

**United States Department of Labor
Employees' Compensation Appeals Board**

B.B., Appellant

and

U.S. POSTAL SERVICE, Mobile, AL, Employer

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Docket No. 08-1206

Issued: October 10, 2008

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge

COLLEEN DUFFY KIKO, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 18, 2008 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated February 12, 2008 which denied her reconsideration request. Appellant also filed a timely appeal of a January 7, 2008 merit decision denying her traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this decision.

ISSUES

The issues are: (1) whether appellant has met her burden to establish that she sustained a traumatic injury in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On November 7, 2007 appellant filed a traumatic injury claim alleging that on the same day she was driving her vehicle when she was struck by another vehicle making a left turn into her lane. She alleged that she sustained neck and back conditions specifically a sprain or strain of the cervical muscles and left deltoid muscle and a possible tear of the deltoid muscle.

On November 26, 2007 the Office requested that appellant submit medical records related to the treatment of her injury including a physician's report.

In a November 21, 2007 status report, Dr. Patrick Harrison, a chiropractor, diagnosed cervical strain/sprain and possible left deltoid tear. He noted that appellant could not perform limited duty and needed to have the option to lie down for 30 minutes out of every hour.

An undated health provider certification noted that appellant was involved in a car accident and had a sprain/strain of cervical muscles and possible deltoid muscle tear.

In a December 3, 2007 evaluation form, Dr. Harrison diagnosed left shoulder strain/sprain/tear and cervical strain/sprain.

In a December 4, 2007 letter, the Office informed appellant that chiropractors are deemed physicians under the Act only when the services are for treatment consisting of manual manipulation of the spine to correct subluxation as demonstrated by x-ray to exist. The Office advised appellant that she should either submit a report from her chiropractor which diagnosed subluxation or submit a report from a medical doctor or osteopath.

In a January 7, 2008 decision, the Office denied appellant's traumatic injury claim. It found that the events occurred as alleged but there was no evidence that she sustained a diagnosed condition in connection with the incident.

Additional reports were received. In a January 23, 2008 letter, Dr. Harrison reported that appellant was seen in his office on November 7, 2007 with various subjective and objective signs due to a motor vehicle accident. He informed the Office that he was treating appellant for correction of vertebral subluxations. Dr. Harrison found multiple subluxations on the x-ray and noted that they had been manipulated. He concluded that appellant still had residual problems resulting from the motor vehicle accident. In work capacity evaluations dated November 7, 2007 through January 28, 2008, Dr. Harrison stated that appellant had a subluxation of C2 which prevented her from performing her normal job. He further diagnosed a C2 subluxation with associated edema, radiculitis and muscle spasms associated with subluxation.

On January 28, 2008 appellant requested reconsideration.

In a February 12, 2008 nonmerit decision, the Office denied appellant's request for reconsideration finding that the evidence submitted was repetitious and cumulative. It noted that although Dr. Harrison diagnosed subluxation at C2 a copy of the x-ray was not provided as supporting evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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

¹ 5 U.S.C. §§ 8101-8193

was timely filed within the applicable time limitation period of the Act, that an injury was sustained 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 upon a traumatic injury or an occupational disease.³

In order to determine whether an employee sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether “fact of injury” has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.⁴ The second component is whether the employment incident caused a personal injury.⁵ Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.⁶

Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.⁷ The Office’s regulations at 20 C.F.R. § 10.5(bb) define subluxation 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 of x-rays.⁸

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained a back condition when she was involved in a motor vehicle accident. The Office accepted that the event occurred as alleged. The case turns on the issue of whether this employment incident caused an injury. In order to establish that the employment incident caused an injury appellant must establish through medical evidence that she has a diagnosed condition causally related to the incident. Initially in support of her claim, appellant submitted reports from Dr. Harrison who diagnosed left shoulder strain/sprain/tear and cervical strain/sprain and noted that appellant could not perform limited duty. Only a physician

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *Elaine Pendleton*, *supra* note 2.

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *See Robert G. Morris*, 48 ECAB 238 (1996). A physician’s opinion on the issue of causal relationship must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams*, *supra* note 3. Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the claimant’s specific employment factors. *Id.*

⁷ 5 U.S.C. § 8101(2).

⁸ 20 C.F.R. § 10.5(bb).

under the Act can provide a diagnosis.⁹ Dr. Harrison is a chiropractor and chiropractors are only considered to be physicians under the Act to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.¹⁰ As Dr. Harrison did not diagnose subluxation in the initial reports he submitted prior to the merit denial of the claim, he is not considered to be a physician in regards to the diagnoses he did make initially which were cervical sprain/strain and left shoulder strain/strain/tear. His notes were the only evidence of record at the time of the Office's merit review.

The evidence does not establish that appellant has a diagnosed condition or that any condition is casually related to the employment incident as no physician opinions were submitted. The Board finds that as of the date of the January 7, 2008 merit decision appellant had not established that she sustained a condition causally related to her employment incident.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.¹¹ Section 10.608(b) provides that when an application for review of the merits of a claim 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.¹² When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹³

ANALYSIS -- ISSUE 2

The Office issued a decision on February 12, 2008, denying reconsideration of its January 7, 2008 decision on the grounds that the evidence submitted was repetitive and cumulative. The Board must determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to appellant's application for reconsideration and to any evidence submitted in support thereof.

The Board finds that the Office improperly denied appellant's request for reconsideration. The Office based its denial of reconsideration on the fact that a copy of the x-ray relied upon by Dr. Harrison was not submitted to the Office. However, submittal of x-rays to the Office is not a

⁹ 5 U.S.C. § 8101(2).

¹⁰ *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹¹ 20 C.F.R. § 10.606(b)(2) (2003).

¹² 20 C.F.R. § 10.608(b) (2003).

¹³ *Annette Louise*, 54 ECAB 783 (2003).

requirement. A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given weight the medical report must state that x-rays support the finding of spinal subluxation, the Office will not necessarily require submittal of the x-ray, or a report of the x-ray, but the report must be available for submittal on request.¹⁴ The Office never requested the x-ray or x-ray report. In both development letters, the Office requested a physician's report which included within it the results of x-rays but never specifically asked for the x-rays themselves to be submitted.

Dr. Harrison satisfied the requirements for a chiropractor to be considered a physician under the Act, he diagnosed subluxation and indicated that the diagnosis was demonstrated by a x-ray. As his reports are considered to be physician's reports submitted for reconsideration and would constitute "relevant and pertinent new evidence not previously considered by the Office" which would be entitled to a merit review. The Board finds that the Office improperly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that the Office improperly denied appellant's request for reconsideration and a merit decision should have been issued addressing the merits of the new medical evidence. The Board also finds that appellant had not established that she sustained a traumatic injury at the time of the January 7, 2008 merit decision.

¹⁴ 20 C.F.R. § 10.311(c).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 7, 2008 is affirmed and the decision dated February 12, 2008 will be set aside and remanded for further action consistent with this decision.

Issued: October 10, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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