United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 08-471**
	)	**Issued: July 10, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Vienna, OH, Employer	)	

Appearances:
John P. Lutseck, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 5, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated May 21, 2007 that denied her claim and an October 31, 2007 decision that denied her request for reconsideration. 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 met her burden of proof to establish that she sustained an employment-related back injury on December 4, 2005; and (2) whether the Office properly refused to reopen appellant's claim for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 4, 2005 appellant, then a 34-year-old distribution/window clerk, filed a Form CA-1, traumatic injury claim, alleging that on December 2, 2005 she injured her lower back. She stated that the previous September she had injured her right knee and that she could

not bend or lift properly and had difficulty walking. Appellant stopped work on December 4, 2005 and returned on December 7, 2005. By report dated December 5, 2005, Dr. Pedro Ballester, Board-certified in anesthesiology and family medicine, advised that appellant was totally disabled from December 5 to 7, 2005 and could return to restricted duty for 5 to 6 hours daily with a 10-pound lifting restriction. A lumbosacral spine x-ray was normal. In reports dated December 8, 2005, Dr. Harold L. Sandrock, a general practitioner, noted that appellant had a right knee injury, diagnosed a lumbosacral sprain and advised that she could work six hours of restricted duty daily.

On December 23, 2005 the Office informed appellant of the evidence needed to develop her claim. In reports dating from December 8, 2005 to January 10, 2006, Dr. Sandrock noted examination findings of lumbar spasm and negative straight-leg raising. He diagnosed lumbosacral sprain and again advised that appellant could work six hours of restricted duty daily.

By decision dated January 23, 2006, the Office denied the claim on the grounds that she had not established that she sustained an injury on December 2, 2005.

In a letter dated January 19, 2006 and received on January 25, 2006, appellant explained that her back injury occurred when she lifted a parcel that weighed 5 to 10 pounds out of a hamper, stating that she could not distribute her weight evenly due to an accepted knee injury.[1] On February 8, 2006 appellant requested a review of the written record. She described her right knee condition, stating that, since it was swollen, she could not bend properly and that this stressed her back. Appellant related that, on December 2, 2005, after bending to lift a parcel out of a hamper, she could barely pull herself up. In reports dated January 24 and February 10, 2006, Dr. Sandrock reiterated his findings, conclusions and recommendations. By decision dated May 23, 2006, an Office hearing representative affirmed the January 23, 2006 decision.

On May 12, 2007 appellant requested reconsideration, and submitted an August 21, 2006 report from Dr. Mark J. DeMalio, a chiropractor, who noted that he had treated appellant following a motor vehicle accident on June 13, 2006 and reported a history of work-related chronic back pain and a right knee injury. Dr. DeMalio opined that appellant's lower back injury was exacerbated by her right knee injury because she compensated in lifting, bending and moving to favor her right knee. A September 6, 2006 thoracic spine x-ray was unremarkable. In a report received by the Office on May 16, 2007, Dr. Thomas B. Jones, Jr., Board-certified in orthopedic surgery, opined that, during the period that appellant was being treated for a right knee injury, she developed severe back pain, which he attributed to her gait disturbance caused by the knee injury.

In a merit decision dated May 21, 2007, the Office denied modification of the prior decisions.

On September 29, 2007 appellant, through her attorney, requested reconsideration, asking that the instant back claim be consolidated with her knee claim so that they could be analyzed in conjunction with one another. By decision dated October 31, 2007, the Office denied appellant's

[1] The knee injury claim was adjudicated by the Office under file number 092065565. The instant claim was adjudicated under file number 092066763.

reconsideration request, finding the arguments submitted irrelevant as to whether appellant established that she sustained an employment-related injury on December 2, 2005.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained 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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[3]

Office regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[4] In order to determine whether an employee 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 is whether the employee actually experienced the employment incident that 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.[5]

When an employee claims a traumatic injury in the performance of duty, he or she must establish the "fact of injury," namely, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged, and that such event, incident or exposure caused an injury.[6]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[7] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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

[2] 5 U.S.C. §§ 8101-8193.

[3] *Gary J. Watling*, 52 ECAB 278 (2001).

[4] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *Tracey P. Spillane*, 54 ECAB 608 (2003).

[6] *Paul Foster*, 56 ECAB 208 (2004).

