United States Department of Labor
Employees' Compensation Appeals Board

LARRY J. BENNETT, Appellant	)	
and	)	**Docket No. 04-1901**
	)	**Issued: January 12, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Garden City, NY, Employer	)	

Appearances:
Larry J. Bennett, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 26, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 9, 2004 wherein the Office denied appellant's claim for traumatic injury. He also appealed the Office's June 9, 2004 decision denying reconsideration of the merits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained an injury in the performance of duty on December 13, 2003, as alleged; and (2) whether the Office properly denied appellant's request for reconsideration pursuant to 20 C.F.R. § 8128(a).

FACTUAL HISTORY

On December 13, 2003 appellant, then a 53-year-old mail processor, filed a traumatic injury claim alleging that on that date he bent over to pick up a tray of mail and felt a "pop" in his back. Appellant was seen on that date at the Winthrop University Hospital Emergency

Department at which time he was diagnosed with low back pain and hypertension by a physician's assistant. X-rays of appellant's spine taken at Winthrop University Hospital on that date were interpreted by Dr. Jessica Lastig, a radiologist, as showing no evidence of fracture or subluxation. The x-ray did show asymmetric narrowing of the L4-5 space with vacuum phenomenon, mild degenerative change, prominent left renal shadow and a calcified abdominal aorta.

In a report dated December 17, 2003, Dr. Deborah A. Turner, a chiropractor, described appellant's injury as low back subluxation and lumbosacral discogenic radiculitis. Dr. Turner treated appellant with manual chiropractic adjustments and manual traction. In a note dated December 29, 2003, she indicated that appellant was under her care for injuries sustained in a work-related accident on December 15, 2003, and that, due to an exacerbation of his condition, appellant would be out of work until further notice. In a report dated January 12, 2004, Dr. Turner, after reviewing appellant's history and examination, concluded that appellant had thoracic or lumbosacral neuritis/radiculitis, intervertebral disc displacement with myelopathy, lumbar intervertebral disc degeneration and lumbosacral segmental dysfunction. She indicated that x-rays of appellant's cervical, thoracic, lumbosacral and lumbopelvic spinal regions were performed in her office on December 22, 2003. These x-rays indicated narrowed disc spacing at C5-6 and C6-7 intersegmental levels, posterior vertebral lipping and spurring, interverterbral foramina encroachment at C5-6 and C6-7 levels. Dr. Turner continued to treat appellant three times a week with chiropractic adjustments, myofascial release technique and manual traction.

By letter dated January 8, 2004, the Office apprised appellant and Dr. Turner of the requirements for a chiropractor to be deemed a physician under the Federal Employees' Compensation Act and requested a comprehensive report accompanied by x-rays and a diagnosis of subluxation.

By decision dated February 9, 2004, the Office denied appellant's claim. The Office found that although the initial evidence indicated that appellant had experienced the claimed incident, the medical evidence did not establish that a condition had been diagnosed in connection with this event and thus fact of injury had not been established. The Office noted that the medical evidence was signed by a physician's assistant or a chiropractor and not a medical doctor, as required by the Act.

A magnetic resonance imaging scan was conducted on February 26, 2004 and was interpreted by Dr. Melvin Leeds, a Board-certified radiologist, as showing a slight retro-positioning of L4 on L5 associated with marked narrowing and desiccation of that disc space, bulging of the disc with marginal osteophytes narrows the base of the bilateral foramina, broad-based right-sided herniations at the L3-4 disc and mild bulging of the posterior disc margin L5-S1.

On March 5, 2004 appellant requested reconsideration.

In a January 20, 2004 report, first received by the Office on March 8, 2004, Dr. Eial Faierman, a Board-certified orthopedic surgeon, indicated that appellant had recurrent lumbar spine pain and recommended that appellant continue therapy.

In a report dated May 17, 2004, Dr. Turner reiterated that appellant continued to be in her care for injuries sustained as a result of the work-related accident of December 13, 2003.

By decision dated June 9, 2004, the Office denied appellant's request for reconsideration without reviewing the case on the merits.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the 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 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.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or on an occupational disease.[3]

To determine whether an employee has sustained a traumatic injury in the performance of duty, "fact of injury" must first be established.[4] 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.[5] 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.[6] The medical evidence required to establish causal relationship is usually rationalized medical evidence.[7]

Further, section 8101(2) of the Act[8] provides that the term "physician," as used therein, "includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary."[9] Subluxation is defined by the regulations as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading

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[1] 5 U.S.C. §§ 8101-8193.

