

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

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S.A., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
TRANSPORTATION SECURITY )  
ADMINISTRATION, Houston, TX, Employer )

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**Docket No. 09-1525**  
**Issued: May 3, 2010**

*Appearances:*

*Stephen V. Hunt, Sr.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 12, 2009 appellant, through her representative, filed a timely appeal of the Office of Workers' Compensation Programs' December 10, 2008 merit decision denying compensation for wage loss and April 9, 2009 nonmerit decision denying her request for reconsideration. Pursuant to 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 sustained disability commencing August 26, 2003 due to her August 25, 2003 employment injury; and (2) whether the Office properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

Appellant's representative contends that the medical evidence of record is sufficient to establish her entitlement to wage-loss compensation for the claimed period. He further contends that appellant sustained an emotional condition as a consequence of her August 25, 2003 employment injury.

## **FACTUAL HISTORY**

This case was previously before the Board. In a May 2, 2005 decision, the Board affirmed the Office's October 30, 2003 and June 10, 2004 decisions, finding that appellant was not entitled to wage-loss compensation for total disability commencing August 26, 2003 due to her accepted August 25, 2003 injury.<sup>1</sup> The Board found that she did not provide sufficient medical evidence to support that her disability for work for the period in question was causally related to her employment injury.<sup>2</sup>

On July 11, 2005 appellant requested reconsideration before the Office. She submitted medical reports dated January 13 to September 1, 2005 from Dr. Rezik A. Saqer, a Board-certified anesthesiologist, who diagnosed right sacroiliitis, lumbar radiculopathy, bilateral lumbar facets arthropathy and myofascial pain syndrome. In a February 9, 2005 report, Dr. Saqer advised that appellant had been totally disabled for work since her August 25, 2003 injury. He stated that she was unable to remain in the same position for prolonged periods of time without experiencing severe pain over her lower back. Appellant was unable to bend over and lift, push or pull any object weighing more than five pounds without worsening her condition. She could not kneel or perform repetitive movements with her back and lower extremities. Appellant was unable to operate any kind of machinery and had difficulty concentrating and making decisions due to her medication.

Treatment notes from appellant's physical therapist addressed her back pain from April 25 to September 7, 2005. Appellant also submitted reports dated May 10 and July 14, 2005 a chiropractor whose name is illegible and a September 7, 2005 report from Dr. Jack T. Barnett, a chiropractor, who addressed the treatment of appellant's chronic low back and myofascial pain.

By decision dated September 26, 2005, the Office denied appellant's request for reconsideration of its June 10, 2004 decision as the request was not timely filed and failed to establish clear evidence of error.

On January 27, 2006 appellant requested reconsideration and submitted additional physical therapy reports dated September 12, 2005 to June 15, 2007. In reports dated September 29, 2005 to March 1, 2006, Dr. Saqer reiterated the diagnoses of right sacroiliitis, lumbar radiculopathy, bilateral lumbar facets arthropathy and myofascial pain syndrome. In a January 30, 2006 report, he opined that the diagnosed conditions were causally related to the August 25, 2003 injury. Dr. Saqer advised that appellant was not a candidate for surgery and she was totally disabled for work from January 27, 2004 to November 8, 2005 due to her high unpredictable pain level, impaired range of motion and inability to stay in one position for more than a limited period of time. He advised there was a strong possibility of reinjury if she returned to work prematurely.

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<sup>1</sup> Docket No. 04-2235 (issued May 2, 2005).

<sup>2</sup> On August 25, 2003 appellant, then a 31-year-old transportation security screener, filed a traumatic injury claim alleging that on that date she strained her back while lifting a bag. She stopped work on August 25, 2003. By letter dated October 14, 2003, the Office accepted her claim for a lumbar strain.

In reports dated December 1, 2005 to November 13, 2008, Dr. Charles K. Speller, an orthopedic surgeon, advised that appellant sustained lumbar sprain, depression, frustration, sleep deprivation, anxiety and emotional stress. He opined that she was totally disabled for work during this period. In an April 5, 2007 report, Dr. Speller advised that appellant had not been able to return to gainful employment since the accepted employment injury.

