

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

J.G., Appellant

and

**DEPARTMENT OF AGRICULTURE,
FORESTRY SERVICE, Atlanta, GA, Employer**

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**Docket No. 10-1214
Issued: February 3, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 22, 2010 appellant filed a timely appeal from a September 25, 2009 merit decision of the Office of Workers' Compensation Programs and a November 13, 2009 nonmerit decision. 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 on July 30, 2009 in the performance of duty; and (2) whether the Office properly denied appellant's November 3, 2009 request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ 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 August 3, 2009 appellant, then a 32-year-old forester, filed a traumatic injury claim for compensation alleging that on July 30, 2009 his car was rear-ended by another vehicle, resulting in back pain and muscle soreness. He explained that he was on Interstate 75 in Atlanta, Georgia when traffic began to stop, but the vehicle behind him was unable to stop in time. Appellant stopped work on July 30, 2009 and returned on July 31, 2009.

In an August 19, 2009 letter, the Office informed appellant that the evidence on record was insufficient to support his claim and requested that he submit a detailed, narrative medical report which should include a history of his injuries, a firm diagnosis of any condition resulting from the employment incident, symptoms and test results which support all conditions diagnosed, treatments provided, the period and extent of disability and a medical opinion explaining how the condition was believed to have been caused or aggravated by the July 30, 2009 incident.

Appellant thereafter submitted as medical evidence (Form CA-16), Part B dated August 27, 2009 and signed by Dr. Jacqueline Kilraine, a chiropractor,² who repeated appellant's history of injury on July 30, 2009 his vehicle was rear ended while traveling south on Interstate 75 in Atlanta, Georgia. Dr. Kilraine also listed diagnostic codes but did not identify a specific diagnosis or explain the diagnostic codes. She further noted that an x-ray report and examination findings were attached to the form, but no other documentation was received by the Office. Regarding the cause of appellant's condition, Dr. Kilraine checked a box marked "yes" that she believed appellant's condition was caused or aggravated by the July 30, 2009 incident.

The Office also received a motor vehicle accident report dated July 30, 2009 which explained that the third-party was traveling south on Interstate 75 and made an illegal lane change, striking appellant's car in the rear. In addition, it received an incident/investigation report dated July 30, 2009 with similar information.

By decision dated September 25, 2009, the Office accepted that the July 30, 2009 incident occurred but found that the medical evidence failed to provide a medical diagnosis of any condition resulting from such incident. It found that, Dr. Kilraine was not established as a physician under the Federal Employees' Compensation Act. Since appellant failed to provide a medical diagnosis by an acceptable physician, the Office found that he did not sustain an injury as defined under the Act and, thus, denied his claim.

On November 3, 2009 the Office received appellant's request for reconsideration. Appellant stated that his doctor would be resubmitting her diagnosis and a copy of the x-ray report.

The Office received an October 22, 2009 letter from Kilraine Chiropractic Center stating that a copy of appellant's x-ray report and physical examination results were enclosed, but no

² Although the chiropractor's report is signed, Dr. Kilraine's name is not printed on the form. Appellant's November 3, 2009 reconsideration request, however, referred to his chiropractor, Dr. Kilraine, and the October 22, 2009 letter from Kilraine Chiropractic Center also noted her as his chiropractor.

information was received. In addition, it received a duplicate of Form CA-16, Part B physician's report which was previously submitted, with the addition that the diagnoses of subluxation of lumbar spine, lumbar sprain/strain, subluxation of thoracic spine and thoracic pain were written with the ICD9 codes.

On November 13, 2009 the Office issued a decision denying appellant's request for reconsideration and review of the merits because the additional evidence submitted was either irrelevant or duplicative. It specifically pointed out that the duplicate Form CA-16 report included handwritten diagnosis codes. The Office found them irrelevant though as the diagnostic codes did not match the diagnoses. As appellant did not submit any new, relevant evidence, the Office determined that he failed to establish grounds for further merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act³ has the burden of proof to establish the essential elements of his claim by the weight of the reliable, probative, and substantial evidence⁴ 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.⁵

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.⁶ 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.⁷ 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.⁸ 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.⁹

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.¹⁰ Rationalized medical opinion evidence is medical evidence which includes

³ 5 U.S.C. §§ 8101-8193.

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

⁵ *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).

⁶ *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

⁷ *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

⁸ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *T.H.*, 59 ECAB 388 (2008); *see also Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

¹⁰ *See J.Z.*, 58 ECAB 529 (2007); *Paul E. Thams*, 56 ECAB 503 (2005).

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.¹¹ 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.¹²

The term "physician" 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.¹³

ANALYSIS -- ISSUE 1

The Office accepted that on July 30, 2009 appellant was involved in a motor vehicle accident. The Board finds however that he failed to submit medical evidence, from a physician, providing a diagnosis of a condition causally related to the July 30, 2009 incident. Appellant therefore, did not establish that he sustained an injury as defined under the Act.

