United States Department of Labor
Employees' Compensation Appeals Board

J.J., Appellant	)	
and	)	**Docket No. 10-1435**
	)	**Issued: February 9, 2011**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, New York, NY, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 26, 2010 appellant filed a timely appeal from a December 15, 2009 merit decision of the Office of Workers' Compensation Programs which denied his claim for traumatic injury and a March 23, 2010 decision which denied his 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.[1]

ISSUES

The issues are: (1) whether appellant established that he sustained a back injury in the performance of duty on September 11, 2009; and (2) whether the Office properly denied appellant's December 20, 2009 request for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] For Office decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On September 14, 2009 appellant, then a 44-year-old park police officer, filed a traumatic injury claim alleging that on September 11, 2009 he sustained a back injury when he slipped and fell while walking to the Hangar B restrooms on Floyd Bennett Field. He explained that it was raining heavily and the wet gravel caused him to slip and fall, resulting in sharp pain in his lower back and stiffness. Appellant stopped work on September 13, 2009 and returned on October 5, 2009.

On November 12, 2009 the Office advised appellant that he submitted insufficient evidence to establish his claim and requested additional information. It requested that he submit all records of any medical treatment he received and a medical report that included dates of examination and treatment, history of injury, detailed description of findings, results of examinations and tests, diagnosis and a physician's opinion supported by medical rationale explaining how the work incident caused or aggravated the claimed injury. Appellant did not respond.

By decision dated December 15, 2009, the Office denied appellant's claim on the grounds of insufficient medical evidence. It accepted that the September 11, 2009 incident occurred at the time, place, and in the manner alleged, but determined that he did not submit any medical evidence to establish that a diagnosed condition resulted from the employment incident.

On December 20, 2009 appellant filed a timely request for reconsideration. He submitted patient progress requests and physical therapy notes dated September 14 to October 27, 2009 with an illegible signature, a September 11, 2009 treatment note from an unknown provider, and an undated and unsigned physical examination sheet.

Appellant provided a September 14, 2009 New York State Workers' Compensation report of Dr. Beth Massey, a pain medication and family practitioner, but with no signature. Dr. Massey noted that appellant stated that he slipped on gravel and injured his back when he slipped and fell while walking briskly in heavy rain in Floyd Bennet Field and that he complained of numbness, pain and stiffness in his low back. Boxes were checked noting pain and tenderness in appellant's lower back and both active and passive range of motion. A box was marked "yes" that appellant's complaints were consistent with his history of injury and with objective findings.

In a December 21, 2009 letter, appellant contended that all medical information not previously received by the Office was submitted. He stated that on approximately October 23, 2009 his doctor informed him that all the medical information was sent to the Department of Labor, but the Office had advised him that no evidence was received. Appellant requested that the Office contact Dr. Beth Massey for further information and assistance.

In a March 23, 2010 decision, the Office denied appellant's request for reconsideration finding that he did not show that it erroneously applied or interpreted a point of law, advance a new legal argument, or provide relevant, pertinent evidence. It found that the medical evidence submitted lacked any probative value as it was not signed by any physician.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of proof to establish the essential elements of his claim by the weight of the reliable, probative and substantial evidence[3] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether "fact of injury" has been established.[5] 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.[6] Second, the employee must submit evidence, generally only in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[7] An employee may establish that the employment incident occurred as alleged but fail to show that his disability or condition relates to the employment incident.[8]

Whether an employee sustained an injury in the performance of duty requires the submission of rationalized medical opinion evidence providing a diagnosis or opinion as to causal relationship. 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 specified employment factors or incident. 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.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an injury in the performance of duty. The evidence supports that the September 11,

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[2] 5 U.S.C. §§ 8101-8193.

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[4] *M.M.*, 60 ECAB __ (Docket No. 08-1510, issued November 25, 2010); *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

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

[7] *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[8] *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[9] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

2009 employment incident occurred as alleged. However, appellant did not submit medical evidence to establish that the September 11, 2009 employment incident caused a low back injury.