In an April 28, 2006 report, Dr. Charles B. Covert, a Board-certified psychiatrist, listed his findings on mental and psychological examination. He diagnosed dysthymic disorder, moderate to severe pain disorder and low back injury with disc protrusion at L4-5 and disc bulge at L5-S1. Dr. Covert found that appellant's dysthymic disorder and pain disorder were due to the August 25, 2003 injury. He further opined that she was totally disabled from performing her work duties as a baggage examiner and handler.

In progress notes dated May 3, 2006 to February 11, 2008, Dr. David Suchowiecky, a psychiatrist, advised that appellant sustained lumbar intervertebral disc without myelopathy, chronic lumbar pain and tension headaches. He also advised that she sustained depression due to her disability. In a May 3, 2006 report, Dr. Suchowiecky opined that the diagnosed conditions were causally related to the August 25, 2003 injury.

By decision dated December 10, 2008, the Office denied modification of its prior decisions. It found the medical evidence insufficient to establish that appellant was totally disabled commencing August 26, 2003 due to her August 25, 2003 work injury.

On January 22, 2009 appellant requested reconsideration of the December 10, 2008 decision. In reports dated December 15, 2008 and March 16, 2009, Dr. Speller provided essentially normal findings on physical examination with limited range of motion and pain in the lumbar spine and excessive numbness in both hands. He diagnosed lumbar sprain/strain, insomnia and unspecified lumbosacral neuritis or radiculitis. Dr. Speller advised that appellant continued to experience panic attacks, depression and anxiety. He opined that she remained temporarily totally disabled.

In progress notes dated December 5, 2008 to March 27, 2009, appellant's physical therapists addressed the treatment of her back condition.

By decision dated April 9, 2009, the Office denied appellant's request for reconsideration. It found that she did not raise a substantive legal question or include new and relevant evidence sufficient to warrant further merit review of her claim.

### **LEGAL PRECEDENT -- ISSUE 1**

A claimant has the burden of establishing the essential elements of her claim, including that the medical condition for which compensation is claimed is causally related to the employment injury.<sup>3</sup> For wage-loss benefits, the claimant must submit medical evidence

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<sup>3</sup> 20 C.F.R. § 10.115(e) (2008); see *Tammy L. Medley*, 55 ECAB 182, 184 (2003).

showing that the condition claimed is disabling.<sup>4</sup> The evidence submitted must be reliable, probative and substantial.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant did not establish that she was disabled commencing August 26, 2003. While Dr. Saqer's reports cover the claimed period of total disability, the Board finds that they are insufficient to establish appellant's claim. He advised that she sustained right sacroiliitis, lumbar radiculopathy, bilateral lumbar facets arthropathy and myofascial pain syndrome. Appellant's claim was accepted for a lumbar strain and not the conditions listed by the physician. Dr. Saqer opined that appellant had been totally disabled for work since her August 25, 2003 injury. However, he did not provide sufficient medical rationale explaining how her work injury caused disability beginning August 26, 2003. The Board finds that Dr. Saqer's opinion is of reduced probative value.

Similarly, Dr. Covert's April 28, 2006 report advised that appellant's diagnosed dysthymic disorder and moderate-to-severe pain disorder were causally related to the August 25, 2003 employment injury is not sufficient to establish her claim. He did not explain how the diagnosed conditions were caused by the work injury. The Board notes that appellant's claim was not accepted for an emotional condition.

Dr. Speller's reports cover the claimed period of total disability and found that appellant sustained lumbar sprain, depression, frustration, sleep deprivation, anxiety and emotional stress. He opined that she was totally disabled. However, Dr. Speller failed to address whether appellant's disability was caused by the August 25, 2003 employment injury. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value.<sup>6</sup> As noted, the Office has not accepted appellant's claim for an emotional condition. The Board finds that Dr. Speller's reports have diminished probative value in establishing appellant's claim.

