

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

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**P.D., Appellant**

**and**

**DEPARTMENT OF THE ARMY, TOBYHANNA  
ARMY DEPOT, Tobyhanna, PA, Employer**

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**Docket No. 09-360  
Issued: August 7, 2009**

*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  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On November 19, 2008 appellant filed a timely appeal from an August 11, 2008 decision of the Office of Workers' Compensation Programs denying her claim for an injury to her right index finger and an October 27, 2008 decision denying her request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether appellant sustained trigger finger of the right index finger in the performance of duty; and (2) whether the Office abused its discretion in denying her request for a review of the written record.

**FACTUAL HISTORY**

On May 14, 2008 appellant, then a 46-year-old fabric worker, filed an occupational disease claim alleging that she sustained trigger finger of her right index finger on April 14, 2008 causally related to her federal employment. Her job involved continuous marking, cutting,

sewing and folding of heavy vinyl and rubber materials. Appellant also used a mallet to insert grommets into the material and a caulking gun to apply adhesive to certain material. She submitted records from nurses and a physician's assistant.

By letter dated May 20, 2008, the Office asked appellant to submit additional evidence including a comprehensive medical report from a treating physician with a description of symptoms, the results of tests, a diagnosis and a rationalized medical opinion as to how the condition was causally related to factors of her employment.

In treatment notes dated May 27 and June 16, 2008, Dr. Gregory J. Menio, an attending Board-certified orthopedic surgeon, stated that appellant had persistent pain and triggering in her right index finger for which she was given a cortisone shot. He noted that her job involved making tarps. Dr. Menio provided findings on physical examination and diagnosed trigger finger of the right index finger. He stated that, based on what appellant told him about her job, "I believe this is work related."

By decision dated August 11, 2008, the Office denied appellant's claim on the grounds that the medical evidence did not establish that her trigger finger of her right index finger was causally related to factors of her federal employment. It accepted that her work as a fabric worker involved repetitive use of her upper extremities.

By letter postmarked September 12, 2008, appellant requested a review of the written record and submitted an additional medical report. In a September 4, 2008 note, Dr. Menio stated that he treated appellant for an injury to her right index finger. He stated that she "apparently" injured her finger at work. Dr. Menio stated, "At this point in time, I believe this injury should be considered a work-related injury based on the information that I have."

By decision dated October 27, 2008, the Office denied appellant's request for a review of the written record on the grounds that the request was untimely and the issue of causal relationship in the case could be resolved through a request for reconsideration and the submission of additional medical evidence establishing that her right index finger condition was causally related to factors of her employment..

### **LEGAL PRECEDENT -- ISSUE 1**

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, an employee must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.<sup>1</sup> Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the

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<sup>1</sup> See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, 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 employee.<sup>2</sup>

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that an employee's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by his employment is sufficient to establish causal relationship.<sup>3</sup>

### **ANALYSIS -- ISSUE 1**

Appellant submitted medical records from nurses and a physician's assistant. Nurses and physician's assistants do not qualify as a physician under the Federal Employees' Compensation Act.<sup>4</sup> Registered nurses, licensed practical nurses, physician's assistants and physical therapists are not physicians as defined under the Act and their opinions are of no probative value.<sup>5</sup> The Board has held that medical evidence must be in the form of a reasoned opinion by a qualified physician.<sup>6</sup> Consequently, the reports from the nurses and the physician's assistant do not constitute probative medical evidence and are not sufficient to establish that appellant sustained a work-related injury.

Appellant was advised by the Office on May 20, 2008 that she needed to submit a comprehensive medical report containing a description of her symptoms, the results of tests and medical rationale explaining how her trigger finger of her right index finger was causally related to factors of her employment.

In brief treatment notes dated May 27 and June 16, 2008, Dr. Menio stated that appellant had persistent pain and triggering in her right index finger. He noted that her job involved making tarps. Dr. Menio provided findings on physical examination and diagnosed trigger finger of the right index finger. Based on what appellant told him of her job, he concluded that her condition was work related. Although Dr. Menio noted that appellant's job involved making tarps, he did not describe any specific tasks that she performed. He failed to provide medical rationale explaining how her specific employment work duties would cause or aggravate the trigger finger of her right index finger. There is no medical evidence of record with a description of appellant's specific job duties and medical rationale establishing that the diagnosed condition is causally related to specific factors of her employment. Moreover, he failed to explain the basis

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<sup>2</sup> *I.J.*, 59 ECAB \_\_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>3</sup> *D.I.*, 59 ECAB \_\_\_\_ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 691 (1965).

<sup>4</sup> See 5 U.S.C. § 8101(2) which provides: "‘physician’ includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law"; see also *Roy L. Humphrey*, 57 ECAB 238 (2005); *Jennifer L. Sharp*, 48 ECAB 209 (1996).

<sup>5</sup> *Id.*

<sup>6</sup> See *Robert J. Krstyen*, 44 ECAB 227, 229 (1992).

for his stated conclusion on causal relation.<sup>7</sup> A mere conclusion without medical rationale is not sufficient to support causal relation. Therefore, appellant failed to meet her burden of proof to establish that her trigger finger of her right index finger was caused or aggravated by her job.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>8</sup> A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.<sup>9</sup> A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which the hearing is sought.<sup>10</sup> A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which the hearing is sought.<sup>11</sup> The Office has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>12</sup> In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's request for a review of the written record was postmarked September 12, 2008, more than 30 days after the Office's August 11, 2008 decision.<sup>14</sup> Therefore, she was not entitled to a review of the written record as a matter of right. The Office exercised its discretion and determined that the issue in the case, whether appellant's trigger finger of the right index finger was causally related to her federal employment, could be resolved through a request for reconsideration and the submission of additional evidence establishing that her right finger

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<sup>7</sup> See *Beverly A. Spencer*, 55 ECAB 501 (2004).

<sup>8</sup> 5 U.S.C. § 8124(b)(1).

<sup>9</sup> 20 C.F.R. § 10.615.

<sup>10</sup> *Id.* at § 10.616(a).

<sup>11</sup> *James Smith*, 53 ECAB 188 (2001).

<sup>12</sup> 20 C.F.R. § 10.616(b).

<sup>13</sup> *James Smith*, *supra* note 11.

<sup>14</sup> Wednesday, September 10, 2008 was the 30<sup>th</sup> day after the August 11, 2008 decision. On appeal, appellant stated that she mailed her request for a review of the written record on September 10, 2008 but it was returned to her on September 12, 2008 because she used insufficient postage.

condition was caused or aggravated by specific employment factors.<sup>15</sup> The Board finds no evidence that the Office abused its discretion in denying appellant's untimely request for a review of the written record in its October 27, 2008 decision.

**CONCLUSION**

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained trigger finger of her right index finger in the performance of duty. The Board further finds that the Office did not abuse its discretion in denying her request for a review of the written record.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 27 and August 11, 2008 are affirmed.

Issued: August 7, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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<sup>15</sup> In a September 4, 2008 report submitted with appellant's request for a review of the written record, Dr. Menio stated that she "apparently" injured her finger at work. He stated, "At this point in time, I believe this injury should be considered a work-related injury based on the information that I have." This report lacks medical rationale explaining how specific factors of employment caused appellant's right index finger condition. Dr. Menio's opinion on causal relationship is also equivocal in that he stated that she "apparently" injured her finger at work.