

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

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**MELINDA H. QUINTERO, Appellant** )

**and** )

**U.S. POSTAL SERVICE, POST OFFICE, Grand  
Prairie, TX, Employer** )

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**Docket No. 04-649  
Issued: May 20, 2004**

*Appearances:*  
*Melinda H. Quintero, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On January 12, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated August 25, 2003, which denied her claim on the basis that she failed to establish an injury as defined under the Federal Employees' Compensation Act<sup>1</sup> and a nonmerit decision dated September 18, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of these issues.

**ISSUES**

The issues are: (1) whether appellant has established that her back condition was sustained in the performance of duty; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On May 22, 2003 appellant, a 31-year-old letter carrier, filed an occupational disease claim alleging that her back injury was due to years of bending and lifting.

In a June 5, 2003 letter, the Office advised appellant that the information submitted in her claim was not sufficient to determine whether she was eligible for benefits under the Act. The Office requested certain factual and medical information. In particular, appellant was directed to provide a comprehensive medical report and a physician's opinion, with medical reasons for such opinion, as to how her work caused or aggravated the claimed injury.

In response to the Office's request, appellant submitted a June 30, 2003 report by Dr. Asghar Baharanchi, a chiropractor, a June 18, 2003 statement from herself, a May 23, 2003 statement by Glenn Talley, a May 7, 2003 Texas Workers Compensation report, treatment notes for the period June 13 to August 5, 2003 and a Texas Workers' Compensation Work Status reports covering the period May 8 to July 22, 2003 by Dr. Baharanchi.

In his June 30, 2003 report, Dr. Baharanchi diagnosed lumbar disc syndrome and lumbar neuralgia. He interpreted a May 7, 2003 x-ray as showing a "slight intervertebral disc space narrowing at L5-S1" and a "moderate lumbar myospasm and moderate right curvature which apexed at L3."

By decision dated August 25, 2003, the Office denied appellant's claim on the basis that she failed to establish that she sustained an injury as defined by the Act. Specifically, the Office noted that she failed to provide the necessary medical opinion evidence. The Office found that Dr. Baharanchi could not be considered a physician under the Act as he failed to diagnosis a subluxation by x-ray.

Appellant requested reconsideration on September 2, 2003 and submitted a September 11, 2003 Texas Workers' Compensation Work Status report by Dr. Baharanchi in support of her request and treatment notes for August 27, 2003.

By nonmerit decision dated September 18, 2003, the Office denied appellant's request for reconsideration.<sup>2</sup>

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

An employee seeking benefits under the Act has the burden of establishing that 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 an 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>3</sup> These are essential elements of each and

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<sup>2</sup> The Board notes that appellant submitted new medical evidence subsequent to the Office's decision. However, the Board cannot consider that evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

<sup>3</sup> *Derrick C. Miller*, 54 ECAB \_\_\_\_ (Docket No. 02-140, issued December 23, 2002).

every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</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;<sup>5</sup> (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;<sup>6</sup> 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 the claimant.<sup>7</sup> The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.<sup>8</sup>

The medical evidence required to establish causal relationship generally is 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.<sup>9</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>10</sup> must be one of reasonable medical certainty<sup>11</sup> 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>12</sup>

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

In the instant case, the issue is whether appellant established that she sustained an injury causally related to her employment. In order to establish her claim, appellant's burden of proof includes submitting medical evidence establishing the presence or existence of the disease or

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<sup>4</sup> *Janice Guillemette*, 54 ECAB \_\_\_\_ (Docket No. 03-1124, issued August 25, 2003); *Kathryn A. Tuel-Gillem*, 52 ECAB 451 (2001).

<sup>5</sup> *Solomon Polen*, 51 ECAB 341 (2000).

<sup>6</sup> *Marlon Vera*, 54 ECAB \_\_\_\_ (Docket No. 03-907, issued September 29, 2003); *Janet L. Terry*, 53 ECAB \_\_\_\_ (Docket No. 00-1673, issued June 5, 2002); *Roger Williams*, 52 ECAB 468 (2001).

<sup>7</sup> *Ernest St. Pierre*, 51 ECAB 623 (2000).

<sup>8</sup> *Luis M. Villanueva*, 54 ECAB \_\_\_\_ (Docket No. 03-977, issued July 1, 2003).

<sup>9</sup> *Conard Hightower*, 54 ECAB \_\_\_\_ (Docket No. 02-1568, issued September 9, 2003).

<sup>10</sup> *Tomas Martinez*, 54 ECAB \_\_\_\_ (Docket No. 03-396, issued June 16, 2003).

