United States Department of Labor
Employees' Compensation Appeals Board

BARBARA F. JAMES, Appellant	)	
and	)	**Docket No. 04-1396**
	)	**Issued: September 20, 2004**
SOCIAL SECURITY ADMINISTRATION, PERSONNEL OPERATIONS TEAM, Troy, NY, Employer	)	

Appearances:
Barbara F. James, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 3, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 3, 2003 denying her claim for an employment-related cervical or upper extremity injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case. Pursuant to the same regulations, the Board also has jurisdiction over a January 27, 2004 nonmerit decision which denied appellant's request for reconsideration.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a cervical or upper extremity injury in the performance of duty on June 4, 2003; 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).

FACTUAL HISTORY

On June 6, 2003 appellant, then a 54-year-old claims representative, filed a claim alleging that she sustained cervical and upper extremity injuries due to being seated in the same position for an extended period of time at work on June 4, 2003.[1] Appellant stopped work on June 5, 2003 and returned to work on June 6, 2003.

Appellant submitted a June 5, 2003 form report in which Dr. Louis J. Costello, an attending chiropractor, indicated that she sustained cervical radiculitis due to sitting at a computer at work for an extended period of time. Dr. Costello indicated that appellant could resume light work on June 7, 2003. By letter dated June 18, 2003, the Office requested that appellant submit additional evidence in support of her claim. The Office advised appellant of the standards under which the report of a chiropractor is considered medical evidence under the Federal Employees' Compensation Act.

Appellant then submitted additional reports of Dr. Costello. In a report dated June 20, 2003, Dr. Costello stated that appellant was being treated for an employment-related cervical injury and noted that she was released from work for one week. In a form report dated June 17, 2003, he diagnosed cervical subluxation, cervical whiplash and cervical sprain/strain, due to sitting for an extended time on June 4, 2003. In a report dated June 23, 2003, Dr. Costello stated that appellant presented on that date with cervical and upper extremity complaints which she claimed were due to engaging in increased sitting and typing at work for the past week. He indicated that appellant would be treated for "segmental dysfunction (subluxation) of the cervical spine complicated by brachial radiculitis and trigger points in the left arm."[2]

By decision dated October 3, 2003, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence. The Office found that the reports of Dr. Costello did not constitute medical evidence.

By letter dated January 8, 2004, appellant requested reconsideration of her claim and submitted a November 3, 2003 report from Dr. Costello, who stated that he had previously diagnosed appellant with "segmental dysfunction (subluxation) of the cervical spine." He noted that Medicare and the New York state workers' compensation board did not require the taking of x-rays to demonstrate a subluxation. He indicated that, given her circumstances, exposing appellant to x-rays would constitute malpractice. By decision dated January 27, 2004, the Office refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] Appellant indicated that she had earlier sustained permanent neck and arm injuries, due to a vehicular accident and that, therefore, she had difficulty sitting for extended periods. The record contains factual and medical documents regarding a July 18, 1996 vehicular accident. It is unclear from the record whether this accident occurred in connection with appellant's federal service. Appellant indicated that she last received treatment for the effects of the accident in late 1999.

[2] In a June 38, 2003 note, Dr. Costello indicated that appellant would return to full duty with no restrictions.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[3] has the burden of establishing the essential elements of 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.[4] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[6] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[7] The term "injury" as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to or contact with, certain factors, elements or conditions.[8]

ANALYSIS -- ISSUE 1

In the present case, appellant claimed that she sustained cervical and upper extremity injuries due to being seated in the same position for an extended period of time at work on June 4, 2003. She submitted a June 17, 2003 form report in which Dr. Costello, an attending chiropractor, diagnosed cervical subluxation, cervical whiplash and cervical sprain/strain due to sitting for an extended period of time on June 4, 2003 and a June 23, 2003 report in which he diagnosed: "segmental dysfunction (subluxation) of the cervical spine complicated by brachial radiculitis and trigger points in the left arm." The opinion of Dr. Costello, however, has no probative value on the issue of whether appellant sustained an employment-related cervical or upper extremity injury because his reports do not constitute medical evidence within the meaning of the Act. Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as

[3] 5 U.S.C. § 8101 *et seq.*

[4] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

[6] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987).

[7] *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[8] *Elaine Pendleton*, *supra* note 4; 20 C.F.R. § 10.5(a)(14).

demonstrated by x-ray to exist.[9] Although Dr. Costello diagnosed cervical subluxations,[10] he did not indicate in any of his reports that his findings of subluxations were demonstrated by x-rays to exist. For these reasons, the Office properly determined that appellant did not meet her burden of proof to establish that she sustained a cervical or upper extremity injury in the performance of duty on June 4, 2003.[11]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[12] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[13] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[14] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[15]

ANALYSIS -- ISSUE 2

In support of her January 8, 2004 reconsideration request, appellant submitted a November 3, 2003 report in which Dr. Costello indicated that he had previously diagnosed her with a cervical subluxation. Dr. Costello expressed his opinion that it was not necessary to demonstrate through x-rays that appellant's subluxation existed. In essence, this report is similar

[9] 5 U.S.C. § 8101(2). *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

[10] The Office's regulations at 20 C.F.R. § 10.5(bb) have defined a subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays. 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

[11] The record contains a Form CA-16 completed on June 6, 2003 which purports to authorize treatment by Dr. Costello. Where an employing agency properly executes a Form CA-16 authorizing treatment as a result of an employee's claim of sustaining an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See Danita E. Lindsey*, 40 ECAB 450, 452 (1989). It is unclear from the record whether Dr. Costello was paid in connection with this Form CA-16.

[12] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[13] 20 C.F.R. §§ 10.606(b)(2).

[14] 20 C.F.R. § 10.607(a).

[15] 20 C.F.R. § 10.608(b).

to Dr. Costello's previous reports in which he diagnosed cervical subluxation yet failed to demonstrate it existed through x-ray testing.[16] The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[17] Appellant also submitted a copy of Dr. Costello's June 23, 2003 report, but this report had already been considered by the Office.

In the present case, appellant has not established that the Office improperly refused to reopen her claim for a review on the merits of its October 3, 2003 decision under section 8128(a) of the Act, because the evidence she submitted did not to show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constitute relevant and pertinent new evidence not previously considered by the Office.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a cervical or upper extremity injury in the performance of duty on June 4, 2003. The Board further finds that 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).

[16] He noted that Medicare and the New York state workers' compensation board did not require the taking of x-rays to demonstrate a subluxation, but the standards of other compensation programs would not be relevant in the present case. *See Daniel Deparini*, 44 ECAB 657 (1993).

[17] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2004 and October 3, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 20, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member