

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS CAPRIA and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATIONALIZATION SERVICE, Philadelphia, PA

*Docket No. 98-1238; Submitted on the Record;
Issued December 7, 1999*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an injury in the performance of duty on October 24, 1996, as alleged; and (2) whether the Office of Workers' Compensation Programs, in its December 18, 1997 decision, abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in the present appeal and finds that appellant failed to meet his burden of proof in establishing that he sustained an injury in the performance of duty on October 24, 1996 as alleged and that the Office, by its December 18, 1997 decision, did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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 and that the claim was filed within the applicable time limitations of the Act.² An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,³ that the injury was sustained while in the performance of duty,⁴ and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.⁵ These are the essential elements of each and every compensation

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Robert A. Gregory*, 40 ECAB 478 (1989).

⁴ *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *Steven R. Piper*, 39 ECAB 312 (1987).

claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.⁶

There is no dispute that appellant is a federal employee, that he timely filed his claim for compensation benefits and that the incident occurred as alleged. Appellant, then a 31-year-old detention enforcement officer, claimed that while on training exercises, on October 24, 1996 “while participating in “red man” cell extraction, my right foot was stepped on. I pulled away and in the process strained my right foot and right knee.” However, the Office found that the evidence was insufficient to establish that an injury resulted from the incident.

The Board finds that appellant has not established that the October 24, 1996 employment incident resulted in an injury. To support the claim, appellant submitted a December 17, 1996 authorization for examination and/or treatment (Form CA-16) by Dr. James W. Paup, a chiropractor; medical report forms by Dr. Paup and his associate Dr. Gary E. Harcourt, covering the period January 3 through April 30, 1997; progress notes by Drs. Paup and Harcourt covering the period March 26 through April 30, 1997; January 3 and February 25, 1997 progress reports by Dr. Paup and a January 10, 1997 radiology report by Dr. Richard R. Dipietro, chairman of the Department of Radiology/nuclear medicine at memorial hospital in York, Pennsylvania. Dr. Dipietro’s January 10, 1997 radiology report failed to provide a history of injury, or a diagnosis and failed to address a causal relationship between a diagnosed condition and the October 24, 1996 employment incident. Therefore, Dr. Dipietro’s radiology report is insufficient to establish appellant’s claim. Drs. Paup and Harcourt are chiropractors and the Act specifies that chiropractors are only considered physicians 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. Since Drs. Paup and Harcourt did not diagnose a subluxation based on x-rays, they may not be considered physicians and their reports do not constitute competent medical evidence. By letters dated May 8 and July 21, 1997,⁷ the Office advised appellant of the type of evidence needed to establish his claim and on May 8, 1997 specifically explained the limitations on medical evidence submitted by chiropractors, but such evidence has not been submitted. Therefore, the Board finds that the evidence of record is insufficient to meet appellant’s burden of proof.⁸ The Office properly denied appellant’s claim in it’s September 3, 1997 decision.

The Board also finds that in its decision dated December 18, 1997, the Office did not abuse its discretion in refusing to reopen appellant’s case for further consideration of his claim on the merits under 5 U.S.C. § 8128(a).

⁶ *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ On December 16, 1996 appellant submitted a notice of recurrence. On July 21, 1997 the Office advised appellant that before making a decision regarding a recurrence of disability, he must first establish that he sustained an original injury on October 24, 1996.

⁸ In an August 14, 1997 statement, appellant stated that on October 28, 1997 he was treated by a Dr. Roger Hill at the training site, but did not submit any evidence to support his statement.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or a fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.⁹ Section 10.138(b)(2) provides that when application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹⁰

In his September 18, 1997 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did he advance a point of law or a fact not previously considered by the Office. In support of his reconsideration request, appellant submitted a copy of a May 6, 1997 medical form report by Dr. Harcourt which was already of record.¹¹

As appellant's September 18, 1997 request for reconsideration does not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying that request.

⁹ 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

¹⁰ 20 C.F.R. § 10.138(b)(2).

¹¹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984) (where the Board found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

The decisions of the Office of Workers' Compensation Programs dated December 18 and September 3, 1997 are affirmed.¹²

Dated, Washington, D.C.
December 7, 1999

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² In appellant's September 18, 1997 request for reconsideration of the Office's September 3, 1997 decision, appellant stated that he was not aware of the provisions of the Act pertaining to chiropractors as physicians. However, appellant was advised of the limitations on chiropractic treatments and afforded the opportunity to provide medical evidence from a physician, which was not done.