<sup>11</sup> *John W. Montoya*, 54 ECAB \_\_\_\_ (Docket No. 02-2249, issued January 3, 2003).

<sup>12</sup> *Judy C. Rogers*, 54 ECAB \_\_\_\_ (Docket No. 03-565, issued July 9, 2003).

condition for which compensation is claimed and that this condition is causally related to the employment factors identified by the claimant.<sup>13</sup> The medical evidence of record, however, is limited to the reports of the chiropractor, Dr. Baharanchi. In support of her claim, appellant submitted a June 30, 2003 report by Dr. Baharanchi, a chiropractor. In his report, Dr. Baharanchi diagnosed lumbar neuralgia and lumbar disc syndrome. He interpreted a May 7, 2003 x-ray as showing disc narrowing at L5-S1 and moderate right curvature and lumbar myospasm at L3, but made no diagnosis of a subluxation.

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.”<sup>14</sup> Dr. Baharanchi does not provide a report with a diagnosis of subluxation as demonstrated by x-ray. The June 30, 2003 report by Dr. Baharanchi noted a May 7, 2003 x-ray as showing a slight narrowing of the intervertebral disc space at L5-S1 and a moderate right curvature moderate lumbar myospasm at L3, without further explanation or description of the findings as a subluxation.<sup>15</sup> In this report, he diagnosed lumbar disc syndrome and lumbar neuralgia. Dr. Baharanchi did not diagnose a subluxation.

In the absence of a diagnosis of subluxation based on x-rays, Dr. Baharanchi is not a “physician” under the Act. Since he is not a physician, his reports are of no probative medical value to the claim.<sup>16</sup> The Board, therefore, finds that appellant has not met her burden of proof in this case as she failed to submit a rationalized medical opinion.

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

Section 8128(a) of the Act<sup>17</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>18</sup> Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>19</sup>

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section

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<sup>13</sup> *Nicolette R. Kelstrom*, 54 ECAB \_\_\_\_ (Docket No. 03-275, issued May 14, 2003).

<sup>14</sup> 5 U.S.C. § 8101(2).

<sup>15</sup> The Office’s implementing federal regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See* 20 C.F.R. § 10.5(bb) (2003).

<sup>16</sup> *Michelle Salazar*, 54 ECAB \_\_\_\_ (Docket No. 03-623, issued April 11, 2003).

<sup>17</sup> 5 U.S.C. § 8128(a) (“the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

<sup>18</sup> *Raj B. Thackurdeen*, 54 ECAB \_\_\_\_ (Docket No. 02-2392, issued February 13, 2003); *Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>19</sup> 20 C.F.R. § 10.608(a).

10.606(b)(2).<sup>20</sup> The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>21</sup>

Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.<sup>22</sup>

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

The issue in the instant case is whether appellant is entitled to a merit review of the denial of her claim. In order to obtain a merit review by the Office, appellant must submit a timely application for reconsideration in writing and submit pertinent and relevant new evidence, advance a relevant legal argument not previously considered by the Office or show that the Office erroneously applied or interpreted a specific point of law. Appellant's January 26, 2003 reconsideration request neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of her January 26, 2003 reconsideration request, appellant submitted a September 11, 2003 Texas Workers' Compensation Work Status Report by Dr. Baharanchi and treatment notes for August 27, 2003. She had previously submitted a Texas Workers' Compensation Work Status Report by Dr. Baharanchi covering the period May 8 to July 17, 2003 and treatment notes for June 30 to August 5, 2003. The reports are repetitive of previous reports. Furthermore, these reports are not pertinent as Dr. Baharanchi is not a physician under the Act, as he failed to diagnosis a subluxation by x-ray and thus, cannot be considered medical evidence. Since appellant has not shown that the Office erroneously applied or interpreted a specific point of law, failed to advance a relevant legal argument and failed to submit relevant and pertinent evidence, the Board finds that the Office properly declined to reopen her claim for a merit review.

### **CONCLUSION**

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained a medical condition in the performance of duty, as she failed to submit any relevant

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<sup>20</sup> 20 C.F.R. § 10.606(b)(1)-(2); *see Sharyn D. Bannick*, 54 ECAB \_\_\_\_ (Docket No. 03-567, issued April 18, 2003).

<sup>21</sup> 20 C.F.R. § 10.608(b).

<sup>22</sup> *Id.*

medical opinion evidence. The Board finds that the Office properly denied appellant's request for a merit review.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 18 and August 25, 2003 are hereby affirmed.

Issued: May 20, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member