December 16, 2013, when appellant was startled by a mouse trap while picking up a paper towel. The issue before the Board is whether there is sufficient medical evidence to establish a diagnosed condition as

[3] 5 U.S.C. § 8102(a).

[4] *Valerie C. Boward*, 50 ECAB 126 (1998).

[5] *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

[6] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(c) (January 2013).

[8] *Id.*, Chapter 2.805.3(d) (January 2013).

[9] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

causally related to the employment incident. The Board notes that the December 19, 2013 report from a registered nurse is of no probative value in establishing causal relationship. It is well established that nurses are not physicians under FECA and are not competent to render a medical opinion.[10] In addition, it is well established that medical evidence that is unsigned and lacking proper identification is of no probative medical value.[11] The February 14, 2014 report provides no information as to the author of the report and is of no probative medical value.

Appellant was treated by Dr. Jones on December 18, 2013. In a report of that date, Dr. Jones provided a history that appellant had bumped his head and right shoulder on a microwave cart. But he does not provide an opinion as to a diagnosed condition resulting from the employment incident. In his report, Dr. Jones refers to mild vertigo and headaches. Although OWCP refers to a lack of a definitive diagnosis,[12] the primary deficiency in the report is the lack of an opinion as to causal relationship with employment. When a physician reports a claimant striking his head at work, but does not provide any opinion on causal relationship between a diagnosed condition and the employment incident, his report is of diminished probative value in establishing the claim.[13] Dr. Jones does not provide a sufficiently detailed medical report with an opinion on causal relationship between a specific diagnosed condition and the December 16, 2013 employment incident.

With respect to a laceration to the left hand, Dr. Jones did not provide a diagnosis or an opinion on causal relationship with employment. The Board notes that he provided little explanation as to disability for work. Dr. Jones stated in the December 18, 2013 report that appellant should be excused from work, without discussing appellant's job duties or providing additional explanation. In his request for reconsideration, on July 21, 2014 he mentions that he consulted with a Dr. Martinak; however, the record is devoid of any of his medical reports.

In the absence of probative medical evidence on causal relationship with the employment incident, the Board finds appellant did not meet his burden of proof in this case. 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.

[10] *See Vincent Holmes*, 53 ECAB 468 (2002). *See also* 5 U.S.C. § 8101(2), providing a description of the term "physician" under FECA.

[11] *Thomas L. Agee*, 56 ECAB 465 (2005); *Richard F. Williams*, 55 ECAB 343 (2004); *Merton J. Sills*, 39 ECAB 572 (1988).

[12] OWCP did note that the International Classification of Diseases (ICD 9) provides a diagnostic code for headache (784) and for dizziness (780.4).

[13] *See D.D.*, Docket No. 13-1517 (issued April 14, 2014) (the medical evidence provided a history that the claimant had struck his head on a truck door and a diagnosis of intracranial hemorrhage based on a CT scan, without providing an opinion on causal relationship with employment).

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[14] OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."[15] 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.[16]

ANALYSIS -- ISSUE 2

In the request for reconsideration received on July 7, 2014, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. He provided what he felt was a rebuttal to OWCP's decisions denying his claim. Although appellant refers to Ms. Ziegler as Dr. Ziegler, the record clearly indicated that she was a registered nurse. As noted above, a nurse is not a physician under FECA.

The underlying issue in the case was the lack of probative medical evidence on the issue of causal relationship between a diagnosed condition and the December 16, 2013 employment incident. Appellant did not submit any new and relevant evidence on reconsideration. The Board finds that he 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 constitute relevant and pertinent evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly denied the reconsideration request without merit review of the claim.

On appeal, appellant states that the evidence was sufficient to warrant a review. The Board has reviewed the merits of the claim for compensation and the evidence submitted prior to the June 24, 2014 merit decision. Appellant may, as noted above, submit new evidence to OWCP and request reconsideration. But there was no error in denying merit review in the September 29, 2014 decision, as appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish an injury in the performance of duty on December 16, 2013. The Board further finds that OWCP properly denied the application for reconsideration without merit review of the claim.

[14] 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[15] 20 C.F.R. § 10.606(b)(3).

[16] 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 29 and June 24, 2014 are affirmed.

Issued: March 2, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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