

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

D.G., Appellant)

and)

U.S. POSTAL SERVICE, PASADENA)
POST OFFICE, Pasadena, MD, Employer)

Docket No. 16-1009
Issued: October 24, 2016

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 April 12, 2016 appellant filed a timely appeal from a February 3, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP) and a March 17, 2016 nonmerit decision. 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 a right lower extremity or low back injury in the performance of duty; and (2) whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 9, 2015 appellant, then a 60-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that on May 28, 2015 she tripped over a tub of packages and sustained a right leg injury and right-sided lumbar pain with radiation into the right lower extremity.

In an August 4, 2015 letter, OWCP advised appellant of the evidence needed to establish her claim, including factual evidence corroborating the May 28, 2015 incident, medical evidence containing a definite diagnosis, and her physician's explanation of how and why tripping over a tub of mail would cause the diagnosed condition. It afforded appellant 30 days to submit such evidence.

In response, appellant submitted an August 24, 2015 report from Dr. Varada Nargund, an attending osteopathic physician Board-certified in pain medicine. Dr. Nargund noted that appellant sustained a left tibial fracture when she fell off a ladder in October 2006, with hardware removal in January 2008. Appellant underwent total left knee arthroplasty on April 14, 2009, with a repeat arthroplasty on December 21, 2010 due to a hardware defect. On examination, Dr. Nargund found stiffness and restricted motion in the left knee. She noted that a September 9, 2008 lumbar magnetic resonance imaging (MRI) scan showed a small L4-5 herniation with a left foraminal annular tear and marked left-sided foraminal stenosis, and a left-sided L3-4 protrusion. An April 6, 2010 nerve conduction velocity (NCV) study was within normal limits. Dr. Nargund diagnosed postsurgical status, a history of complex regional pain syndrome, morbid obesity, diabetes, and peripheral polyneuropathy. She prescribed medication.

By decision dated September 8, 2015, OWCP denied appellant's claim, finding that appellant had failed to submit evidence establishing that the May 28, 2015 incident occurred at the time, place, and in the manner alleged. It further found that appellant had not submitted "medical evidence containing a medical diagnosis in connection" with the claimed events.

In an October 1, 2015 letter, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. She submitted additional evidence.²

In a September 3, 2015 letter, appellant asserted that on May 28, 2015 she struck her right foot on a tub of mail and began to fall. A coworker reached out to stop appellant from falling, which caused a shooting pain from appellant's right shin radiating upward into her right buttock. Another coworker helped appellant to the break room. The postmaster asked appellant if she wanted to be taken to the hospital. Appellant refused, and decided to try to "get the muscle to release with a yoga stretch." She explained that because she was on prescription pain medication for her left knee, she delayed seeking treatment and did not initially realize that she had sustained a significant injury to her right leg.

² Appellant also submitted an August 21, 2015 report signed by a physician assistant. The Board notes that physician assistants are not considered physicians under FECA. *See* 5 U.S.C. § 8101(2). As this report was not signed or reviewed by a physician, it cannot constitute medical evidence in this case. *Ricky S. Storms*, 52 ECAB 349 (2001).

An employing establishment official provided a September 15, 2015 letter corroborating appellant's account of the May 28, 2015 incident. She confirmed that appellant was "in obvious pain," and had to be assisted to the break room.

Dr. Paula L. Lyons, an attending Board-certified family practitioner, provided a June 9, 2015 report noting the May 28, 2015 incident where appellant tripped over a tub of mail. On examination, she noted right-sided radicular symptoms in the low back. Dr. Lyons diagnosed right-sided lumbar radiculitis. She recommended an orthopedic referral.

Dr. Vivek Sood, an attending Board-certified orthopedic surgeon, submitted a June 16, 2015 report noting a May 28, 2015 date of injury. On examination of the right lower extremity, he found tenderness of the right hamstring, normal range of motion of the hip and knee, and no weakness. Dr. Sood commented that appellant walked with a limp. An x-ray of the pelvis showed mild early degenerative joint disease of the right hip. Dr. Sood diagnosed a right hamstring muscle strain and mild degenerative joint disease of the right hip. He prescribed physical therapy.

By decision dated February 3, 2016, an OWCP hearing representative affirmed OWCP's decision as modified, finding that she established the May 28, 2015 incident, that she was in the performance of duty, and provided a medical diagnosis, however, the medical evidence remained insufficient to establish causal relationship. She found that Dr. Sood's report did not contain medical rationale explaining how and why the May 28, 2015 tripping incident caused or contributed to the diagnosed conditions.

In a March 2, 2016 letter, appellant requested reconsideration. She asserted that new medical evidence from her treating physician established causal relationship. Appellant submitted a July 21, 2015 report from Dr. Sood, noting that her pain symptoms had improved with physical therapy. Dr. Sood noted that appellant no longer walked with a limp. He restricted appellant from cutting grass at work. Appellant also submitted a duplicate copy of Dr. Sood's June 16, 2015 report.