Dr. Suchowiecky's progress notes and reports found that appellant sustained lumbar intervertebral disc without myelopathy, chronic lumbar pain, tension headaches and depression due to her disability. In a May 3, 2006 report, Dr. Suchowiecky opined that the diagnosed conditions were causally related to the August 25, 2003 employment injury. Although he found that appellant's emotional condition was caused by her disability, the Office has not accepted her claim for this condition. As Dr. Suchowiecky did not provide an opinion addressing whether appellant's total disability commencing August 26, 2003 was caused by the August 25, 2005 injury, the Board finds that his progress reports are not sufficient to establish her claim.<sup>7</sup>

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<sup>4</sup> *Id.* at § 10.115(f).

<sup>5</sup> *Id.* at § 10.115.

<sup>6</sup> *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>7</sup> *Id.*

The treatment notes of appellant's physical therapists have no probative medical value in establishing her claim. A physical therapist is not a "physician" as defined under the Federal Employees' Compensation Act.<sup>8</sup>

Similarly, the May 10, July 14 and September 7, 2005 chiropractic reports from a physician whose signature is illegible and Dr. Barnett have no probative medical value in establishing appellant's claim. Section 8101(2) of the Act<sup>9</sup> defines the term "physician," to include 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> Although Dr. Barnett and an unidentified chiropractor treated appellant's chronic low back and myofascial pain, they did not diagnose spinal subluxation by x-ray. Therefore, they are not physicians as defined under the Act and their reports have no probative medical value.<sup>11</sup>

Appellant has failed to submit rationalized medical evidence supporting that her disability resulted from the effects of the August 25, 2003 employment injury. She has failed to meet her burden of proof.

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

To require the Office to reopen a case for merit review under section 8128 of the Act,<sup>12</sup> the Office's regulations provide 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.<sup>13</sup> To be entitled to a merit review of an Office 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>14</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

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

On January 22, 2009 appellant disagreed with the Office's December 10, 2008 decision which denied wage-loss compensation for total disability for the period commencing

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<sup>8</sup> See 5 U.S.C. § 8101(2). *David P. Sawchuk*, 57 ECAB 316 (2006).

<sup>9</sup> 5 U.S.C. § 8101(2).

<sup>10</sup> See 20 C.F.R. § 10.400(e) (defining reimbursable chiropractic services). See *Marjorie S. Geer*, 39 ECAB 1099, 1101-02 (1988).

<sup>11</sup> *Id.*

<sup>12</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>13</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>14</sup> *Id.* at § 10.607(a).

August 26, 2003. The relevant issue is whether her total disability commencing August 26, 2003 was due to her August 25, 2003 injury. The Board notes that this issue is medical in nature.

Dr. Speller's December 15, 2008 and March 16, 2009 reports advised that appellant suffered from lumbar and emotional conditions. He opined that she remained temporarily totally disabled. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.<sup>15</sup> Dr. Speller did not provide a medical opinion addressing the relevant issue of whether appellant's total disability commencing August 26, 2003 was due to her August 25, 2003 employment injury. The Board finds that this evidence is insufficient to reopen her claim for further merit review.

The progress notes from appellant's physical therapists do not constitute pertinent relevant medical evidence because physical therapists are not considered physicians for purposes of the Act.<sup>16</sup> Thus, their opinions and reports are not considered medical evidence for purposes of the Act and are insufficient evidence to constitute a basis for reopening the claim for further merit review.

The evidence submitted by appellant did not show that the Office erroneously applied or interpreted a specific point of law; advance a relevant legal argument not previously considered or constitute relevant and pertinent new evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that she is not entitled to further merit review.<sup>17</sup>

### **CONCLUSION**

The Board finds that appellant has failed to establish that she is entitled to wage-loss compensation for the period commencing August 26, 2003 due to her August 25, 2003 injury. The Board further finds that the Office properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>15</sup> *D'Wayne Avila*, 57 ECAB 642 (2006).

<sup>16</sup> *See supra* note 9.

<sup>17</sup> *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration 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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 9, 2009 and December 10, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 3, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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