United States Department of Labor
Employees' Compensation Appeals Board

S.B., Appellant	)	
and	)	**Docket No. 06-2137**
	)	**Issued: April 9, 2007**
U.S. POSTAL SERVICE, DUANESBURG POST OFFICE, Duanesburg, NY, Employer	)	

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 September 22, 2006 appellant filed a timely appeal of a March 23, 2006 merit decision of the Office of Workers' Compensation Programs, finding that she did not sustain an injury in the performance of duty and nonmerit decisions dated April 26 and August 25, 2006, denying her requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant established that she sustained a back and neck injury in the performance of duty on December 29, 2005, as alleged; and (2) whether the Office properly denied her April 12 and May 24, 2006 requests for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 4, 2006 appellant, then a 35-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 29, 2005 she experienced pain in her lower back,

a muscle spasm in her left leg and tightness in her neck and middle back when she stepped off a curb and slipped on ice while loading her car with mail. She stated that she did not realize the parking lot was "glared" with ice.

On appellant's claim form, Judith C. Bianchine, an employing establishment postmaster, controverted the claim on the grounds that the alleged injury did not occur in the performance of duty. She stated that appellant did not report any incident, accident or injury to her until January 3, 2006. Ms. Bianchine further stated that appellant had complained about chronic back pain since the beginning of her reemployment at the employing establishment. She noted that appellant made numerous chiropractic visits for back and neck pain and muscle spasms which she spoke about often to everyone at work. Ms. Bianchine related that her knowledge of the facts of the injury was not in agreement with appellant's statement of injury. She contended that appellant had changed the facts several times or there was a lack of facts regarding the alleged injury. Ms. Bianchine noted that on January 3, 2006 appellant called in sick at 6:20 a.m. but did not mention an injury. Two hours later appellant stated that she "slipped" on Thursday.

In a January 3, 2006 email message, Ms. Bianchine further described the alleged injury. On Tuesday, January 3, 2006 at approximately 6:20 a.m., appellant contacted Ms. Bianchine at home to advise that she was unable to work on that day. She had seen a chiropractor on the previous day who she believed cracked her back into place but she was unable to sit or stand that morning. Appellant further advised that she had not found anyone to cover her route. Ms. Bianchine responded that she would call her back. After spending over one hour calling several offices and substitutes, Ms. Bianchine found no available substitute. When she called appellant back, appellant stated that she slipped on ice in the parking lot on Thursday, December 29, 2005. Ms. Bianchine stated that appellant had not advised her about the injury. Appellant stated that she told, Lisa Thatcher, a coworker, about the injury. At approximately 9:45 a.m., appellant called Ms. Bianchine from her physician's office and requested the address of the workers' compensation office so that her physician could order x-rays. Ms. Bianchine stated that she was too busy to provide this information and appellant replied that she would call her back. John Reilly, an employing establishment employee, advised Ms. Bianchine that, until appellant filed a CA-1 form, no accident had occurred. Appellant called Ms. Bianchine at 2:45 p.m. and stated that she was waiting for her physician to read the x-rays and that she may have sustained a herniated disc.

In a January 5, 2006 narrative statement, Stacey Mercier, appellant's coworker, related that appellant was supposed to be on vacation during the week between Christmas and New Year's Day and that no coverage for her absence was available. She stated that she was exhausted so she asked appellant either on Thursday, December 22 or Friday, December 23, 2005, whether she was going to call in during the stated time period. Ms. Mercier responded that she did not have it in her to perform appellant's and her job which usually occurred when she called in. Appellant stated that she was not going to call in during the stated week but could not promise that she would not call in soon.

In an undated narrative statement, Ms. Thatcher stated that she did not remember the day appellant fell in the employing establishment's parking lot but remembered her coming back inside the office after she loaded her car with mail. Appellant cautioned her to be careful because it was slippery by her car and she almost fell. Ms. Thatcher stated that she did not

appear to be hurt or affected in any way. She related that appellant left to deliver her mail and did not refer to this matter again. Several days later, Ms. Thatcher stated that she reiterated her statement of injury when Ms. Bianchine asked her about the incident.

Appellant submitted a January 3, 2006 medical report from Dr. Kevin P. Cope, a Board-certified family practitioner, who provided a history that she complained about low and middle back pain after falling on ice at work on December 29, 2005. Dr. Cope stated that appellant sustained lumbar radiculopathy and thoracic and cervical strains. In a January 9, 2006 report, he reiterated his prior diagnoses and opinion on causal relation. Dr. Cope's January 3, 2006 disability certificate stated that appellant was off work from that date until January 9, 2006. On January 3, 2006 he ordered physical therapy. In a January 9, 2006 disability certificate, Dr. Cope stated that appellant was to remain off work from that date through January 10, 2006.