On November 12, 2009 the Office advised appellant of the medical evidence needed to establish his claim. It requested that he submit a medical report from his physician explaining how the September 11, 2009 employment incident caused an injury. Appellant failed to submit any medical evidence before the December 15, 2009 Office decision denying his claim. He did not meet his burden of proof to establish a *prima facie* claim.[10]

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether to review an award for or against compensation.[11] The Office's regulations provide that the Office may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district Office.[12]

To require the Office to reopen a case for merit review pursuant to the Act, the claimant must provide evidence or an argument which: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[13] A request for reconsideration must also be submitted within one year of the date of the Office decision for which review is sought.[14] 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.[15]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record or does not address the particular issue involved does not constitute a basis for reopening a case.[16] While reopening of a case may be predicated solely on a legal premise or evidence not previously considered such reopening is not required where the legal contention or evidence does not have a reasonable color of validity.[17]

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[10] *J.Z.*, 58 ECAB 529 (2007); *see also Donald W. Wenzel*, 56 ECAB 390 (2005).

[11] 5 U.S.C. § 8128(a); *see also D.L.*, 61 ECAB __ (Docket No. 09-1549, issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

[12] 20 C.F.R. § 10.605; *see also R.B.*, 61 ECAB __ (Docket No. 09-1241, issued January 4, 2010); *A.L.*, 60 ECAB __ (Docket No. 08-1730, issued March 16, 2009).

[13] 20 C.F.R. § 10.606(b); *see also L.G.*, 61 ECAB __ (Docket No. 09-1517, issued March 3, 2010); *C.N.*, 60 ECAB __ (Docket No. 08-1569, issued December 9, 2008).

[14] 20 C.F.R. § 10.607(a).

[15] *Id*. at § 10.608(b).

[16] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[17] *Jennifer A. Guillary*, 57 ECAB 485 (2006); *Vincent Holmes*, 53 ECAB 468 (2002).

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for reconsideration. Appellant failed to meet any of the criteria for reopening a case for review on the merits. In his reconsideration request, he did not allege that the Office erroneously applied or interpreted a point of law. Appellant failed to advance a relevant legal argument or submit relevant and pertinent evidence not previously considered by the Office.

In the December 15, 2009 decision, the Office denied appellant's claim due to insufficient medical evidence to establish that he sustained a back injury due to the September 11, 2009 employment incident. On December 20, 2009 appellant filed a timely request for reconsideration. In a March 23, 2010 decision, the Office denied appellant's request for reconsideration on the grounds that the medical documents submitted did not constitute new and relevant medical evidence.

Appellant submitted as evidence a September 14, 2009 unsigned medical report in which Dr. Massey checked a box marked "yes" that appellant's complaints were consistent with his history of injury. He also submitted physical therapy notes dated September 14 and October 27, 2009 with an illegible signature, a September 11, 2009 treatment note from an unknown provider, and an undated and unsigned physical examination sheet. However, this evidence is not relevant to the underlying issue of whether appellant sustained a diagnosed condition resulting from the September 11, 2009 employment incident. The Board notes that none of this evidence provides a diagnosis of appellant's condition. The Board notes that the underlying issue is medical in nature and can only be resolved through the submission of probative medical evidence from a physician.[18] The evidence submitted is not established as having come from a physician, or did not contain any physician's signature.[19] The evidence is not probative to the underlying issue in this case and was insufficient to warrant review on the merits.

Appellant submitted a December 21, 2009 letter contending that his doctor submitted all the relevant medical information to the Office and that the evidence of record was sufficient to support his claim. The record establishes that the information submitted to the record lacks probative value as it is not established as constituting medical evidence signed by a physician. As noted, the Office does not need to reopen a case if there is no reasonable color of validity to the argument.[20] Appellant did not submit competent medical evidence supporting his contention. His argument was insufficient to warrant further merit review.[21]

The Board finds that appellant 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 constitute new and relevant evidence not previously considered. As appellant

[18] *L.H.*, 59 ECAB 253 (2007); *Gloria J. McPherson*, 51 ECAB 441 (2000).

[19] *See R.M.*, 59 ECAB 690 (2008).

[20] *Jennifer A. Guillary*, *supra* note 17.

[21] *L.T.*, 61 ECAB __ (Docket No. 09-2032, issued August 3, 2010); *Elagine M. Borghini*, 57 ECAB 549 (2006).

did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

CONCLUSION

The Board finds that appellant did not establish that he sustained back injury on September 11, 2009. The Board also finds that the Office properly denied his request for reconsideration of his claim under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2010 decision of the Office of Workers' Compensation Program is affirmed.

Issued: February 9, 2011
Washington, DC

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

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

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