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

[3] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

[4] *Neal C. Evins*, 48 ECAB 242 (1996).

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

[6] 5 U.S.C. § 8101(5); 20 C.F.R. § 10.5(ee) (defining traumatic injury).

[7] *Michael E. Smith, supra* note 3.

[8] 5 U.S.C. § 8101(2).

[9] *See* 20 C.F.R. § 10.311.

of x-rays.[10] Without diagnosing a subluxation from x-ray, a chiropractor is not a "physician" under the Act and his opinion on causal relationship does not constitute competent medical evidence.[11] Furthermore, a physician's assistant is not considered a physician under the Act.[12]

ANALYSIS

The record establishes that on December 13, 2003 appellant felt a "pop" in his back while picking up a tray of mail in the performance of duty. However, appellant has not submitted medical evidence sufficient to establish that he sustained a medical condition causally related to this incident. Appellant received treatment at Winthrop University Hospital on the date of the employment incident, December 13, 2003, by a physician's assistant; these opinions would not be sufficient to establish compensation as a physician's assistant is not considered a physician under the Act. Therefore, the reports are insufficient to establish appellant's claim.

In this case, Dr. Lastig, a radiologist, interpreted x-rays taken on the date of appellant's alleged injury, December 13, 2003, as indicating no evidence of fracture or subluxation. Although she included a history of the alleged injury, she did not address causal relationship.

Appellant also was treated by Dr. Turner, a chiropractor. However, in order for a chiropractor's opinion to be able to establish a medical condition, it must be based on treatment consisting of manual manipulation of the spine to correct a subluxation as determined by x-ray to exist, thus rendering her a physician under the Act. Dr. Turner indicated that x-rays taken in her office on December 22, 2003 showed narrowed disc spacing at C5-6 and C6-7 and interforminal encroachment at C5-6 and C6-7 levels, which is in keeping with the Office's definition of a subluxation as provided in its regulations.[13] The Board notes that Dr. Turners' x-rays were taken after she already had diagnosed subluxation. Although Dr. Turner's x-rays confirmed her December 17, 2003 diagnosis of low back subluxation, she did not specifically relate the x-ray finding to the December 13, 2003 employment incident and did not address whether this diagnosis resulted in disability, especially since the x-rays were taken nine days after the December 13, 2003 employment incident. As the Board has held, an opinion on causal relationship based in part on an x-ray remotely taken after a claimant's exposure to a factor of employment must explain how the physician can determine that the x-ray demonstrates a condition caused by the implicated factor of employment.[14] Accordingly, Dr. Turner's reports do not establish that appellant sustained an injury on December 13, 2003 as alleged. No other medical evidence links appellant's condition to her federal employment. Therefore, the Office properly denied appellant's claim.

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[10] 20 C.F.R. § 10.5(b).

[11] *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[12] *Ricky S. Storms*, 52 ECAB 349, 353 (2001).

[13] 20 C.F.R. § 10.5(b).

[14] *Linda Mendenhall*, 41 ECAB 532, 539 (1990).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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.[15]

ANALYSIS -- ISSUE 2

Appellant does not make any argument that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. Appellant did submit a February 26, 2004 MRI scan and a January 20, 2004 report by Dr. Faierman. However, neither of these reports state that appellant sustained a diagnosed medical condition due to the December 13, 2003 employment incident. As Dr. Turner's May 17, 2004 report merely reiterated statements in her prior reports, it is considered duplicative of evidence previously considered by the Office and thus, insufficient to warrant review.[16] Accordingly, the Board finds that appellant did not show that the Office erroneously applied or interpreted a specific point of law, did not raise any substantive legal questions and failed to submit any relevant and pertinent new evidence not previously reviewed by the Office.

CONCLUSION

Appellant has failed to establish that he sustained an injury in the performance of duty on December 13, 2003, as alleged. Furthermore, he has not established that the Office improperly refused merit review.

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[15] 20 C.F.R. § 10.606(b)(2)(i-iii).

[16] *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 9 and February 9, 2004 are affirmed.

Issued: January 12, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member