A January 10, 2006 disability certificate of Diane Vecchio, a nurse practitioner, stated that appellant was totally incapacitated from that date until January 24, 2006. In a January 11, 2006 report, Ms. Vecchio provided a history that approximately two weeks ago, appellant slipped and fell on ice. She provided a diagnosis of cervical and lumbar strains and lumbar contusion. On January 24, 2006 Ms. Vecchio conducted a follow-up examination regarding a slip and fall that occurred approximately six weeks ago. She reiterated her prior diagnoses and stated that appellant also had intermittent symptoms of nerve irritation/radiculitis.

In an undated narrative statement, Ms. Bianchine stated that Michael Fisher, appellant's replacement, advised her that it was well known that appellant did not want to work until she got a new car. Mr. Fisher further advised that the transmission was not working in her car and she complained about the car and how she could not afford to replace it. He informed Ms. Bianchine that appellant's car broke down on several occasions and Mr. Ketchum, a garage owner, gave her a ride to work so that she could finish her route with her other car. Ms. Bianchine stated that Mr. Fisher related that appellant could not regularly use the other car because her back hurt when she sat on the console and she could not reach the boxes. Mr. Fisher reported that he told her it was her responsibility to find a vehicle that she could work out of in a safe manner. Appellant responded that she could not afford one.

By letter dated February 3, 2006, the Office advised appellant that the evidence submitted was insufficient to establish her claim. It addressed the factual and medical evidence that she needed to submit to support her claim of injury.

The Office received a January 30, 2006 report from Dr. Timothy J. Greenan, a Board-certified radiologist. A magnetic resonance imaging (MRI) scan of appellant's cervical spine demonstrated mild discogenic disease, spondylosis and diffuse posterior disc bulges at C5-6 and C6-7 and a left lateral herniated nucleus pulposus at C5-6 impression on the left ventral aspect of the spinal cord extending into the left anterior recess.

A January 24, 2006 form report from Dr. Russell N.A. Cecil, a Board-certified orthopedic surgeon, stated that appellant sustained a neck, low back and left leg injury on December 29, 2005. On January 31, 2006 Dr. Cecil determined that appellant was totally disabled. He opined that appellant could not return to limited-duty work that required twisting and turning. In addition, she could not return to her regular work duties because they required

physical labor. Appellant informed Dr. Cecil that she could not drive to Albany, New York to work inside the employing establishment.

Ms. Vecchio's January 24, 2006 disability certificate stated that appellant was totally incapacitated from that date through February 21, 2006.

In a January 25, 2006 letter, Louise T. Coulombe, an employing establishment injury compensation specialist, stated that the January 30, 2006 MRI scan clearly demonstrated that appellant had underlying discogenic disease, spondylosis and diffuse posterior disc bulges at C5-6 and C6-7. She noted that, prior to filing a claim, appellant was being treated by a chiropractor. According to Ms. Coulombe appellant did not report an injury to her postmaster and that as a rural carrier she was responsible for providing her own vehicle to deliver mail. She related that the postmaster stated that at no time did appellant report an injury. Ms. Coulombe contended that appellant did not have a vehicle to deliver mail and alleged an injury because she had no money to repair her vehicle. She further contended that the facts surrounding the alleged injury were not accurate and that appellant's postmaster advised her that she had made it very clear to her subordinates that she had no intentions of returning to work.

The Office received treatment notes from appellant's physical therapists covering intermittent dates from January 6 through February 24, 2006. Undated and unsigned form reports indicated that appellant sustained a low back, left leg and neck injury on December 29, 2005. Ms. Vecchio's January 26, 2006 report reiterated her prior diagnoses. On January 4, 2006 Dr. Kevin Lau, a Board-certified radiologist, performed an x-ray of appellant's cervical spine which demonstrated minimal degenerative change.

