

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

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**C.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Newberg, OR, Employer**

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**Docket No. 10-1997  
Issued: August 8, 2011**

*Appearances:*  
*Greg Dixon, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On July 29, 2010 appellant, through his representative, filed a timely appeal from a May 13, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying modification of the denial of his traumatic injury claim. He also timely appealed from the nonmerit June 18, 2010 decision denying reconsideration. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has established that he sustained a sacroiliac injury in the performance of duty on December 7, 2009, as alleged; and (2) whether OWCP properly refused to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On December 8, 2009 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim alleging that on December 7, 2009 he strained his sacroiliac joint while lifting a tub of flats.

In a December 7, 2009 release to work form, Dr. Audrey M. Lusby, a treating chiropractor, indicated that appellant could return to work on December 14, 2009. In December 18, 2009, her release to work form, indicated that he was capable of returning to modified work on December 14, 2009.

By letter dated December 18, 2009, OWCP informed appellant that the evidence of record was insufficient to support his claim as there was no diagnosed condition. Appellant was advised as to the type of medical and factual evidence required to support his claim.

In a December 21, 2009 x-ray interpretation, Dr. Lloyd E. Heller, a Board-certified radiologist, diagnosed a sacroiliac strain with no fracture or subluxation and recommended further evaluation by a magnetic resonance imaging (MRI) scan.

In her December 29, 2009 report, Dr. Lusby provided physical findings and a history of the injury. She diagnosed acute nontraumatic moderate sacroiliac lumbar spine strain with inflammation, muscle pain, spinal subluxations and muscle spasms. These diagnoses were supported by appellant's decreased lumbar range of motion and pain in all planes. Dr. Lusby provided work restrictions on release to work forms.

In a January 5, 2010 progress note, Dr. John L. Cummings reported that appellant was having pain in the left sacroiliac and sacroiliac notch. Appellant related that on December 7, 2009 he bent down to lift a tub of mail when he felt instant pain in his left sacroiliac joint.

By decision dated January 29, 2010, OWCP denied appellant's claim on the grounds that there was no medical evidence containing a diagnosis causally related to the accepted employment injury.

Following the decision, OWCP received additional medical evidence. Dr. Cummings, in January 12 and 22, 2010 progress notes, reported left sacroiliac tenderness on percussion. He noted "low back pain referable to the left sacroiliac joint" in his January 29, 2010 progress notes. On February 15, 2010 Dr. Cummings reported a chronic sacroiliac joint strain as well as some sacroiliac joint osteoarthritis.

A review of a February 1, 2010 lumbar MRI scan by Dr. Anthony J. DiRe, a Board-certified radiologist, revealed no significant change from the December 21, 2009 x-ray interpretation, bilateral sacroiliac joint degeneration great on the left and multilevel lumbar degenerative changes. Dr. Ross A. Cauthorn, a Board-certified radiologist, found no evidence of sacroiliitis and a normal sacrum/coccyx from a review of a February 1, 2010 MRI scan of the sacrum and coccyx.

On February 10, 2010 Dr. Timothy Sellers reviewed a December 21, 2009 x-ray interpretation and found slight left rotational malpositions at L3 and L4.

In a February 27, 2010 report, Dr. Lusby stated that a chiropractic radiologist had reviewed her x-ray interpretations and found slight left L3 and L4 malpositions. She reiterated that her diagnoses of spinal subluxations were based on physical findings found during her examination of appellant. Dr. Lusby diagnosed lumbar spine and sacroiliac joint subluxations based on his restricted motion found on motion palpation.

On March 15 and 23, 2010 OWCP received appellant's reconsideration requests.

By decision dated May 13, 2010, OWCP denied modification, finding that the medical evidence submitted with the reconsideration request was sufficient to modify the decision of January 29, 2009 to reflect the factual injury medical component. However, the medical evidence is currently lacking causal relationship between appellant's S1 strain to the incident of December 7, 2009.

On May 30, 2010 appellant requested reconsideration. In a May 28, 2010 report, Dr. Lusby stated that he sustained a left sacroiliac strain as a result of his work duties. She reported that appellant bent over at the waist and lifted a tub of magazines and that as "he was rising up from the bent over position he felt instant pain in the left side of his lower back." Dr. Lusby concluded that the improper lifting caused the lower back sacroiliac strain.

By nonmerit decision dated June 18, 2010, OWCP denied reconsideration.<sup>2</sup>

### **LEGAL PRECEDENT -- ISSUE I**

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a fact of injury has been established.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>6</sup> Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on

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<sup>2</sup> The Board notes that appellant submitted new evidence with his appeal to the Board. However, the Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003); *M.B.*, Docket No. 09-176 (issued September 23, 2009).

<sup>3</sup> *John J. Carlone*, 41 ECAB 354 (1989); *B.F.*, Docket No. 09-60 (issued March 17, 2009).

<sup>4</sup> *D.B.*, 58 ECAB 464 (2007); *Paul Foster*, 56 ECAB 208 (2004).

<sup>5</sup> *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, 57 ECAB 364 (2006); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

<sup>6</sup> *A.D.*, 58 ECAB 149 (2006); *Michael S. Mina*, 57 ECAB 379 (2006); *Y.J.*, Docket No. 08-1167 (issued October 7, 2008).

whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors.<sup>7</sup> 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.<sup>8</sup>

### ANALYSIS -- ISSUE 1

Appellant alleged that he sustained a sacroiliac injury on December 7, 2009 while lifting a tub of flats. He established that the December 7, 2009 employment incident occurred at the time, place and in the manner alleged. The issue is whether the medical evidence establishes that appellant sustained a sacroiliac injury as a result of this incident.

