

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

VENITA WASHINGTON-POINTER, Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SAFETY)
ADMINISTRATION, INTERNATIONAL)
AIRPORT, St. Louis, MO, Employer)

**Docket No. 05-1897
Issued: June 12, 2006**

Appearances:
Venita Washington-Pointer, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On September 13, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 9, 2005 which denied her claim for a back injury. She also appealed the decision dated August 25, 2005 which denied merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether appellant has met her burden of proof in establishing that she sustained a back injury in the performance of duty; and (2) whether the Office properly denied her request for reconsideration without a merit review.

FACTUAL HISTORY

On April 17, 2003 appellant, then a 50-year-old transportation security screener, filed a traumatic injury claim alleging that on April 14, 2003 she was lifting a passenger bag and injured her lower back. She did not stop work.

Appellant submitted an attending physician's report from Dr. Richard Culligan, a chiropractor, dated April 17, 2003, who noted that her back condition commenced on April 15, 2003, when she was lifting a bag at work and diagnosed a lumbar sprain or strain with radiculopathy. He noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity and advised that she could return to work with restrictions on lifting. Also submitted was an ultrasound of the thoracic and lumbar spines which revealed inflammation of a mild degree at T8, L4, L5 and at the sacroiliac joint area.

By letter dated January 4, 2004, the Office asked appellant to submit additional information including a comprehensive medical report from her treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to her claimed back injury.

In a decision dated February 9, 2005, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that her condition was caused by the factors of employment as required by the Federal Employees' Compensation Act.¹

Appellant submitted a statement dated May 19, 2005 which indicated that she noticed radiculopathy on her right side in June 2004. She advised that her position as a screener aggravated her condition because of the forceful activities she was required to perform.

In a letter dated July 28, 2005, appellant requested reconsideration and submitted additional medical evidence. She noted that her current condition was a recurrence of a prior claim for a back injury filed in June 2004. Appellant submitted a report from Dr. Culligan, dated June 28, 2005, who noted that her back condition was related to a work injury which occurred in April 2003 when she was lifting baggage onto a screening machine. He advised that over time appellant performed repetitive duties of lifting which caused radiculopathy, pain and numbness in the lower extremity. Dr. Culligan opined that appellant's condition was chronic.

In a decision dated August 25, 2005, the Office denied appellant's reconsideration request on the grounds that her letter neither raised substantive legal questions nor included new and relevant evidence and was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

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 filed within the applicable time limitation 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²

¹ 5 U.S.C. §§ 8101-8193.

² Gary J. Watling, 52 ECAB 357 (2001).

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.³ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁴

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.⁵ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁶

ANALYSIS -- ISSUE 1

The Office properly found that the April 14, 2003 lifting incident occurred as appellant alleged. The Board finds, however, that the medical evidence is insufficient to establish that she sustained a back injury causally related to the April 14, 2003 incident.

In support of her claim, appellant submitted an attending physician's report from Dr. Culligan, a chiropractor, dated April 17, 2003, who noted that her back condition commenced on April 15, 2003 while she was lifting a bag at work and diagnosed a sprain or strain of the lumbar with radiculopathy. He noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity and advised that she could return to work with restrictions on lifting. 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

³ *Michael E. Smith*, 50 ECAB 313 (1999).

⁴ *Id.*

⁵ *Leslie C. Moore*, 52 ECAB 132 (2000).

⁶ *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

demonstrated by x-ray to exist and subject to regulation by the Secretary.”⁷ Section 10.311 of the implementing federal regulations provides:

“(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. [The Office] will not necessarily require submittal of the x-ray or a report of the x-ray, but the report must be available for submittal on request.”⁸

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.⁹ In the present case, Dr. Culligan did not diagnose a subluxation as demonstrated by x-ray to exist and, therefore, his reports are not those of a physician.

The remainder of the medical evidence, including an ultrasound of the thoracic and lumbar spines dated April 18, 2003, fail to provide an opinion on the causal relationship between appellant’s job and her diagnosed back condition. For this reason, this evidence is not sufficient to meet her 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 her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Under section 8128(a) of the Act,¹¹ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹² which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

⁷ 5 U.S.C. § 8101(2).

⁸ 20 C.F.R. § 10.311.

⁹ See *Susan M. Herman*, 35 ECAB 669 (1984).

¹⁰ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b).

“(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].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹³

ANALYSIS -- ISSUE 2

Appellant’s July 28, 2005 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office.

Appellant’s request for reconsideration advised that her current condition was a recurrence of a prior claim for a back injury filed in June 2004.¹⁴ She also submitted a statement dated May 19, 2005 which indicated that she noticed radiculopathy on her right side in June 2004. Appellant noted that her position as a screener aggravated her condition because of the forceful activities she was required to perform. However, her letters did not show that the Office erroneously applied or interpreted a point of law, nor did it advance a point of law or fact 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). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted a report from Dr. Culligan, dated June 28, 2005, who noted that her back condition was related to a work injury which occurred in April 2003 and opined that over time appellant’s repetitive duties of lifting caused radiculopathy, pain and numbness in the lower extremity. However, this report is similar to his prior report dated April 17, 2003 already contained in the record¹⁵ and was previously considered by the Office in its decisions dated February 9, 2005 and found deficient.¹⁶ Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

¹³ 20 C.F.R. § 10.608(b).

¹⁴ The Board notes that, on appeal, appellant referenced another appeal before the Board, Docket No. 05-1678, regarding a separate Office claim and requested that that claim be reviewed in conjunction with the present appeal before the Board. However, the Board only has jurisdiction over final Office decisions. 20 C.F.R. § 501.2(c). The Board issued its appeal decision in Docket No. 05-1678, adjudicating an Office decision in the other claim on October 19, 2005.

¹⁵ 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; see *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹⁶ *Id.*

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office.”¹⁷ Therefore, the Board finds that the Office properly denied appellant’s requests for reconsideration without reviewing the merits of the claim.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a back injury causally related to her April 14, 2003 employment incident and that the Office properly denied appellant’s requests for reconsideration without conducting a merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the August 25 and February 9, 2005 decisions of the Office of Workers’ Compensation Programs are affirmed.

Issued: June 12, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees’ Compensation Appeals Board

David S. Gerson, Judge
Employees’ Compensation Appeals Board

¹⁷ 20 C.F.R. § 10.606(b).