In a February 16, 2006 letter, appellant further described the December 29, 2005 incident. Upon arriving at work on that date at approximately 10:00 a.m., she began to load her car with mail to deliver on her route. She stepped off the curb and slipped on ice, injuring her neck and back on the left side. Appellant stated that she did not realize that the parking lot around the car was a "glare" of ice. She related that it was not properly maintained that morning and no salt was put down. Appellant indicated that she did not feel any pain at that moment, she just felt stiff and tight. She immediately advised Ms. Thatcher to be very careful because she had just slipped on the ice. Ms. Thatcher replied that she was aware of the ice because she almost slipped that morning while getting out of her car. Appellant stated that she did not advise her boss at that time about the injury because her boss was at a counter waiting on customers and she was not in immediate pain. She proceeded to deliver mail and later noticed that the more she reached for the gas and brake pedals with her left leg, her back began to get tighter. The more appellant reached and stretched to put mail in boxes, the more her neck started to tighten. She continued her route. Appellant returned to the office, signed out and went home. She stated that, when she arrived home, she put heat on her back and neck every 20 minutes to loosen them up. Appellant also took Tylenol to ease the discomfort. She stated that she continued to perform her regular work duties on December 30 and 31, 2005 and January 1 and 2, 2006 despite experiencing stiffness in her neck and back, muscle spasms down the left side of her neck and back and a headache. On December 30, 2005 appellant told Ms. Mercier that her back and neck were stiff and sore from slipping on ice the day before.

Appellant related that on January 1, 2006 she could hardly walk or sit for more than 20 minutes. She sought chiropractic treatment on January 2, 2006. In the morning on January 3, 2006, appellant called Ms. Bianchine at home to inform her that she was not coming into work that day due to extreme pain. She stated that she fell on December 29, 2005 while loading her car and that she thought the pain would go away and that she would get better in a few days. Appellant described her symptoms and medical treatment. Ms. Bianchine advised her that no one was available to cover for her. Appellant responded that she was unable to drive to work due to her condition. Ms. Bianchine called her back at 7:17 a.m. reiterating that no coverage could be found. Appellant again stated that she was unable to work and that she was seeking medical attention. She called Ms. Bianchine from her physician's office to obtain insurance information but she was too busy to give her the requested information. Appellant called back later that day and advised Ms. Bianchine that she would be off work for one week and that she had a follow-up appointment scheduled on January 9, 2006. On January 12, 2006 she received a call from Ms. Bianchine requesting that she remove her mail car from the employing establishment's property because it was a safety hazard.

Appellant stated that she had not sustained any other injury between December 29, 2005 and January 3, 2006. She had not experienced any pain and discomfort or been treated for a back or neck injury prior to December 29, 2005. Appellant related that, contrary to Ms. Bianchine's statement, she only had one chiropractic appointment in August 2004 and April 2005.

In a letter dated March 2, 2006, Ms. Coulombe contended that appellant had issues about not being able to take time off work during the holidays. She had a history of back problems and chiropractic treatment which she shared with Ms. Bianchine. Ms. Coulombe stated that the cause of the alleged injury was questionable as the history provided by appellant was not consistent.

In an undated narrative statement, Ms. Bianchine reiterated that she had no knowledge of appellant's statements regarding the alleged December 29, 2005 injury and that she did not receive any report of icy conditions in the employing establishment's parking lot from any other employees or customers that day. She denied any knowledge of appellant's allegations regarding her condition from December 30, 2005 through January 2, 2006. Ms. Bianchine stated that appellant had ample opportunity to mention the incident and that she was usually very vocal about any particular ache or pain she experienced. She related that Ms. Mercier told her that she did not remember appellant saying anything about "slipping" and/or her symptoms. Appellant mentioned for the first time in her statement that she fell. Ms. Bianchine stated that her previous statements only spoke about a slip and she first received notice about the claimed fall from the injury compensation office. She noted that appellant's CA-1 form indicated that she slipped. Ms. Bianchine further noted that she had several discussions with appellant regarding the proper way to lift. On one occasion, appellant stated that she could not lift properly due to her knees. Ms. Bianchine instructed her to stop and get out of her vehicle to rearrange her load. She also instructed her to remove her personal vehicle from the employing establishment's property as another carrier could not park as assigned. Snow was accumulating around the vehicle and the area could not be plowed. Ms. Bianchine stated that the build up was causing an unsafe condition in the parking lot but she did not know how this information pertained to appellant's alleged injury. She noted that appellant had complained to her on many occasions about sciatic pain. Ms. Bianchine was aware of this condition because she was undergoing surgery in

March 2006 to correct her own sciatica and L5-4 disc problems. She and appellant often discussed the similar nature of their back and leg pain.

