

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

E.L., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOOD
SAFETY & INSPECTION SERVICE,
Winston Salem, NC, Employer**

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**Docket No. 07-1937
Issued: January 7, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 17, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 19, 2007 denying her claim for compensation and a June 25, 2007 decision denying her application for reconsideration without merit review of the claim. Pursuant to 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 January 22, 2007; and (2) whether the Office properly denied appellant's application for reconsideration without merit review of the claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 24, 2007 appellant, then a 69-year-old food inspector, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury on January 22, 2007. She alleged that

while inspecting a pheasant with an infected leg, fluid from the animal squirted into her right eye. The record contains a (Form CA-16,) authorization for examination and/or treatment, dated January 22, 2007 and signed by an employing establishment supervisor.¹ No other evidence was submitted.

By decision dated March 19, 2007, the Office denied the claim for compensation. The Office accepted that an incident occurred as alleged, but found that there was no probative medical evidence to support an injury.

On March 22, 2007 the Office received additional evidence. A form report dated January 22, 2007 contains a history that a diseased chicken part went into appellant's right eye and provides results on examination and a diagnosis of "foreign body/fluid exposure [right] eye." The report is initialed by a physician's assistant, Ken Bush. Appellant submitted additional copies of the report that contain an unidentified initial next to Mr. Bush's name. A January 23, 2007 form report contains results on examination and a diagnosis of "F.B. [foreign body] OD." A copy of the report submitted on April 10, 2007 contains an illegible physician's signature. On April 10, 2007 the Office also received an application for reconsideration.

By decision dated June 25, 2007, the Office determined the application for reconsideration was insufficient to warrant merit review of the claim. The Office indicated that a physician's assistant was not a physician under the Federal Employees' Compensation Act.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act² has the burden of establishing that he or she sustained an injury while in the performance of duty.³ In order to determine whether an employee actually sustained an injury in the performance of duty, the Office 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.⁴

Office'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.⁵ In clear-cut

¹ Where an employing establishment properly executes a CA-16 form which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the CA-16 form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *Tracey P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by the Office. *See* 20 C.F.R. § 10.300(c).

² 5 U.S.C. §§ 8101-8193.

³ *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

⁴ *See John J. Carlone*, 41 ECAB 354, 357 (1989).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d) (June 1995).

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.⁶

Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the identified employment factor. The opinion of the physician must be based on a complete factual and medical background, must be 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.⁷

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained an injury when animal fluid squirted into her right eye during an inspection. The Office accepted that a January 22, 2007 incident occurred as alleged. Therefore, the issue is whether the evidence is sufficient to establish an injury resulting from the employment incident. This is not a case where the Office may accept an injury based on visual inspection without a medical report. Prior to the March 19, 2007 decision, no medical evidence was submitted. The Board accordingly finds that appellant did not meet her burden of proof to establish an injury in the performance of duty on January 22, 2007.

As noted, the record contained a CA-16 form, which may entitle an employee to medical treatment regardless of whether the Office accepts an employment injury. The Office did not address the issue and it is not before the Board on this appeal.⁸

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁹ the Office's regulations provides 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 [the Office] erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by [the Office]; or (iii) constitutes relevant and pertinent evidence not previously considered by [the Office]."¹⁰

⁶ *Id.*

⁷ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

⁸ On return of the case record the Office shall address this issue.

⁹ 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").

¹⁰ 20 C.F.R. § 10.606(b)(2).

Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.¹¹

ANALYSIS -- ISSUE 2

In this case, appellant did submit additional evidence that was not previously considered by the Office. The evidence must, however, be relevant and pertinent to the issue presented. To be considered competent medical evidence, a medical report must be from a physician under the Act.¹² 5 U.S.C. § 8101(2) provides that a physician includes, “surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.”¹³ A physician’s assistant is not a “physician” as defined by the Act.¹⁴ The reports from Mr. Bush are therefore not considered competent medical evidence.

With respect to a January 22, 2007 report, there are copies in the record containing what appears to be an unidentified initial. It is not clear, however, whether this was a physician’s initial as the report contains no other identifying marks or signature.¹⁵ It is well established that medical evidence lacking proper identification is of no probative medical value.¹⁶ This report lacks proper identification and it is unclear whether a physician under the Act prepared or reviewed the report. It is therefore not considered competent medical evidence.

The January 23, 2007 report does contain a physician’s signature, although the name of the physician is unclear. To the extent that this report constitutes competent medical evidence, it is not considered relevant and pertinent to the medical issue presented. The report does not provide a history of injury or any opinion on causal relationship between the employment incident and a diagnosed condition. While the evidence does not have to be sufficient to establish the claim, it must be relevant and pertinent evidence. The Board finds that the January 23, 2007 report is not sufficient to require the Office to reopen the case for merit review.

The Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent evidence not previously considered by the Office. Accordingly, the Office properly refused to reopen the claim for merit review.

¹¹ *Id.* at 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

¹² *See James Robinson, Jr.*, 53 ECAB 417 (2002).

¹³ 5 U.S.C. § 8101(2).

¹⁴ *Allen C. Hundley*, 53 ECAB 551 (2002).

¹⁵ One of the copies contains a circle around the term “M.D.” another does not. It is not clear who circled the term M.D.

¹⁶ *Thomas L. Agee*, 56 ECAB ____ (Docket No. 05-335, issued April 19, 1985); *Richard F. Williams*, 55 ECAB 343 (2004); *Merton J. Sills*, 39 ECAB 572 (1988).

CONCLUSION

The Office properly denied the claim as appellant did not submit any supporting medical evidence. On application for reconsideration, appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 25 and March 19, 2007 are affirmed.

Issued: January 7, 2008
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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