

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL L. RITTHALER and DEPARTMENT OF AGRICULTURE,
ANGELL JOB CORPS, Yachats, OR

*Docket No. 98-319; Submitted on the Record;
Issued October 7, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty on February 20, 1997; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay on the grounds that he did not establish fact of injury.

The Board has reviewed the record and finds that appellant has not met his burden of proof to establish that he sustained an injury in the performance of duty on February 20, 1997.

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

In the present case, appellant alleged that he sustained an injury to his back on February 20, 1997 while holding a light fixture up to the ceiling over his head. By letter dated May 19, 1997, the Office advised appellant of the deficiencies in his claim and advised him as to the evidence to submit. By letter decision dated August 28, 1997, the Office denied his claim

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).

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

based on the deficiencies in the medical evidence.⁴ By decision dated August 29, 1997, the Office denied appellant's claim on the basis that fact of injury had not been established and he was therefore not entitled to continuation of pay.⁵

As noted above, appellant's burden of proof requires the submission of probative medical evidence in support of his claim. In this case, appellant submitted a first medical report (Form 827) from Dr. James E. Corstorphine, a chiropractor, dated February 28, 1997 which noted appellant's diagnosis by code numbers 840, 846 and 847.1. In a duty status report dated May 6, 1997, Dr. Corstorphine diagnosed acute sprain of the left shoulder, acute sprain/strain of the thoracic and lumbar spines and myospasm. In an authorization for examination and/or treatment (Form CA-17) dated April 6, 1997, Dr. Corstorphine noted a decreased range of motion and positive orthopedic test of lumbar, thoracic regions. 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."⁶ As Dr. Costorphine did not diagnose a subluxation of the spine demonstrated on x-ray, he is not a physician for purposes of the Act and his reports do not constitute the medical evidence necessary to establish appellant's claim.

In the absence of probative medical evidence from a qualified physician that includes an accurate and complete history and a reasoned opinion on causal relationship between a diagnosed condition and a February 20, 1997 employment injury, the Board finds that appellant has not met his burden of proof in this case.

The Board further finds that the Office properly denied appellant's request for continuation of pay based on its determination that appellant did not establish fact of injury.

Section 8118(a) of the Act provides in pertinent part:

"The United States shall authorize continuation of pay of an employee ... who has filed a claim for a traumatic injury with his immediate supervisor ... within the time specified in section 8122(a)(2) of this title."⁷

Thus, the Act contemplates continuation of pay only in situations where an employee has sustained a traumatic injury. As discussed *supra*, in the present case appellant has not

⁴ In a letter dated September 25, 1997, appellant requested "an extension of the cut off date for the Appeal date" and indicated he would fax something by close of business on October 6, 1997. By letter dated September 29, 1997, the Office advised appellant that it did not have the jurisdiction to grant him a waiver for filing an appeal date and informed him that a request to the Employees' Compensation Appeal Board must be made within 90 days from the date of his decision.

⁵ The Board notes that, subsequent to the August 28 and August 29, 1997 decisions, appellant submitted additional evidence. The Board may not consider this evidence in its review of appellant's case on appeal. Pursuant to its *Rules of Procedure*, the Board's jurisdiction is limited to that evidence which was before the Office at the time it rendered the final decision. 20 C.F.R. § 501.2(c).

⁶ 5 U.S.C. § 8101(2).

⁷ 5 U.S.C. § 8118(a).

established that he sustained a traumatic injury in the performance of duty on February 20, 1997 and therefore is not entitled to continuation of pay.⁸

The Board further finds that appellant is not entitled to continuation of pay as the Office has not found that he has sustained a traumatic injury in the performance of duty.

The decisions of the Office of Workers' Compensation Programs dated August 29 and August 28, 1997 are hereby affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁸ *Richard D. Wray*, 45 ECAB 758 (1994).