

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARY A. HILES and U.S. POSTAL SERVICE,  
POST OFFICE, Sioux Falls, SD

*Docket No. 00-2332; Submitted on the Record;  
Issued August 9, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof in establishing that she developed a back condition in the performance of duty.

On December 3, 1999 appellant, then a 35-year-old clerk, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that her back condition was employment related. She stated that she first became aware of her back condition on November 24, 1999, while performing repetitive activities at work.

Accompanying appellant's claim was a duty status report dated November 24, 1999 prepared by Dr. Jeffrey S. Wheeler, Board-certified in emergency medicine; a magnetic resonance imaging (MRI) scan of the lumbar spine dated November 26, 1999; and a temporary reassignment to light-duty form also prepared by Dr. Wheeler. The duty status report indicated that appellant could return to restricted duty on November 24, 1999 but could not lift or carry, bend, twist, pull or push. Dr. Wheeler diagnosed appellant with a back strain. The MRI scan of the lumbar spine noted narrowing at the lumbosacral interspace with a central and left lateral protrusion of the disc. The temporary reassignment form noted that appellant sustained a herniated disc and indicated that appellant could return to light duty subject to restrictions on lifting, walking, standing and sitting.

In a letter dated December 22, 1999, the Office of Workers' Compensation Programs advised appellant of the type of factual and medical evidence needed to establish her claim and requested that she submit such evidence. The Office particularly requested that appellant submit a physician's reasoned opinion addressing the relationship of her claimed condition and specific employment factors.

In response to the Office's request appellant submitted progress notes from Dr. Wheeler from November 24, 1999 to January 20, 2000; a medical report prepared by Dr. John T. Mahan, an orthopedic surgeon, dated December 16, 1999; a duty status report dated December 16, 1999 prepared by Dr. Mahan; progress notes from Dr. Joseph Carr, a chiropractor, from December 29,

1999 to February 4, 2000; and a narrative statement. The progress notes from Dr. Wheeler document appellant's history of persistent low back pain beginning in 1998. His progress notes from December 3, 1999 noted that the MRI scan revealed a herniated nucleus pulposis of the lumbar spine. The medical report prepared by Dr. Mahan, noted appellant was injured at work as a result of performing repetitive bending, turning and twisting duties. He noted that upon physical examination appellant ambulated without difficulty; forward flexion and extension was limited; seated and supine straight leg raises were positive on the left, equivocal on the right; cross over straight leg raises were positive for production of left-sided lower back pain; Lasegue's maneuver on the left was positive; and there were no signs of sensory deficits or asymmetries. He noted x-rays were essentially normal, however, an MRI scan of the lumbar spine demonstrated an L5-S1 disc herniation. Dr. Mahan diagnosed appellant with an L5-S1 disc degeneration with herniation and left radicular symptoms. He recommended conservative treatment. The duty status report indicated that appellant could return to work on December 16, 1999 with lifting and carrying restrictions. The progress notes from Dr. Carr, indicated appellant sustained an L5-S1 disc herniation due to a work-related repetitive trauma injury. He noted that appellant was referred for McKenzie exercises and a home stabilization program due to an L5-S1 disc herniation. Dr. Carr noted appellant was progressing and was not experiencing significant pain. Appellant indicated, in her narrative statement, that she began experiencing back pain on November 16, 1999 and sought medical treatment thereafter. She provided a description of her employment duties as a clerk.

The employing establishment submitted a limited-duty offer dated December 29, 1999; an employment description; as well as various records indicating that appellant had experienced similar back problems in 1997 through 1999. The limited-duty offer, accepted by appellant, indicated that appellant would return to work as a clerk with restrictions on lifting, sitting, standing, walking however was not permitted to climb, bend, stoop, twist, pull or push.

On March 22, 2000 the Office issued a decision and denied appellant's claim for compensation under the Federal Employees' Compensation Act.<sup>1</sup> The Office found that the medical evidence was not sufficient to establish that her medical condition was caused by employment factors.

The Board finds that appellant has not met her burden of proof in establishing that she developed a back condition in the performance of duty.

