

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

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**E.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Stone Mountain, GA, Employer**

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**Docket No. 06-1856  
Issued: April 6, 2007**

*Appearances:*  
*Appellant, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 8, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated May 9, 2006 denying his request for reconsideration. The record also contains a January 19, 2006 decision on the merits of the claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has established an injury in the performance of duty on November 18, 2005; and (2) whether the Office properly refused to reopen the claim for merit review pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On November 25, 2005 appellant, then a 35-year-old letter carrier, filed a traumatic injury claim (Form CA-1), alleging that on November 18, 2005 he was injured in the performance of duty. He stated that he sustained muscle spasms in his low back and neck

stiffness after his vehicle was struck from behind. The reverse of the claim form indicated that appellant stopped working on November 18, 2005.

Appellant submitted a duty status report (Form CA-17), dated November 25, 2005, from Dr. Michael Moccio, a chiropractor, who indicated that appellant had muscle spasms and reduced range of motion of the spine.

The Office requested that appellant submit additional evidence regarding his claim, noting that a chiropractor is considered a physician only if there is a diagnosis of subluxation as shown by x-rays. Appellant submitted "disability certificate" form reports from Dr. Moccio indicating that he was disabled through December 19, 2005.

By decision dated January 19, 2006, the Office denied the claim for compensation. The Office found that an employment incident occurred as alleged, but the medical evidence did not establish an injury causally related to the employment incident.

Appellant requested reconsideration on February 6, 2006. He submitted a narrative report dated January 23, 2006 from Dr. Moccio who provided a history of a motor vehicle accident on November 18, 2005. Dr. Moccio diagnosed acute moderate sprain/strain of the cervical, thoracic and lumbar spine and spinal muscle spasm. He opined that appellant was disabled through December 18, 2005. Appellant also submitted examination notes from Dr. Moccio dated November 21 and December 16, 2005.

In a decision dated May 9, 2006, the Office determined that the request for reconsideration was insufficient to warrant merit review of the claim.

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

An employee seeking benefits under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing that he or she sustained an injury while in the performance of duty.<sup>2</sup> 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.<sup>3</sup>

The Office's procedures recognize that a claim may be accepted without a medical report when the condition is a minor one which can be identified on visual inspection.<sup>4</sup> In clear-cut

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Melinda C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

<sup>3</sup> *See John J. Carlone*, 41 ECAB 354, 357 (1989).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d) (June 1995).

traumatic injury claims, such as a fall resulting in a broken arm, a physician's affirmative statement is sufficient and no rationalized opinion on causal relationship is needed. In all other traumatic injury claims, a rationalized medical opinion supporting causal relationship is required.<sup>5</sup>

Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the identified employment factor. The opinion of the physician must be based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>6</sup>

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

The Office accepted that appellant sustained an employment incident as alleged on November 18, 2005 when his vehicle was struck from behind. To establish the second component of fact of injury, however, appellant must submit rationalized medical evidence on causal relationship. This is not a minor injury that can be identified on visual inspection or a clear-cut injury requiring only a physician's affirmative statement.

The evidence submitted prior to the January 19, 2006 decision consisted of reports from Dr. Moccio, a chiropractor. Before this evidence can be considered competent medical evidence, Dr. Moccio must be established as a physician under the Act. 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>7</sup> Dr. Moccio did not diagnose a subluxation in this case. Since he did not diagnose a subluxation as demonstrated by x-rays, he is not considered a physician under the Act and his reports are of no probative medical value.<sup>8</sup>

The Board accordingly finds that appellant did not establish fact of injury as he did not submit rationalized medical evidence on causal relationship between a diagnosed condition and the employment incident. Appellant did not meet his burden of proof and the Office properly denied the claim.

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<sup>5</sup> *Id.*

<sup>6</sup> *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

<sup>7</sup> 5 U.S.C. § 8101(2).

<sup>8</sup> *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

## LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>9</sup> the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent evidence not previously considered by the Office."<sup>10</sup> Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.<sup>11</sup>

## ANALYSIS -- ISSUE 2

The claim was denied on the grounds that the medical evidence was not sufficient to establish a diagnosed condition causally related to the November 18, 2005 employment incident. On reconsideration, appellant submitted additional evidence from Dr. Moccio. He did not diagnose a subluxation as demonstrated by x-rays. As noted above, Dr. Moccio's reports are not competent medical evidence until he is established as a physician under the Act. He is not a physician under the Act and the evidence submitted on reconsideration is not relevant to the medical issue presented.<sup>12</sup>

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a new and relevant legal argument or submit relevant and pertinent evidence not previously considered by the Office. He did not meet any of the requirements of 20 C.F.R. § 606(b)(2) and, therefore, the Office properly declined to reopen the case for merit review.

## CONCLUSION

Appellant did not meet his burden of proof to establish an injury in the performance of duty on November 18, 2005. On reconsideration, the Office properly refused to reopen the case for review of the merits under 5 U.S.C. § 8128(a).

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<sup>9</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.")

<sup>10</sup> 20 C.F.R. § 10.606(b)(2).

<sup>11</sup> 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>12</sup> The Board notes that only evidence that was before the Office at the time of the final decision may be considered by the Board on appeal. 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 9 and January 19, 2006 are affirmed.

Issued: April 6, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board