United States Department of Labor
Employees' Compensation Appeals Board

E.K., Appellant	)	
	)	
and	)	**Docket No. 09-1827**
	)	**Issued: April 21, 2010**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Salem, MA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 3, 2009 appellant filed a timely appeal of an October 30, 2008 decision of the Office of Workers' Compensation Programs denying his claim for compensation and a January 30, 2009 decision denying his request for reconsideration without a merit review. 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 met his burden of proof to establish that he sustained a traumatic injury on July 20, 2008, as alleged; and (2) whether the Office properly denied appellant's request for reconsideration without further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 22, 2008 appellant, then a 61-year-old laborer, filed a traumatic injury claim alleging that on July 20, 2008 he sustained toxic smoke inhalation in the performance of duty. He stopped work on July 21, 2008 and returned on July 22, 2008.

A July 20, 2008 ambulance report from the responding emergency medical technicians (EMT) noted that appellant was holding a bucket of laker oil that was releasing smoke and fumes. They also noted appellant's complaints of dizziness after inhaling smoke and fumes. Appellant was transported to a local emergency room. In a chest x-ray report of the same date, Dr. Julie Stiles, a Board-certified diagnostic radiologist, noted a history of smoke inhalation. She found normal heart size, clear lungs and no pleural effusion or pneumothorax. Dr. Stiles determined that appellant had no acute cardiopulmonary findings.

In an August 1, 2008 report, Dr. Hon Yee, Board-certified in emergency medicine, treated appellant for smoke inhalation and dizziness. He indicated that appellant was exposed to a chemical fire consisting of tar and turpentine within a closed space. Dr. Yee noted that appellant worked in the building that contained the tar material. He stated that appellant had a history of asthma. Dr. Yee diagnosed dizziness and "rule out" smoke inhalation.

On September 23, 2008 the Office advised appellant of the factual and medical evidence necessary to establish his claim and allowed him 30 days to submit additional evidence.

Appellant submitted an undated statement indicating that on July 20, 2008 he and a coworker entered a shed after smelling smoke. He reported seeing smoke inside of a bucket, which he removed and felt dizzy afterward. In a July 20, 2008 statement, appellant's coworker reiterated that she and appellant found a barrel with smoke. She noted that appellant felt dizzy after carrying the barrel outside.

In a July 20, 2008 hospital discharge report, a registered nurse determined that appellant sustained an inhalation injury. She noted that this type of injury was most commonly seen with smoke or chemicals at work. A September 26, 2008 report from a physician's assistant noted that in the past appellant had intermittent episodes of asthma that were triggered by upper respiratory infection. The physician's assistant advised that appellant was last seen for asthma by his primary care physician in 2004 and had not had any flare-ups since then.

In an October 30, 2008 decision, the Office denied appellant's claim. It found that the July 20, 2008 incident occurred as alleged; however, the medical evidence did not provide a firm diagnosis that could be connected to this event.

On November 25, 2008 appellant requested reconsideration, noting that he was submitting hospital discharge papers with an attending physician's signature to establish that he was treated for inhaling toxic fumes. He attached the July 20, 2008 hospital discharge report, already of record, that also contained Dr. Yee's signature dated November 21, 2008.

In a January 30, 2009 decision, the Office denied appellant's request for reconsideration without a merit review. It found that the evidence submitted was duplicative and that appellant did not otherwise meet the requirements for reconsideration.

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 claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within the applicable time limitation; that an injury was sustained while 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[2]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a "fact of injury" has been established. 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. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[3]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion 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 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.[4]

ANALYSIS -- ISSUE 1

The record supports that on July 20, 2008 appellant was exposed to smoke and fumes while in the performance of duty. However, the medical evidence does not establish that the accepted exposure caused or aggravated appellant's claimed condition.

In an August 1, 2008 report, Dr. Yee noted that appellant was exposed to a chemical fire and complained of smoke inhalation and dizziness. He diagnosed dizziness and to rule out smoke inhalation. To the extent that he described dizziness as a symptom on examination,

[1] 5 U.S.C. §§ 8101-8193.

[2] *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *Id*.

[4] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

Dr. Yee did not provide a firm medical diagnosis.[5] He did not specifically address whether any diagnosed medical condition was caused or aggravated by the accepted workplace exposure.[6] Dr. Yee did not provide a medical opinion which explained the reasons why appellant's fume exposure on July 20, 2008 caused or contributed to a diagnosed condition. Consequently, his report is insufficient to establish appellant's claim.