[7] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

condition and the specific employment factors identified by the claimant.[8] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[9]

ANALYSIS -- ISSUE 1

The Board must initially determine whether an employment incident occurred as alleged on December 2, 2005. Although the Office found that the evidence was not sufficient to establish the incident, there are no inconsistencies in the factual evidence that cast serious doubt as to whether the incident occurred as alleged.[10] Appellant filed her claim two days after the incident alleging that she sustained a back injury when lifting at work and she sought medical care two days later. In both a response to an Office inquiry and with her request for a review of the written record, she explained that she was lifting a parcel from a hamper on December 2, 2005. An employee's statement regarding the occurrence of an employment incident will stand unless refuted by strong or persuasive evidence.[11] While the employing establishment stated that appellant did not inform her supervisor on the date of injury, no further information was received from the employing establishment. The Board finds that appellant established the employment incident of December 2, 2005.

Appellant, however, failed to meet her burden of proof to establish that she sustained an injury caused by this incident. The medical evidence of record includes reports from Drs. Ballester and Sandrock. Dr. Ballester did not provide a diagnosis. His reports are therefore insufficient to establish fact of injury.[12] While Dr. Sandrock diagnosed a lumbosacral sprain, he did not provide any opinion regarding the cause of the diagnosed condition, and medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[13]

Regarding Dr. DeMalio's report, in assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under section 8101(2) of the Act.[14] 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.[15] In this case, Dr. DeMalio did not diagnose a spinal subluxation by x-ray. His report would therefore be of

[8] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[9] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[10] *See Barbara R. Middleton*, 56 ECAB 634 (2005).

[11] *Sedi L. Graham*, 57 ECAB 494 (2006).

[12] *Leslie C. Moore*, *supra* note 8.

[13] *Willie M. Miller*, 53 ECAB 697 (2002).

[14] 5 U.S.C. § 8102(c).

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

diminished probative value.[16] While Dr. Jones' report is generally supportive that appellant's back condition was a consequence of her accepted right knee injury, he did not in any way relate her back condition to the December 2, 2005 lifting incident. Medical opinion evidence must be 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.[17] Dr. Jones' report is therefore of diminished probative value.

The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to the claimed incident and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[18] In this case, the medical evidence does not support that appellant sustained a new back injury on December 2, 2005.[19]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[20] Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[21] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[22] Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a

[16] *See Isabelle Mitchell*, 55 ECAB 623 (2004).

[17] *Roy L. Humphrey*, 57 ECAB 238 (2005).

[18] *Patricia J. Glenn*, 53 ECAB 159 (2001).

[19] *John W. Montoya*, 54 ECAB 306 (2003). The Board notes, however, that appellant can request that her back condition be accepted as a consequence of her accepted right knee injury. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury. Larson, *The Law of Workers' Compensation* § 1300; *see Charles W. Downey*, 54 ECAB 421 (2003).

[20] 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.606(b)(2).

[22] 20 C.F.R. § 10.608(b).

case.[23] Likewise, evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[24]

ANALYSIS -- ISSUE 2

With the September 29, 2007 reconsideration request, appellant's attorney noted that appellant's claim was caused by lifting and also noted that her back pain had been present for a period of time and requested that the back claim be analyzed in conjunction with her knee claim.[25] The merit issue in this case is whether appellant sustained an employment-related injury on December 2, 2005, a medical issue which must be resolved by rationalized medical evidence.[26] The Board therefore finds that, as appellant did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[27]

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted no additional evidence. As stated above, the merit issue in this case is whether she established that she sustained an employment-related injury. This requires the submission of medical evidence establishing that the claimed condition is causally related to the December 2, 2005 employment incident. As appellant submitted no additional medical evidence, she did not submit relevant and pertinent new evidence not previously considered by the Office, and the Office properly denied her reconsideration request.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an employment injury on December 2, 2005 and that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[23] *Helen E. Paglinawan*, 51 ECAB 591 (2000).

[24] *Kevin M. Fatzer*, 51 ECAB 407 (2000).

[25] *Supra* note 1. Office procedures provide that cases should be doubled if a new injury is reported for a similar condition or the same body part, if two or more separate injuries occurred on the same day, or if adjudication would require frequent reference between the two, *e.g.*, if there were overlapping periods of disability. Federal (FECA) Procedure Manual, Part 2 -- Claims, "*Doubling Case Files*," Chapter 2.400.8(c) (February 2000).

[26] *Jacqueline M. Nixon-Steward*, *supra* note 7.

[27] 20 C.F.R. § 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 31, 2007 is affirmed. The May 21, 2007 decision is affirmed as modified.

Issued: July 10, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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