Ms. Vecchio's February 14, 2006 addendum treatment note reported appellant's back and neck symptoms and her headaches, dizziness and nausea. She instructed appellant to remain off work until February 21, 2006. Dr. Cecil's February 21, 2006 disability certificate stated that appellant was unable to work from that date through March 7, 2006. A February 28, 2006 disability certificate from Dr. Frank L. Genovese, a Board-certified neurosurgeon, stated that appellant should remain off work until she was evaluated on March 27, 2006 by Dr. Paul W. Salerno, a Board-certified physiatrist, for her severe neck, arm and shoulder pain. On January 3, 2004 Dr. Lau performed several x-rays. Appellant's lumbar spine was negative and there was no evidence of a fracture of her thoracic spine. Minimal degenerative changes were found in her cervical spine.

By decision dated March 23, 2006, the Office denied appellant's claim on the grounds that she did not establish that the claimed employment incident occurred at the time, place and in the manner alleged and that she sustained a medical condition caused by the alleged incident.

The Office received Dr. Cecil's February 27, 2006 treatment note which stated that appellant sustained cervical disc disease.

By letter dated April 12, 2006, appellant requested reconsideration of the Office's March 23, 2006 decision. She submitted Dr. Salerno's March 27, 2006 prescription note which stated that appellant had pain in her cervical spine, left arm and low back. Form reports from Dr. Cecil, Dr. Craig Anderson, a chiropractor, and Dr. Salerno dated March 29 and 31 and April 3, 2006, respectively, provided a history that on December 29, 2005 appellant slipped on ice while in the performance of duty. Dr. Cope stated that she fell on ice at work on the claimed date. Drs. Cecil, Cope and Salerno diagnosed cervical, lumbar and upper extremity pain, lumbar spine sprain/strain, cervical, lumbar and thoracic strains and lumbar contusion and radiculopathy. Dr. Anderson diagnosed "847.25, 724.8, 847.0, 722.0 and 847.15." All of these physicians indicated with an affirmative mark that the diagnosed conditions were caused by the December 29, 2005 incident. Dr. Cecil stated that appellant worked on December 30 and 31, 2005 which aggravated her original injury.

In a March 27, 2006 narrative report, Dr. Salerno reiterated his prior history of the alleged injury. He reported appellant's complaints and his findings on physical and radiological examination. Dr. Salerno opined that appellant had cervical spine pain with left upper extremity pain symptoms status post the alleged injury of December 29, 2005. He stated that her symptoms were consistent with left C5-6 herniated nucleus pulposus with associated myofascial pain. Appellant also sustained lumbar spine sprain/strain status post the alleged December 29, 2005 work injury. Dr. Salerno stated that her symptoms were likely musculoskeletal in nature.

Dr. Anderson's January 2, 2006 narrative report reiterated his prior history of the alleged December 29, 2005 injury. He reported his findings on physical and objective examination. Dr. Anderson stated that the new primary diagnosis was an acute moderate lumbar strain/sprain with associated acute moderate sacroiliac sprain/strain. He also diagnosed acute moderate cervical sprain/strain with associated cervical disc displacement and an acute moderate thoracic

sprain/strain with associated thoracic somatic dysfunction. Dr. Anderson opined that these conditions were caused by the alleged December 29, 2005 injury.

In a January 25, 2006 report, Ms. Vecchio stated that appellant had a serious health condition that began on December 29, 2005 and would probably continue until June 30, 2006. She further stated that the probable duration of her incapacity was contained in her January 24, 2006 report.

The Office received additional treatment notes from appellant's physical therapist covering intermittent dates from January 6 through May 2006.

By decision dated April 26, 2006, the Office denied appellant's request for reconsideration on the grounds that her arguments and the evidence that she submitted were insufficient to warrant a merit review of the Office's prior decision.

The Office received Dr. Cope's May 2, 2006 report which reiterated his prior history of injury. Dr. Cope noted appellant's ability to work and medical treatment she received following the alleged injury including an evaluation on January 3 and 9, 2006 in his office by Thomas Venditti, a physician's assistant. He reported appellant's symptoms and his findings on physical examination. Dr. Cope opined that she had a left lateral herniated nucleus pulposus at C5-6 and cervical, thoracic and lumbosacral strains that were related to the December 29, 2005 work incident.

By letter dated May 24, 2006, appellant requested reconsideration of the Office's April 26, 2006 decision. She submitted Dr. Cope's May 16, 2006 report which reiterated appellant's history of injury and medical treatment, her ability to work and his opinion regarding causal relation as set forth in his May 2, 2006 report.

