United States Department of Labor
Employees' Compensation Appeals Board

S.G., Appellant	)	
	)	**Docket No. 08-307**
and	)	**Issued: April 28, 2008**
	)	
U.S. POSTAL SERVICE, Pulaski, NY, Employer	)	
	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 8, 2007 appellant timely filed an appeal of a March 6, 2007 merit decision of the Office of Workers' Compensation Programs which denied her occupational disease claim. She also timely appealed the Office's August 8, 2007 nonmerit decision denying her request for reconsideration on the grounds that the evidence submitted was insufficient to require a merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of appellant's claim.

ISSUES

The issues are: (1) whether appellant sustained an occupational disease in the performance of duty; and (2) whether the Office properly refused to reopen her case for further review of the merits of her claim on the grounds that she did not provide any additional evidence or legal argument to establish that she sustained an occupational disease.

FACTUAL HISTORY

On December 26, 2006 appellant, then a 43-year-old letter carrier, filed an occupational disease claim alleging that she sustained a right lower back condition due to carrying her bag

over her shoulder. She stated that she first became aware that her condition was caused or aggravated by her employment on December 19, 2006.

In a January 8, 2007 letter, the Office informed appellant that additional information was needed including a detailed description of the alleged factors of employment, and a comprehensive medical report in support her claim.

Appellant responded in a January 22, 2007 letter in which she explained that the mail loads are heavy in October, November and December and that she developed back spasms on December 18, 2006. Medical reports were also submitted. In a December 21, 2006 report, Dr. Jay Sullivan, Board-certified in family medicine, examined appellant and diagnosed lumbago/low back pain. He noted that appellant reported having a spasm when she lifted her bag on December 18, 2006. In a December 22, 2006 report, Dr. Jane Hafner, a chiropractor, examined appellant and diagnosed lumbar sacral segmental dysfunction, thoracolumbar segmental dysfunction, lumbar strain and degenerative disc disease. A December 26, 2006 x-ray of the thoracic spine found mild scoliosis and moderate degenerative disc disease. A December 27, 2006 work disability certificate restricted appellant to no street work and only lifting 15 pounds or less.

In a March 6, 2007 decision, the Office denied appellant's occupational disease claim on the grounds that the evidence was insufficient to establish that she sustained a low back condition, finding that there was no diagnosed condition.

On May 1, 2007 appellant requested reconsideration. She stated that her back and shoulder problems were due to the constant carrying of the mailbag, lifting mail tubs, turning, twisting, walking and stepping up and down stairs. Appellant submitted a copy of a previously submitted document. Also submitted was a progress note dated December 22, 2006 and May 4, 2007 from Dr. Hafner who described appellant's treatments and progress.

On August 8, 2007 the Office issued a nonmerit decision denying reconsideration on the grounds that appellant did not raise a substantive legal question, or submit any new or relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

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 diagnosed condition is causally related to the employment factors identified by the claimant.[1]

The medical opinion needed to establish an occupational disease claim must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of

[1] *Elizabeth H. Kramm (Leonard O. Kramm),* 57 ECAB ___ (Docket No. 05-715, issued October 6, 2005).

the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[2]

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 condition and employment. Neither the fact that the condition became apparent during a period of employment, nor an employee's belief that the condition was caused by or aggravated by employment conditions is sufficient to establish causal relationship.[3]

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained a lower back condition causally related to factors of her federal employment. The Office accepted that the employment events occurred as alleged. The case therefore rests on a determination of whether appellant's employment factors caused a disease or condition. The Board finds that the medical evidence does not establish that appellant has a diagnosed condition causally related to the accepted employment factors.

The medical reports submitted failed to diagnose a medical condition. Dr. Sullivan diagnosed lumbago or low back pain. The Board has continuously held that a physician's mere diagnosis of pain does not constitute a basis for payment of compensation as pain is a symptom, not a medical condition.[4] Dr. Hafner diagnosed multiple conditions but she is not considered to be a physician under the Federal Employees' Compensation Act. Only a physician under the Act can provide a diagnosis.[5] In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under 5 U.S.C. § 8101(2). A chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.[6] Dr. Hafner did not diagnose a subluxation based on an x-ray; therefore, she is not considered a physician under the Act and her report is of limited probative medical value. Had she taken an x-ray of appellant's spine and diagnosed a subluxation, she would be considered to be a "physician" under the Act.[7] As there is no diagnosis of a medical condition by a physician, there is no evidence of an injury.

Appellant has failed to meet her burden to establish that she sustained a condition causally related to her employment.

---

[2] *Donald W. Wenzel*, 56 ECAB 390 (2005).

[3] *Alberta S. Williamson*, 47 ECAB 569 (1996).

[4] *Robert Broome*, 55 ECAB 339 (2004).

[5] 5 U.S.C. § 8101(2).

[6] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[7] *Id.*

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[8] does not entitle a claimant to a review of an Office decision as a matter of right.[9] The Act does not mandate that the Office review a final decision simply upon request by a claimant.[10]

To require the Office to reopen a case for merit review under section 8128 (a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[11]

ANALYSIS -- ISSUE 2

The Office is required to reopen a case for merit review if an application for reconsideration or if appellant demonstrates that the Office erroneously applied a specific point of law, puts forth relevant and pertinent new evidence or presents a new relevant legal argument. Appellant did not argue that the Office erroneously applied a point of law. She submitted evidence that was new but it was not relevant and pertinent. Evidence previously considered by the Office is not deemed to be relevant and pertinent. The only new evidence submitted after the merit decision was a progress note from Dr. Hafner. As explained previously, a chiropractor is only considered to be a "physician" under the Act if she diagnoses subluxation as supported by an x-ray.[12] Therefore, the progress note is not relevant to the issue at hand, whether appellant sustained a condition as a result of her employment factors. As appellant did not submit any relevant and pertinent new evidence, she is not entitled to merit review by the Office.

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 also finds that the Office properly denied merit review.

[8] 5 U.S.C. § 8128(a).

[9] *Darletha Coleman*, 55 ECAB 143 (2003).

[10] *Donna M. Campbell*, 55 ECAB 241 (2004).

[11] 20 C.F.R. § 10.606(b)(2)(iii) (2004).

[12] *See Mary A. Ceglia, supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the August 8 and March 6, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 28, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board