Prior to the September 25, 2009 denial of his claim, appellant submitted as evidence an August 27, 2009 Form CA-16 signed by Dr. Kilraine. The Board notes initially that Dr. Kilraine is a chiropractor and would only be considered a physician under the Act, and therefore able to provide a probative opinion regarding diagnosis and causal relationship, if she diagnosed subluxation based on x-ray examination.¹⁴ In this case, though there is no diagnosis of subluxation nor any reference to such diagnosis by x-rays. Although, Dr. Kilraine stated that she enclosed an x-ray report with the Form CA-16, the Office did not receive such evidence.

On appeal, appellant asserts that he sustained a back injury and that the medical evidence supports a diagnosis of subluxation. His belief, however, absent sufficient medical evidence is insufficient to establish that his alleged condition was caused or aggravated by the July 30, 2009 employment incident.¹⁵ This is a medical question that can only be established by probative medical opinion.¹⁶ As appellant failed to provide such medical evidence in this case, he did not meet his burden of proof to establish his claim.

Appellant further contends on appeal that his doctor submitted supporting evidence, including a radiology report and her comprehensive examination, but the Office did not receive

¹¹ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹² *B.B.*, 59 ECAB 234 (2007); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

¹³ 5 U.S.C. § 8101(2); *see also D.S.*, 61 ECAB __ (Docket No. 09-860, issued November 2, 2009); *Paul Foster*, 56 ECAB 208 (2004).

¹⁴ *D.S.*, *supra* note 13; *see also A.O.*, 60 ECAB __ (Docket No. 08-580, issued January 28, 2009).

¹⁵ *W.D.*, 61 ECAB __ (Docket No. 09-658, issued October 22, 2009); *R.T.*, 60 ECAB __ (Docket No. 08-408, issued December 16, 2008).

¹⁶ *L.H.*, 59 ECAB 253 (2007); *Gloria J. McPherson*, 51 ECAB 441 (2000).

such evidence prior to the September 25, 2009 decision. Where a claimant claims that a condition not accepted or approved by the Office was due to an employment injury, the claimant bears the burden of proof to establish causal relationship through the submission of rationalized medical evidence.¹⁷ Despite appellant's assertions, he failed to provide such medical evidence in this case, and thus, did not establish that he sustained a back injury on July 30, 2009.

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.¹⁸ 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.¹⁹

To require the Office to reopen a case for merit review pursuant to the Act, the claimant must provide evidence or an argument that: (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.²⁰

A request for reconsideration must also be submitted within one year of the date of the Office decision for which review is sought.²¹ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If the Office chooses to grant reconsideration, it reopens and reviews the case on its merits.²² If the request is timely but fails to meet at least one of the requirements for reconsideration, the Office will deny the request for reconsideration without reopening the case for review on the merits.²³

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for reconsideration because appellant failed to meet any of the criteria for reopening a case for review on the merits.

¹⁷ *T.M.*, 60 ECAB __ (Docket No. 08-975, issued February 6, 2009).

¹⁸ 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).

¹⁹ 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).

²⁰ *Id.* at § 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).

²¹ *Id.* at § 10.607(a).

²² *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

²³ *Id.* at § 10.608(b); *E.R.*, 61 ECAB __ (Docket No. 09-1655, issued March 18, 2010); *Y.S.*, 60 ECAB __ (Docket No. 08-440, issued March 16, 2009).

Appellant did not allege that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument, nor submit pertinent evidence not previously considered. Thus, the Office was proper in denying his request for further merit review.

With his request for further review appellant submitted a copy of the Form CA-16 physician's report that was previously submitted, except that this copy contained handwritten diagnoses. The submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²⁴ The underlying issue in the case was whether appellant had established an injury, by submission of probative medical evidence. While Dr. Kilraine again noted that x-ray documentation of a diagnosis would be submitted, the duplicate evidence did not offer a diagnosis of subluxation an x-ray. While the handwritten diagnosis states thoracic subluxation, the Act specifically requires that the diagnosis must be "demonstrated" by x-ray to exist. Since the Office previously considered Form CA-16, and appellant did not submit evidence to establish that Dr. Kilraine is in fact a physician under the Act, this Form CA-16 merely duplicates the evidence on file. Thus, it did not constitute new and pertinent evidence sufficient to warrant a further review of the merits and the Office was proper in denying appellant's claim for reconsideration.

Because appellant's request for reconsideration did not meet at least one of the criteria required to reopen a case, the Office properly denied his request for reconsideration pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that the Office properly denied appellant's claim for traumatic injury and refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).²⁵

²⁴ *E.M.*, 60 ECAB ____ (Docket No. 09-39, issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

²⁵ The Board notes that appellant submitted additional evidence on appeal. Since the Board's jurisdiction is limited to evidence that was before the Office at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 25 and November 13, 2009 are affirmed.

Issued: February 3, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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