United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 09-1062**
	)	**Issued: November 19, 2009**
DEPARTMENT OF THE ARMY, HEADQUARTERS U.S. ARMY SIGNAL COURT, Fort Gordon, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 13, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' nonmerit decision dated December 9, 2008, which denied her request for reconsideration. She also timely appealed the November 14, 2008 merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the issues in this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty on August 13, 2008; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 22, 2008 appellant, then a 49-year-old clinical nurse, filed a traumatic injury claim alleging that on August 13, 2008, while making a patient's bed, she felt a pull in her lower back while in the performance of duty. She did not initially stop work.

In an August 15, 2008 statement, Lamarr K. Howell, a staff nurse, indicated that he worked with appellant on August 13, 2008. He noted that he held a patient, while appellant cleaned him. Mr. Howell indicated that afterwards, appellant stated that her back was hurting and she went to the emergency room after work.

By letter dated October 2, 2008, the Office informed appellant of the type of evidence needed to support her claim and requested that she submit such evidence within 30 days.

By decision dated November 14, 2008, the Office denied the claim. It found that the evidence supported that the claimed events occurred. However, there was no medical evidence that provided a diagnosis, which could be connected to the events.

On November 24, 2008 appellant requested reconsideration. Her request was comprised of filling in an "x" in the box for reconsideration on the appeal request form.

By decision dated December 9, 2008, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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[2] and that an injury was sustained in the performance of duty.[3] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

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.[5] The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[6] The medical evidence required to establish causal relationship is usually

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[4] *Delores C. Ellyett*, 41 ECAB 992 (1990).

[5] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

[6] *Id*. For a definition of the term "traumatic injury," *see* 20 C.F.R. § 10.5(ee).

rationalized medical 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.[7]

ANALYSIS -- ISSUE 1

Appellant alleged that on August 13, 2008 she injured her back while in the performance of duty. The Office found that the evidence supported that the claimed events occurred. Therefore, the Board finds that the first component of fact of injury is established; the claimed incident -- that appellant was working with a patient as alleged on August 13, 2008.

Appellant did not submit any medical evidence, however, to establish the second component of fact of injury, that the August 13, 2008 employment incident caused an injury. There is no medical evidence, which contains a physician's reasoned explanation of how the accepted employment incident on August 13, 2008 caused or aggravated an injury.

Appellant has not met her burden of proof to establish that the August 13, 2008 employment incident caused or aggravated a specific injury.

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,[8] the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office]."[9]

[7] *D.E.*, 58 ECAB ___ (Docket No. 07-27, issued April 6, 2007).

[8] 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim that does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[10]

ANALYSIS -- ISSUE 2

Appellant disagreed with the denial of her claim and requested reconsideration on November 24, 2008. Other than completing the appeal form by filling in an "x" to indicate her request for reconsideration, appellant did not submit any arguments or present any evidence to support her request. Appellant therefore did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

On appeal, appellant submitted additional evidence. She requested that all of her evidence be considered. The Board may not consider new evidence for the first time on appeal.[11] However, this decision does not preclude appellant from seeking to have the Office consider such evidence pursuant to a reconsideration request filed with 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 on August 13, 2008. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

[10] *Id.* at § 10.608(b).

[11] *See id.* at § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 9 and November 14, 2008 are affirmed.

Issued: November 19, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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