United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
and	)	**Docket No. 09-349**
	)	**Issued: September 1, 2009**
DEPARTMENT OF VETERANS AFFAIRS, TOGUS VETERANS ADMINISTRATION MEDICAL CENTER, Augusta, ME, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 17, 2008 appellant filed a timely appeal from an October 17, 2008 nonmerit decision of the Office of Workers' Compensation Programs' denying reconsideration of a September 18, 2008 merit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 the Board has jurisdiction of the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on April 16, 2008 causally related to her federal employment; and (2) whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128

FACTUAL HISTORY

On June 11, 2008 appellant, a 63-year-old nurse, filed a traumatic injury claim (Form CA-1) for a lower back and right leg injury. She attributed her injury to an April 16, 2008

incident when, while lifting a 23-pound instrument set, she experienced pain in the mid and lower back that ran down into her right leg.

Appellant submitted a March 31, 2004 report signed by Dr. William L. Griffith, a Board-certified internist, who diagnosed low back strain. She also submitted an April 15, 2004 report signed by Dr. Griffith, which diagnosed appellant with neurogenic claudication. In a report dated May 6, 2004, Dr. Griffith noted that a magnetic resonance imaging (MRI) scan of appellant's lumbar and sacral spine revealed disc damage and a narrowing of the canal at L4-5 consistent with neurogenic claudication.

In an August 25, 2008 report, Dr. Christopher J. Mahoney, a Board-certified diagnostic radiologist, reported that an MRI scan of appellant's lumbar spine revealed a small disc herniation at the T10-11 level. He also reported that the MRI scan revealed a moderate to large broad-based herniation at the L2-3 level that appeared to have enlarged since the previous examination. Dr. Mahoney noted that the presence of a right neural foraminal narrowing from a combination of the disc and osteophytes. A broad-based bulging as well as a bilateral small foraminal herniation was present at the L3-4 level and an anterolisthesis of the L4 vertebrae relative to the L5 causing an uncovering of the disc. Finally, Dr. Mahoney observed minimal broad-based bulging at the L5-S1 level. He diagnosed anterolisthesis of the L4 relative to the L5 and multilevel disc bulging and/or herniation with central canal stenosis at the L2-3, L3-4 and L4-5 levels.

Appellant submitted a September 5, 2008 note, from Dr. Michael Klein, Board-certified in emergency and internal medicine, who reported interviewing and examining her for the first time on September 5, 2008. After reviewing her medical history, including a description of the April 16, 2008 surgical tray lifting incident, Dr. Klein concluded that her physical findings reflected a worsening of the disc bulging with some nerve impingement at the L2 level.

By decision dated September 18, 2008, the Office denied the claim because the evidence of record did not demonstrate that the claimed medical condition was related to the established work-related event.

Appellant requested reconsideration and submitted a July 21, 2008 report signed by a Dr. B.G. Newman, who noted her continuing complaints. She also submitted a September 9, 2008 note, signed by a Dr. Kennebec Locum, who noted that she developed low back pain on April 16, 2008 after lifting a heavy surgical tray and who diagnosed her with recurrent low back pain with evidence of increasing disc protrusion of the L2-3 level, multilevel disc disease and canal stenosis and tobacco abuse disorder. Appellant also submitted a September 5, 2008 medical note from Dr. Klein that reported her pain complaints.

By decision dated October 17, 2008, the Office denied reconsideration of its prior decision.[1]

LEGAL PRECEDENT -- ISSUE 1

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[2] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[3]

As part of appellant's burden, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.[4] 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.[5]

ANALYSIS -- ISSUE 1

The Office has accepted that on April 16, 2008 appellant lifted a 23-pound instrument set while at work. Appellant's burden is to establish that her alleged lower back and right leg injury are causally related to this identified employment incident. As noted above, causal relationship is a medical issue requiring submission of medical evidence establishing that the employment incident caused a personal injury. The Board finds that the evidence of record is insufficient to accomplish such a task and, therefore, appellant has not met her burden to establish that she sustained an injury in the performance of duty causally related to her federal employment.

The relevant medical evidence of record consisted of medical reports from Drs. Griffith and Mahoney as well as notes signed by Dr. Klein. The Board notes initially that Dr. Griffith's and Dr. Mahoney's reports did not provide a history of injury. The Board has previously held that, medical opinion evidence must be based on a complete factual and medical background, these

[1] On appeal, appellant submitted additional medical evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). *See J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008) (holding the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision). As this evidence was not part of the record when the Office issued either of its previous decisions, the Board may not consider it for the first time as part of appellant's appeal.

[2] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[3] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[4] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Nancy G. O'Meara*, 12 ECAB 67, 71 (1960).

[5] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004); *Naomi A. Lilly*, 10 ECAB 560, 573 (1959).

reports did not indicate an awareness of appellant's history of injury and furthermore these reports did not attempt to correlate his diagnosed conditions with the accepted incident. These medical reports are of diminished probative value as they lack an opinion concerning the causal relationship between a diagnosed condition and the identified employment incident.

While Dr. Klein's reports did note a history of appellant's surgical tray lifting incident on April 16, 2008, he offered no rationalized medical opinion causally relating the diagnosed conditions to this lifting incident. The Board has held that medical reports and notes lacking an opinion on causal relationship are of limited probative value.[6] The Board has held that the fact that a condition manifests itself or worsens during a period of employment[7] or that work activities produce symptoms revelatory of an underlying condition[8] does not raise an inference of causal relationship between a claimed condition and an employment incident. As neither the medical reports or the medical note contained a physician's opinion concerning the causal relationship between a diagnosed condition and the identified employment-related incident, they are of limited probative value and are insufficient to meet appellant's burden.

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 provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[10] To be entitled to a merit review of an Office decision, denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[11] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[12]

ANALYSIS -- ISSUE 2

Appellant's October 14, 2008 reconsideration request neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law nor advanced a relevant

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[6] *See Mary E. Marshall*, 56 ECAB 420 (2005) (medical reports that do not contain rationale on causal relationship have little probative value). *See also, Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001).

[7] *E.A.*, 58 ECAB ___ (Docket No. 07-1145, issued September 7, 2007); *Albert C. Haygard*, 11 ECAB 393, 395 (1960).

[8] *D.E.*, 58 ECAB ___ (Docket No. 07-27, issued April 6, 2007); *Fabian Nelson*, 12 ECAB 155,157 (1960).

[9] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[10] 20 C.F.R. § 10.606(b)(2).

[11] *Id*. at § 10.607(a).

[12] *Id*. at § 10.608(b).

legal argument not previously considered by the Office. Therefore, appellant is not entitled to a review of the merits of her claim based upon the first and second above-noted requirements under section 10.606(b)(2).[13]

Appellant did submit additional evidence with her October 14, 2008 reconsideration request. With her request, she submitted medical reports, dated July 21, September 5 and 9, 2008 signed by Drs. Newman, Locum and Klein.

The Board has long held that evidence that does not address the particular issue involved does not constitute a basis for reopening a claim.[14] None of the additional reports submitted by appellant with her request for reconsideration offered any medical opinion regarding the cause of her diagnosed back condition. As causal relationship was the issue upon which her claim was denied, these reports did not constitute new and relevant evidence pertinent to the issue involved.

CONCLUSION

The Board finds that appellant has not met her burden to establish that she sustained an injury in the performance of duty on April 16, 2008 causally related to her federal employment. The Board also finds that in this case the Office did not abuse its discretion by denying appellant's reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the October 17 and September 18, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 1, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[13] *Id*. at § 10.606(b)(2)(i) and (ii).

[14] *Betty A. Butler*, 56 ECAB 545 (2005).