United States Department of Labor
Employees' Compensation Appeals Board

ELSA I. GARCIA, Appellant	)	
and	)	**Docket No. 04-151**
	)	**Issued: February 13, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Nappa, CA, Employer	)	

Appearances:
Elsa I. Garcia, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On October 28, 2003 appellant filed a timely appeal from the March 31, 2003 decision of the Office of Workers' Compensation Programs' hearing representative. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an injury in the performance of duty.

FACTUAL HISTORY

On November 5, 2001 appellant, then a 37-year-old mail carrier, filed a traumatic injury claim alleging that on that date she hurt her lower middle back while lifting a heavy tray full of mail from the back of her vehicle.[1] No evidence accompanied appellant's claim.

By letter dated September 5, 2002, the Office advised appellant that additional information was necessary to make a determination of her claim. The Office further advised appellant about the type of factual and medical evidence she needed to submit to establish her claim.

In response, Dr. James M. Talcott, a Board-certified orthopedic surgeon and appellant's treating physician, submitted a September 30, 2002 medical report advising the Office about appellant's back pain and need to undergo further testing. In addition, the Office received appellant's response that she had not sustained any other injury either on or off duty and a document indicating that she accepted limited-duty work at the employing establishment on June 24, 2002.

By decision dated October 25, 2002, the Office found the evidence of record sufficient to establish that appellant actually experienced the claimed event, but insufficient to establish that she sustained a condition caused by the accepted employment incident. In a November 13, 2002 letter received by the Office on December 6, 2002, appellant stated that she wished to request a review by the Board in the form of a review of the written record.

Subsequently, the Office received a September 30, 2002 progress report from Dr. Ricco Nel, a chiropractor, revealing several diagnoses for appellant's back.

An Office hearing representative conducted a review of the written record on March 27, 2003 and issued a decision dated March 31, 2003 affirming the Office's January 22, 2003 decision. The hearing representative found the medical evidence of record insufficient to establish that appellant sustained an injury caused by the November 5, 2001 employment incident.[2]

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[3] 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 filed within the applicable time limitation; that an injury was sustained while in the

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[1] The record indicates that appellant's claim was signed on May 1, 2002 and it had been resubmitted based on the request of the Office.

[2] Subsequent to the hearing representative's March 31, 2003 decision, the Office received additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. 20 C.F.R. § 501.2(c)(1).

[3] 5 U.S.C. §§ 8101-8193.

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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury of an occupational disease.[5]

To determine whether an employee has sustained a traumatic injury in the performance of duty, "fact of injury" must first be established.[6] 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.[7] 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.[8] The medical evidence required to establish causal relationship is usually rationalized medical evidence.[9]

ANALYSIS

In this case, appellant satisfied the first criteria. The Office found that the record supported that appellant actually experienced the claimed incident on November 5, 2001. However, the Office determined that the evidence did not establish that a condition had been diagnosed in connection with the November 5, 2001 employment incident. In his September 30, 2002 report, Dr. Talcott stated that appellant initially sustained an industrial injury to her lumbosacral spine on September 16, 1999 and that she reinjured her lower back on November 5, 2001 while lifting a tray of heavy mail, which aggravated her previous industrial injury. Dr. Talcott noted appellant's last office visit on August 12, 2002 and her complaints of chronic back and leg pain. He further noted that appellant was under the care of another physician and that she exercised on a regular basis. Dr. Talcott found that appellant was still experiencing chronic back and leg pain and that she needed a magnetic resonance imaging scan to see if there had been an increase in her pathology. He requested authorization for this procedure and concluded that appellant should continue her back exercises. Dr. Talcott's report did not include a diagnosis of appellant's condition and did not explain how or why appellant's prior back condition was aggravated by the November 5, 2001 employment incident. Thus, Dr. Talcott's report is insufficient to establish appellant's burden.

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[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 4.

[6] *Neal C. Evins*, 48 ECAB 252 (1996).

[7] *Michael W. Hicks*, 50 ECAB 325, 328 (1999).

[8] 5 U.S.C. § 8101(5); 20 C.F.R. § 10.5(ee) (1999) (defining injury).

[9] *Michael E. Smith*, *supra* note 5.

In his September 30, 2002 progress report, Dr. Nel, a chiropractor, stated that appellant experienced a moderate flare-up since her last visit on September 20, 2002 and that she continued to experience moderate intermittent to daily chronic acute low back pain and stiffness. He diagnosed subluxation of the lumbar spine, lumbosacral sprain/strain and sacroiliac subluxation, but did not state whether his diagnoses were based on an objective evaluation that included a significant physical examination, "laboratory, imaging or other diagnostic findings." In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under section 8101(2) of the Act.[10] A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray to exist.[11] While Dr. Nel found that appellant had a subluxation of the lumbar spine, there is no indication in the record that this subluxation was demonstrated on x-ray. Therefore, Dr. Nel is not considered a "physician" under the Act and his report is of no probative value.[12]

CONCLUSION

As appellant has failed to submit rationalized medical evidence establishing that she sustained an injury caused by the November 5, 2001 employment incident, the Board finds that she has failed to satisfy her burden of proof in this case.

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[10] 5 U.S.C. § 8101(2).

[11] *Thomas R. Horsfall*, 48 ECAB 180 (1996).

[12] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member