An employee seeking benefits under the Act 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, that the claim was timely filed within the applicable time limitation period of the Act, that the injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>2</sup> These are the essential elements of each and every

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>3</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant. The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one 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.<sup>4</sup>

In the instant case, it is not disputed that appellant performed repetitive duties in the course of her job. However, she has not submitted sufficient medical evidence to support that a condition has been diagnosed in connection with the employment factor and that any alleged back condition is causally related to the employment factors or conditions. On December 22, 1999 the Office advised appellant of the type of medical evidence needed to establish her claim. She did not submit any medical report from an attending physician addressing how specific employment factors may have caused or aggravated her shoulder condition.

Appellant's treating physician, Dr. Wheeler noted in progress notes from November 24, 1999 to January 20, 2000 that appellant sustained a herniated disc. However, in none of Dr. Wheeler's notes does he indicate a history of the injury or the employment factors believed to have caused or contributed to the appellant's back condition.<sup>5</sup> Additionally, his reports do not include a rationalized opinion regarding the causal relationship between appellant's back condition and the factors of employment believed to have caused or contributed to such condition.<sup>6</sup> Therefore, these notes are insufficient to meet appellant's burden of proof.

The only medical report submitted by appellant was Dr. Mahan's report dated December 16, 1999, which diagnosed appellant with an L5-S1 disc degeneration with herniation

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<sup>3</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>4</sup> *Id.*

<sup>5</sup> *See Cowan Mullins*, 8 ECAB 155, 158 (1955) (where the Board held that a medical opinion based on an incomplete history was insufficient to establish causal relationship).

<sup>6</sup> *See Theron J. Barham*, 34 ECAB 1070 (1983) (where the Board found that a vague and unrationalized medical opinion on causal relationship had little probative value).

and left radicular symptoms. He indicated that appellant was injured at work on November 24, 1999 as a result of performing repetitive bending, turning and twisting duties. Dr. Mahan noted that an MRI scan of the lumbar spine demonstrated a L5-S1 disc herniation. However, his report does not include a rationalized opinion regarding the causal relationship between appellant's accepted conditions and the factors of employment believed to have caused or contributed to such condition.<sup>7</sup> For example, Dr. Mahan did not explain how the acts of bending, turning and twisting would cause or aggravate appellant's condition. Even though he noted that appellant's symptoms were caused by these repetitive acts, without any further explanation or rationale, such report is insufficient to establish a causal relationship.<sup>8</sup> Therefore, this report is insufficient to meet appellant's burden of proof.

The Board has also considered the progress notes submitted by Dr. Carr, a chiropractor, from December 29, 1999 to February 4, 2000. Section 8101(2) of the Act provides that chiropractors are considered physicians "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 and subject to regulation by the Secretary."<sup>9</sup> Section 10.400(e) of the implementing federal regulations provides:

"The term 'subluxation' means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays. A chiropractor may interpret his or her x-rays to the same extent as any other physician defined in this section."<sup>10</sup>

Thus, where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a "physician" and his or her reports cannot be considered as competent medical evidence under the Act.<sup>11</sup>

In this case, the record does not indicate that a subluxation of the spine was diagnosed. Therefore, Dr. Carr's notes are not those of a physician and are of no probative value. The remainder of the medical evidence fails to provide an opinion on the causal relationship between this incident and appellant's diagnosed condition. For this reason, this evidence is not sufficient to meet appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is

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

<sup>8</sup> *Lucrecia M. Nielson*, 42 ECAB 583, 594 (1991).

<sup>9</sup> 5 U.S.C. § 8101(2).

<sup>10</sup> *Id.*

<sup>11</sup> See *Susan M. Herman*, 35 ECAB 669 (1984). In any event, the Board has held that a chiropractor is not a physician for the purposes of calculating a schedule award. *George E. Williams*, 44 ECAB 530, 534 (1993).

sufficient to establish causal relationship.<sup>12</sup> Causal relationships must be established by rationalized medical opinion evidence. Appellant failed to submit such evidence, and the Office therefore properly denied appellant's claim for compensation.<sup>13</sup>

The decision of the Office of Workers' Compensation Programs dated March 22, 2000 is affirmed.

Dated, Washington, DC  
August 9, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member

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<sup>12</sup> See *Victor J. Woodhams*, *supra* note 3.

<sup>13</sup> With her appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c). This decision does not preclude appellant from submitting new evidence to the Office and request reconsideration pursuant to 5 U.S.C. § 8128(a).