

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA J. NASH and U.S. POSTAL SERVICE,
BULK MAIL FACILITY, Des Moines, Iowa

*Docket No. 96-1148; Submitted on the Record;
Issued February 6, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that he sustained an injury in the performance of duty on February 1, 1995.

In the present case, appellant filed a claim alleging that on February 1, 1995, she sustained a low back injury when she twisted her back as she was putting a sack on the floor. The Office of Workers' Compensation Programs denied the claim in a decision dated June 23, 1995, on the grounds that the medical evidence was not sufficient to establish the claim. By decisions dated October 25, 1995 and January 29, 1996, the Office denied appellant's reconsideration requests on the grounds that the evidence was insufficient to warrant merit review.

The Board has reviewed the record and finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty on February 1, 1995.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing that he or she sustained an injury, while in the performance of duty.² In order to determine whether an employee actually sustained an 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 which must be considered in conjunction with one another. The first component to be established, is that the employee actually experienced the employment incident, which is alleged to have occurred. The second component is whether the

¹ 5 U.S.C. §§ 8101-8193.

² *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.110(a).

employment incident caused a personal injury and generally this can be established only by medical evidence.³

In the present case, the Office accepts that an incident occurred as alleged. The issue is whether the medical evidence is sufficient to establish an injury resulting from the employment incident. The record indicates that appellant initially sought treatment from Dr. Douglas Brockman, a chiropractor. As the Office advised appellant, section 8101(2) of the Act provides that 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.”⁴ Although Dr. Brockman diagnosed subluxations, he did not specifically indicate that the diagnosis was based on x-rays. In response to inquiry from the Office, appellant indicated that Dr. Brockman did not take x-rays, because he did not feel they were necessary. Accordingly, the Board cannot find that Dr. Brockman was a “‘physician” under the Act, because the record does not establish subluxations as demonstrated by x-ray to exist. The evidence from Dr. Brockman is therefore of no probative value. The Board notes that physical therapists are not considered physicians under the Act⁵ and therefore an October 2, 1995 physical therapist report is of no probative medical value in this case.

The record does contain a July 13, 1995 report from Dr. Jerrold V. Flatt, an osteopath and a brief note dated August 2, 1995 from Dr. Flatt. In the July 13, 1995 report, Dr. Flatt notes in his history that appellant complained of problems, since “‘she injured it lifting on February 2, 1995 at work. She strained her back lifting a sack of mail.” Dr. Flatt provided results on examination and diagnosed lumbar strain and low back pain. In the August 2, 1995 note, Dr. Flatt states that appellant was seen on July 13, 1995 for a “‘work-related back injury” without further discussion.

The Board finds that Dr. Flatt’s brief statements are not sufficient, to establish appellant sustained an injury, in the performance of duty on February 1, 1995. Although extensive medical rationale would not be necessary to establish a lumbar strain, in the performance of duty, Dr. Flatt does not discuss the employment incident in any detail, nor does he provide a reasoned opinion that the employment incident caused a diagnosed condition. In the absence of sufficiently probative medical opinion evidence, the Board finds that appellant has not met her burden of proof in this case.

³ See *John J. Carlone*, 41 ECAB 354, 357 (1989).

⁴ 5 U.S.C. § 8101(2).

⁵ See *Barbara J. Williams*, 40 ECAB 649, 657 (1989).

The decisions of the Office of Workers' Compensation Programs dated January 29, 1996, October 25 and June 23, 1995, are affirmed.

Dated, Washington, D.C.
February 6, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member