United States Department of Labor
Employees' Compensation Appeals Board

T.F., Appellant	)	
and	)	**Docket No. 07-1781**
	)	**Issued: December 26, 2007**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, King Salmon, AK, 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 June 25, 2007 appellant filed an appeal of August 21, 2006 and January 18, 2007 decisions of the Office of Workers' Compensation Programs denying his traumatic injury claim. He also appealed a March 21, 2007 decision denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained a lumbar injury in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On July 6, 2006 appellant, then a 52-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that on March 7, 2006 he experienced a popping sensation in his low back followed by sharp, shooting pains when he bent over to pick up tools. Robert

Laduke, a coworker, stated that he saw appellant "bend over to pick up tools and he let out a groan."

In a July 12, 2006 letter, the Office advised appellant of the additional medical and factual evidence needed to establish his claim. The Office noted that appellant had not yet submitted any medical evidence diagnosing an injury. Appellant was afforded 30 days in which to submit additional evidence.

In a July 18, 2006 letter, appellant reiterated his account of the March 7, 2006 incident. He explained that he sought treatment on March 8, 2006 from Dr. Gregory Cuthbert, a chiropractor. Appellant did not submit any chiropractic reports or other treatment records.

By decision dated August 21, 2006, the Office denied the claim on the grounds that fact of injury was not established. The Office accepted that the March 7, 2006 incident occurred at the time, place and in the manner alleged. The Office found, however, that appellant did not submit medical evidence diagnosing an injury related to the accepted incident.

In a December 21, 2006 letter, appellant requested reconsideration. He submitted reports from Dr. Cuthbert.[1] In a July 31, 2006 report, Dr. Cuthbert related appellant's account of back pain when bending to pick up tools on March 7, 2006. He noted that, at the March 8, 2006 examination, he was unaware that appellant's claim was work related. Dr. Cuthbert initially diagnosed "lumbar strain, cervical and thoracic joint dysfunction." He first obtained x-rays on July 31, 2006. These studies showed mild spondylitic changes and spurring from L1 to L5, "mild anterolisthesis at L5" and mild facet arthrosis from L4 to S1. Dr. Cuthbert did not opine that the x-rays showed spinal subluxations. He diagnosed lumbar, sacroiliac and thoracic spinal subluxations related to the March 7, 2006 incident but characterized this as a lumbosacral strain or sprain. In an accompanying July 31, 2006 form report, Dr. Cuthbert diagnosed cervical, thoracic, lumbar and sacral subluxations related to the March 7, 2006 incident. He did not state that the diagnosis of spinal subluxations was based on x-rays.

By decision dated January 18, 2007, the Office denied modification on the grounds that fact of injury was not established. The Office found that Dr. Cuthbert was not a physician under the Federal Employees' Compensation Act as he did not diagnose a spinal subluxation by x-ray. The Office noted that the July 31, 2006 x-rays were taken too long after the claimed March 7, 2006 incident to be of probative value in establishing causal relationship.

In a March 5, 2007 letter, appellant requested reconsideration, asserting that new evidence would demonstrate that he timely notified his supervisor of the March 7, 2006 injury. He submitted a March 2006 calendar page with the notation "back injury, told Frank" written over March 7, 2006.

By decision dated March 21, 2007, the Office denied reconsideration on the grounds that the evidence submitted in support of appellant's request was irrelevant to the medical issue in the

[1] Appellant also submitted Dr. Cuthbert's August 1 to 25, 2006 chart notes, billing forms and related correspondence. These documents do not address the March 7, 2006 incident or discuss causal relationship.

case. The Office found that appellant's statement and the calendar page merely confirmed circumstances of the injury no longer at issue.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[2] 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.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

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. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.[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]

ANALYSIS -- ISSUE 1

Appellant asserted that he sustained a lumbar injury on March 7, 2006 when he bent down to pick up tools. The Office accepted that the March 7, 2006 incident occurred as alleged. The Office denied the claim on the grounds that appellant did not submit medical evidence to establish that the accepted incident caused a lumbar injury.

In support of his claim, appellant submitted two July 31, 2006 reports from Dr. Cuthbert, an attending chiropractor. Under section 8101(2) of the Act, chiropractors are considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[7] Dr. Cuthbert first examined appellant on March 8, 2006. He obtained x-rays on July 31, 2006. Dr. Cuthbert opined that the x-rays showed degenerative changes from L1 to L5 and a mild anterolisthesis at L5. He did not state that the x-rays showed spinal subluxations. Although Dr. Cuthbert diagnosed spinal

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

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

[5] *Gary J. Watling*, 52 ECAB 278 (2001).

[6] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[7] 5 U.S.C. § 8101(2). *See also George E. Williams*, 44 ECAB 530 (1993). Section 8101(3) of the Act limits the scope of reimbursable services provided by chiropractors to manual manipulation to treat a spinal subluxation demonstrable by x-ray. 5 U.S.C. § 8101(3).

subluxations elsewhere in his reports, he did not opine that the x-rays he obtained demonstrated any spinal subluxations. Also, he opined that the March 7, 2006 incident caused a lumbar sprain or strain, not spinal subluxations. The Board finds that, under the circumstances of this case, Dr. Cuthbert does not qualify as a physician under the Act as he did not diagnose a spinal subluxation by x-ray.[8] His opinion is thus of no medical value in this case.[9]

The Board finds that appellant did not submit medical evidence establishing that he sustained an injury causally related to the accepted work factors. Therefore, the Office's August 21, 2006 and January 18, 2007 decisions denying appellant's claim are proper under the law and the facts of this case.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[10] section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute 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]

In support of his request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.[13] Appellant need only submit relevant, pertinent evidence not previously considered by the Office.[14] 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.[15]

ANALYSIS -- ISSUE 2

The Office denied appellant's traumatic injury claim by decision dated August 21, 2006, finding that he submitted no medical evidence establishing the presence of an injury. Appellant

[8] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[9] *Isabelle Mitchell*, 55 ECAB 623 (2004).

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(2).

[12] 20 C.F.R. § 10.608(b).

[13] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[14] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

[15] *Annette Louise*, 54 ECAB 783 (2003).

requested reconsideration by December 21, 2006 letter and submitted reports from Dr. Cuthbert. The Office denied modification by January 18, 2007 decision, finding that appellant had not submitted any medical evidence substantiating an occupational injury as Dr. Cuthbert, a chiropractor, was not a physician under the Act for the purposes of the case. Appellant again requested reconsideration by March 5, 2007 letter, asserting that he timely notified his supervisor of the March 7, 2006 incident. The Office denied reconsideration by a March 21, 2007 decision, finding that the factual information submitted was irrelevant to the medical issue in the case.

The issue at the time of the last merit decision in the case was whether appellant established that he sustained an injury causally related to the accepted March 7, 2006 incident. To be relevant, the evidence submitted in support of the March 5, 2007 request for reconsideration must address that issue. Appellant's letter and the calendar page are not medical evidence. Therefore, they are irrelevant to the critical issue in the claim at the time of the last merit decision. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.[16]

Thus, the Office properly refused to reopen appellant's claim for a merit review under section 8128(a) of the Act, because he 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 submit relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant has not established that he sustained a lumbar injury in the performance of duty as alleged. The Board further finds that the Office properly denied appellant's request for reconsideration.

[16] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 21 and January 18, 2007 and August 21, 2006 are affirmed.

Issued: December 26, 2007
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