The Board finds that appellant has not established that the December 7, 2009 employment injury was causally related to his employment. The determination of whether an employment injury is causally related to work factors is generally established by medical evidence.<sup>9</sup>

Appellant submitted reports from Dr. Lusby, a chiropractor, which are insufficient to establish his claim. 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.<sup>10</sup> Dr. Lusby did not diagnose a spinal subluxation based on x-ray as she stated that her diagnosis of a subluxation was based on physical findings. Therefore, her reports are of no probative medical value.<sup>11</sup>

Appellant also submitted a number of progress notes from Dr. Cummings. In a January 5, 2010 progress note, Dr. Cummings reported appellant as having pain in the left sacroiliac and sacroiliac notch and that appellant related that on December 7, 2009 he bent down to lift a tub of mail when he felt instant pain in his left sacroiliac joint. In his January 12 and 22, 2010 progress notes, he reported left sacroiliac tenderness on percussion. Dr. Cummings noted "low back pain referable to the left sacroiliac joint" in his January 29, 2010 progress notes. On February 15, 2010 he reported a chronic sacroiliac joint strain as well as some sacroiliac joint osteoarthritis. Dr. Cummings has provided no opinion as to whether the conditions he diagnosed were caused by the December 7, 2009 employment incident. A physician must provide a narrative description of the specific employment incident and a reasoned opinion on whether the employment incident described caused or contributed to appellant's diagnosed medical condition.<sup>12</sup> Moreover, a physician's mere diagnosis of pain, without more by way of an

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<sup>7</sup> *Sedi L. Graham*, 57 ECAB 494 (2006); *J.J.*, Docket No. 09-27 (issued February 10, 2009).

<sup>8</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>9</sup> *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

<sup>10</sup> 5 U.S.C. § 8101(2); *Paul Foster*, 56 ECAB 208 (2004); *see A.O.*, Docket No. 08-580 (issued January 28, 2009).

<sup>11</sup> *See Michelle Salazar*, 54 ECAB 523 (2003).

<sup>12</sup> *John W. Montoya*, 54 ECAB 306 (2003); *K.E.*, Docket No. 08-1461 (issued December 17, 2008).

explanation, does not constitute a basis for payment of compensation.<sup>13</sup> Dr. Cummings provided no opinion as to whether the conditions he diagnosed were caused by the December 7, 2009 incident or provided any additional explanation for his diagnoses of pain in the back and sacroiliac joint. Thus, these reports are insufficient to meet appellant's burden of proof.

Appellant also submitted MRI scans and x-ray interpretations, in support of his claim that he sustained a sacroiliac condition on December 7, 2009. Reports of diagnostic testing submitted by him do not offer any opinion on causal relationship between the diagnosed medical condition and the December 7, 2009 employment incident. Thus, these reports are of no probative value in establishing appellant's traumatic injury claim.<sup>14</sup>

To meet his burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the medical condition was caused by the employment incident.<sup>15</sup> The issue of the injury sustained on December 7, 2009 was causally related to the work factors is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history.<sup>16</sup> Appellant did not submit sufficient medical evidence to establish that the accepted incident at work caused an injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under section 8128(a) of the Act,<sup>17</sup> OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>18</sup> To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>19</sup> When a claimant fails to meet one of the above standards, OWCP

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<sup>13</sup> *Robert Broome*, 55 ECAB 493 (2004).

<sup>14</sup> *K.W.*, 59 ECAB 271 (2007).

<sup>15</sup> *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>16</sup> *Sandra D. Pruitt*, 57 ECAB 126 (2005).

<sup>17</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

<sup>18</sup> 20 C.F.R. § 10.606(b)(2). *Susan A. Filkins*, 57 ECAB 630 (2006); *see J.M.*, Docket No. 09-218 (issued July 24, 2009).

<sup>19</sup> *Id.* at § 10.607(a). *Robert G. Burns*, 57 ECAB 657 (2006); *see S.J.*, Docket No. 08-2048 (issued July 9, 2009).

will deny the application for reconsideration without reopening the case for review on the merits.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

The underlying issue on reconsideration is whether appellant submitted sufficient medical evidence to show that he sustained a sacroiliac injury as a result of the December 7, 2010 employment incident. Appellant's May 30, 2010 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. The Board finds, however, that he did not provide any relevant or pertinent new evidence warranting the reopening of the case on the merits.

In support of his reconsideration request, appellant submitted a May 28, 2010 report from Dr. Lusby, who found that he sustained a sacroiliac condition due to the December 7, 2009 employment incident. However, this report is substantially similar in content to Dr. Lusby's previous December 29, 2009 and February 27, 2010 reports, which were previously reviewed by OWCP. As her report is repetitious and cumulative of her earlier reports, the Board finds that it is insufficient to reopen appellant's claim for further merit review.

The Board finds that appellant did not submit arguments or evidence showing that OWCP erroneously applied or interpreted a specific point of law; advanced a relevant legal argument not previously considered; or constituted relevant and pertinent new evidence not previously considered by OWCP. Appellant did not meet any of the regulatory requirements and OWCP properly declined to reopen his claim for further merit review.<sup>21</sup>

### **CONCLUSION**

The Board finds that appellant has not established that he sustained a sacroiliac injury in the performance of duty on December 7, 2009, as alleged. The Board further finds that OWCP did not abuse its discretion by refusing to reopen his case for review of the merits.

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<sup>20</sup> 20 C.F.R. § 10.608(b). *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); *see Y.S.*, Docket No. 08-440 (issued March 16, 2009).

<sup>21</sup> *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 18 and May 13, 2010 are affirmed.

Issued: August 8, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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