

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

D.M., Appellant

and

**DEPARTMENT OF THE ARMY, U.S. ARMY
MATERIAL COMMAND, Chambersburg, PA,
Employer**

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**Docket No. 08-2004
Issued: April 1, 2009**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 14, 2008 appellant, through his attorney, filed a timely appeal from an April 14, 2008 merit decision of the Office of Workers' Compensation Programs which affirmed the denial of his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that he sustained a back injury in the performance of duty on July 17, 2006, as alleged.

FACTUAL HISTORY

On July 26, 2006 appellant, then a 49-year-old materials handler, filed a traumatic injury claim alleging that on July 17, 2006 he injured his lower back while lifting a heavy box of battery terminals.

In support of his claim, appellant submitted disability notes, a July 25, 2005 work release and an August 3, 2006 attending physician's report (Form CA-20) from Dr. Victor L. Pierson, a chiropractor, who diagnosed lumbar disc syndrome and indicated that appellant could return to light-duty work on July 26, 2006.

On August 16, 2006 the Office advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It asked appellant to submit a comprehensive medical report from his treating physician describing his symptoms, the medical reasons for his condition and an opinion as to whether his claimed condition was causally related to his federal employment. The Office requested that appellant submit the additional evidence within 30 days.

In a second letter also dated August 16, 2006, the Office informed appellant that chiropractors are deemed physicians under the Federal Employees' Compensation 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. It advised appellant that he should either submit a report from his chiropractor, which diagnosed subluxation or submit a report from a medical doctor or osteopath.

Appellant subsequently submitted treatment notes dated August 10 and 31, 2006 from Dr. Pierson who indicated that no x-ray interpretations were taken as they were not needed for the diagnosis or required under Medicare law. Dr. Pierson noted the history of the injury, dates of treatment and physical findings. He diagnosed a lumbosacral strain due to the lifting of the heavy box on July 17, 2006 which should resolve within 6 to 10 weeks.

By decision dated September 14, 2006, the Office denied appellant's claim for a traumatic injury on July 17, 2006. It found that an incident occurred on July 17, 2006, but there was insufficient medical evidence to establish a diagnosed condition causally related to the employment incident.

Subsequent to the decision appellant resubmitted treatment notes from a report by Dr. Pierson.

On September 25, 2006 appellant requested a review of the written record by an Office hearing representative. He submitted treatment notes and an August 31, 2006 report by Dr. Pierson and a September 25, 2006 statement.

By decision dated January 30, 2007, an Office hearing representative affirmed the denial of appellant's traumatic injury claim.

On July 19, 2007 the Office received a July 13, 2007 report by Dr. Shabbar Hussain, a treating Board-certified orthopedic surgeon, regarding appellant's right foot, who noted that appellant injured his right foot and sustained a fifth metatarsal fracture.

In a letter dated November 26, 2007, appellant requested reconsideration of the denial of his claim. He resubmitted his September 25, 2006 statement and the August 31, 2006 report of Dr. Pierson.

By decision dated April 14, 2008, the Office reviewed the merits of the case and denied modification. It found the medical evidence did not provide a rationalized medical opinion on the issue presented.

LEGAL PRECEDENT

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim 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 or specific condition for which compensation is claimed is causally related to the employment injury.¹

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury. 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.²

Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the identified employment factor.³ The opinion of the physician must be based on a complete factual and medical background, must be 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 claimant.⁴ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.⁵

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.⁶ The Office's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal

¹ *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

² *T.H.*, 59 ECAB ____ (Docket No. 07-2300 issued March 7, 2008); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

³ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Sedi L. Graham*, 57 ECAB 494 (2006).

⁴ *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008); *D.D.*, 57 ECAB 734 (2006).

⁵ *Michael S. Mina*, 57 ECAB 379 (2006); *Jennifer Atkerson*, 55 ECAB 317 (2004).

⁶ 5 U.S.C. § 8101(2). *See Paul Foster*, 56 ECAB 208 (2004); *Jack B. Wood*, 40 ECAB 95, 109 (1988).

spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.⁷

ANALYSIS

Appellant filed a claim for a back injury in the performance of duty on July 17, 2006. The Office accepted that the July 17, 2006 employment incident occurred as alleged. The issue is whether the medical evidence is sufficient to establish a diagnosed condition causally related to the July 17, 2006 employment incident. The initial treatment was provided by a chiropractor, Dr. Pierson, whose reports do not constitute medical evidence as he did not diagnose a subluxation as demonstrated by x-ray.⁸ Dr. Pierson noted that he did not take any x-rays and did not diagnose a subluxation. Accordingly, the Board finds that he is not a physician as defined under the Act as he failed to diagnose a subluxation by x-ray interpretation as required by the Act.

Appellant also submitted a July 13, 2007 report by Dr. Hussain, a Board-certified orthopedic surgeon. However, this evidence is not relevant to the claim. The Board notes that Dr. Hussain's July 13, 2007 report provides no history of the July 17, 2006 employment incident or addresses a back injury. The only injury Dr. Hussain referenced was a fifth metatarsal fracture of the right foot. His medical report contains no opinion addressing the causal relationship between appellant's employment incident and the alleged injury. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁹

An award of compensation may not be based on surmise, conjecture or speculation.¹⁰ Appellant must submit a physician's report in which the physician reviews those factors of employment identified by him as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.¹¹ He failed to submit such evidence and therefore failed to discharge his burden of proof

⁷ 20 C.F.R. § 10.5(bb); *see also* *Mary A. Ceglia*, 55 ECAB 626 (2004); *Bruce Chameroy*, 42 ECAB 121 (1990).

⁸ *Sean O'Connell*, 56 ECAB 195 (2004) (a physician includes chiropractors only to the extent of treatment to correct a subluxation as demonstrated by x-ray to exist).

⁹ *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007) (medical evidence which offers no opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹⁰ *See S.S.*, 59 ECAB ____ (Docket No. 07-579, issued January 14, 2008); *Patricia J. Glenn*, 53 ECAB 159 (2001). *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹¹ *Robert Broome*, 55 ECAB 339 (2004).

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 14, 2008 is affirmed.

Issued: April 1, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board