By decision dated March 17, 2016, OWCP denied reconsideration, finding that the additional reports submitted were not relevant or pertinent new evidence, did not advance a relevant legal argument not previously considered, and did not demonstrate that OWCP erroneously applied or interpreted a specific point of law. It advised that Dr. Sood's June 16, 2015 report was repetitious, and that his July 21, 2015 report was cumulative and also irrelevant as it did not address causal relationship.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish 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.³ 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.⁴

In order to determine whether an employee sustained a traumatic 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 that must be considered conjunctively. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.⁵ An employee has not met his or her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.⁶ 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.⁷

The medical evidence required to establish causal relationship is generally 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.⁸

ANALYSIS -- ISSUE 1

Appellant claimed that she sustained a right lower extremity injury on May 28, 2015 when she tripped over a tub of packages. OWCP initially denied the claim on September 8, 2015, finding that work incident had not been established. Following additional development, it modified the claim by decision dated February 3, 2016, finding that, although the incident was found to be factual, the medical evidence had failed to establish causal relationship.

In support of her claim, appellant submitted an August 24, 2015 report from Dr. Nargund who provided a history of lumbar and left knee injuries. She did not address the May 28, 2015 incident or appellant’s right lower extremity.

Additionally, Dr. Lyons provided a June 9, 2015 report noting the May 28, 2015 incident and diagnosed right-sided lumbar radiculitis. Dr. Sood submitted a June 16, 2015 report noting a May 28, 2015 date of injury. He diagnosed a right hamstring muscle strain and mild

³ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁵ *Gary J. Watling*, 52 ECAB 278 (2001).

⁶ *S.N.*, Docket No. 12-1222 (Issued August 23, 2013); *Tia L. Love*, 40 ECAB 586, 590 (1989).

⁷ *Deborah L. Beatty*, 54 ECAB 340 (2003).

⁸ *Solomon Polen*, 51 ECAB 341 (2000).

degenerative joint disease of the right hip. Dr. Sood also submitted a July 21, 2015 report noting that physical therapy improved appellant's symptoms and functioning. However, neither Dr. Lyons nor Dr. Sood provided medical rationale explaining how or why tripping on a tub of mail would cause the diagnosed lumbar radiculitis, hamstring strain, or degenerative joint disease of the right hip. The physicians did not set forth medical reasoning supporting that the physical effects of the accepted incident resulted in the diagnosed conditions. Therefore, the opinions of Dr. Lyons and Dr. Sood are insufficient to meet appellant's burden of proof.⁹

OWCP advised appellant by August 4, 2015 letter of the necessity of providing her physician's well-reasoned opinion explaining how and why work factors would cause a right lower extremity injury. As appellant did not submit such evidence, it properly denied the claim.

On appeal, appellant contends that Dr. Sood provided medical rationale, a definite diagnosis, data from test results, and his medical reasoning. She argues that OWCP did not consider the medical evidence. As set forth above, Dr. Sood did not explain how and why tripping over the tub of packages on May 28, 2015 caused the right hamstring strain or degenerative joint disease of the right hip. Similarly, Dr. Lyons did not address causal relationship.

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 the office to reopen a case for merit review under section 8128(a) of FECA,¹⁰ section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides 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.¹¹ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹²

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹³ Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.¹⁴ When reviewing an

⁹ *Supra* note 7.

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b)(3).

¹² *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

¹³ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁴ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁵

ANALYSIS -- ISSUE 2

OWCP denied appellant's traumatic injury claim by decision dated February 3, 2016, finding that causal relationship was not established.

In a March 2, 2016 letter, appellant requested reconsideration, asserting that new evidence from Dr. Sood established causal relationship. She submitted a July 21, 2015 report from Dr. Sood, noting that her condition had improved with physical therapy. Appellant also provided a duplicate copy of Dr. Sood's June 16, 2015 report. OWCP issued a March 17, 2016 decision denying reconsideration, finding that the additional evidence was irrelevant or cumulative.

The Board finds that OWCP appropriately denied reconsideration. Both appellant's argument and Dr. Sood's June 16, 2015 report are duplicative of their contentions previously of record. Evidence which is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.¹⁶ Therefore, appellant's March 2, 2016 letter and Dr. Sood's June 16, 2015 report are insufficient to warrant consideration on the merits.

While Dr. Sood's July 21, 2015 report on reconsideration is new medical evidence not previously considered by OWCP, it is not relevant to the claim as it does not address the critical issue of causal relationship. Therefore, it does not comprise a basis for reopening the case.¹⁷

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a right lower extremity or low back injury in the performance of duty. The Board further finds that OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁵ *Annette Louise*, 54 ECAB 783 (2003).

¹⁶ *Denis M. Dupor*, 51 ECAB 482 (2000).

¹⁷ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 17 and February 3, 2016 are affirmed.

Issued: October 24, 2016
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