In a July 20, 2008 chest x-ray report, Dr. Stiles noted a history of smoke inhalation. She noted normal diagnostic findings with no acute cardiopulmonary findings. As noted, appellant's burden of proof includes submitting sufficient medical evidence to establish that the accepted employment incident caused a personal injury. Dr. Stiles did not address whether appellant sustained an injury caused by his July 20, 2008 fume exposure at work. Her report is insufficient to establish his claim.[7] For these reasons, appellant did not submit sufficient medical evidence to establish that he sustained a traumatic injury on July 20, 2008 in the performance of duty.

The Board notes, however, that the issue of reimbursement of appellant's medical expenses is not in posture for decision.

This case is similar to *Val D. Wynn*.[8] The employee experienced weakness and chest pain as a result of his employment and was transported from the employing establishment health unit to a local community hospital. The Board affirmed the denial of the employee's claim for compensation as no firm medical diagnosis had been established. The Board remanded the case to the Office for development on whether he was entitled to reimbursement of medical expenses. The Board stated:

> "Ordinarily, when an employee sustains a job-related injury which may require medical treatment, the designated agency official shall promptly authorize such treatment by giving the employee a properly executed CA-16 within four hours. However, 'cases of a doubtful nature, so far as compensability is concerned, shall be referred ... using a CA-16 for medical services.... In cases of an emergency or cases involving unusual circumstances the Office may, in the exercise of its

[5] *See Deborah L. Beatty*, 54 ECAB 340 (2003) (where the Board found that a treatment note without a firm diagnosis was of insufficient probative value); *see also Larry M. Leudtke*, Docket 03-1564 (issued September 2, 2003) (where the Board found that the diagnoses of dizziness, headache, light-headedness and anxiety described symptoms and did not constitute a firm diagnosis of a medical condition).

[6] *See S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009) (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).

[7] The record also contains reports from a registered nurse, physician's assistant and emergency medical technicians. However, these reports are of no probative value as none of these care providers is a physician as defined under the Act and, therefore, they are not competent to provide a medical opinion. *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physicians' assistants, nurses and physical therapists are not competent to render a medical opinion under the Act); *Charley V.B. Harley*, 2 ECAB 208 (1949) (the Board held that medical opinion, in general, can only be given by a qualified physician). *See also* 5 U.S.C. § 8101(2).

[8] 40 ECAB 666 (1989).

discretion, authorize treatment otherwise … than by a Form CA-16, or it may approve payment for medical expenses incurred other than by a Form CA-16.'

"In this case, the medical personnel at the employing establishment's health unit authorized appellant's transport by government personnel and vehicle to Muhlenberg Community Hospital for examination by a physician within four hours of the employment incident. The Office has failed to determine whether, under these facts, such emergency or unusual circumstances were present in a case of a 'doubtful nature.'"[9]

Although the Office adjudicated and denied appellant's claim of injury, it did not adjudicate the issue of whether appellant should be reimbursed for medical expenses incurred. The case will be remanded for further development of this issue.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), 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] Section 10.608(b) of Office regulations 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.[11]

ANALYSIS -- ISSUE 2

Appellant's reconsideration request consisted of a November 25, 2008 statement indicating that he was submitting a hospital discharge report signed by a physician who noted he was treated for inhaling toxic fumes. However, his assertions did not advance a relevant legal argument not previously considered by the Office. Appellant also did not demonstrate that the Office erroneously applied or interpreted a specific point of law.

The hospital discharge report of November 21, 2008 is new since the previous version of the report was only signed by a nurse and not a physician, however, is not relevant because it does not provide support that appellant's fume exposure at work on July 20, 2008 caused or aggravated a diagnosed medical condition. Instead, it provides general information and discharge instructions for a person who has had an inhalation injury. This report is insufficient to require reopening of the claim for a merit review.

[9] This policy is found in the Office's Federal Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.3(a)(3) (October 1990).

[10] *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

[11] *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

Because appellant's request for reconsideration does not meet at least one of the criteria required to reopen a case, the Board finds that the Office properly denied appellant's request for reconsideration without a merit review.

On appeal, appellant notes that he has submitted a new report from Dr. Yee. However, the Board may not consider this evidence for the first time on appeal. It may only review evidence that was of record at the time the Office issued its final decision.[12]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a traumatic injury on July 20, 2008 in the performance of duty. The Office properly denied appellant's request for reconsideration without a merit review. The case will be returned for consideration of whether appellant's medical expenses should be reimbursed.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated January 30, 2009 and October 30, 2008 are affirmed in finding that appellant did not meet his burden of proof and set aside as to the issue of reimbursement. The case is remanded for further action in conformance of this decision.

Issued: April 21, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[12] 20 C.F.R. § 501.2(c).