On August 25, 2006 the Office issued a decision, denying appellant's request for reconsideration on the grounds that the evidence submitted was of an immaterial nature and insufficient to warrant a merit review of its prior decisions.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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.[2] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3] Establishing that a federal employee has sustained

[1] 5 U.S.C. §§ 8101-8193.

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

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

a traumatic injury in the performance of duty involves two components. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.[4] Second, the employee must submit evidence, in the form of medical evidence to establish that the employment incident caused a personal injury.[5] 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.[6]

An employee who claims benefits under the Act has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[7] An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[8] An employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[9] Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[10] However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[11]

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained a back and neck injury in the performance of duty on December 29, 2005. The Board finds that she established that the employment incident occurred on December 29, 2005, as alleged.

The Board finds that there are not such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim that she experienced an employment incident on December 29, 2005. Appellant consistently claimed that she sustained a back and neck injury on

[4] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[5] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[6] *Elaine Pendleton*, *supra* note 2; 20 C.F.R. § 10.5(a)(14).

[7] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[8] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[9] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[10] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[11] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

December 29, 2005 as a result of slipping and falling on ice in the employing establishment's parking lot while loading mail into her car. Ms. Thatcher stated that, although appellant did not appear to be hurt and proceeded to deliver mail, appellant cautioned her to be careful on the parking lot because she slipped by her car and almost fell. Ms. Thatcher stated that she was aware of the icy conditions because she almost slipped while getting out of her car on December 29, 2005. Dr. Cope's January 3, 2006 report and Ms. Vecchio's January 11 and 24, 2006 reports provided a history as related by appellant that on December 29, 2005 she slipped and fell on ice at work.

Ms. Bianchine and Ms. Coulombe stated that appellant did not promptly report the December 29, 2005 incident, noting that she did not report the incident until January 3, 2006. They also stated that she provided an inconsistent or incomplete statement of injury. Ms. Bianchine noted that on January 3, 2006 appellant called in sick but failed to mention that she sustained an injury. She indicated that it was not until a conversation later that day when appellant told her that she had slipped on ice in the parking lot on December 29, 2005. Both Ms. Bianchine and Ms. Coulombe stated that appellant had underlying neck and back conditions prior to the alleged injury as she had made numerous chiropractic visits for chronic neck and back pain. They both contended that she claimed an injury because she could not afford to fix the car she used to deliver mail. Ms. Bianchine's statement regarding this contention is based on Mr. Fisher's account that appellant's car was not working properly and that she could not afford a new one. The Board notes that the record does not contain any corroborative evidence such as, a statement from Mr. Fisher or Mr. Ketchum regarding the status of appellant's car and her ability to afford a new one.

Appellant explained that she did not promptly report the December 29, 2005 incident to her supervisor because she did not feel any pain at that moment, just stiffness and tightness. In addition, she stated that her supervisor was busy waiting on customers at a counter at the time of the incident. Appellant stated that on December 30, 2005 she told Ms. Mercier that her back and neck were stiff and sore from slipping on ice the day before. Ms. Thatcher stated that appellant told her that she slipped on ice and almost fell while loading mail into her car.

Although appellant continued to work on December 30 and 31, 2005 and January 1 and 2, 2006, she sought medical treatment for her increasing symptoms within a short time period after the December 29, 2005 incident. She was examined by Dr. Cope on January 3, 2006 and he provided a history of the December 29, 2005. Dr. Cope opined that appellant sustained lumbar radiculopathy and thoracic and cervical strains and that she was totally disabled from January 3 through 10, 2006 and ordered physical therapy. Ms. Bianchine stated that on January 3, 2006 appellant called her from her physician's office and told her that she may have sustained a herniated disc as a result of the December 29, 2005 incident. She was evaluated on January 10, 2006 by Ms. Vecchio who provided a history of injury, diagnosed cervical and lumbar strains and lumbar contusion and found her totally disabled from that date through January 24, 2006.

Appellant stated that prior to the December 29, 2005 incident she had not experienced any back or neck pain or discomfort. She denied undergoing several chiropractic treatments. Appellant stated that she was only treated once in August 2004 and April 2005. Contrary to Ms. Coulombe's contention that appellant did not want to work during the holidays, Ms. Mercier

stated that appellant told her she had no plans to call in during the week between Christmas and New Year's Day.

Based on the statements of appellant, Ms. Thatcher, Ms. Mercier and Ms. Bianchine and the reports and disability certificates of Dr. Cope and Ms. Vecchio, the Board finds that the employment incident in the form of slipping and falling on ice in the employing establishment's parking lot on December 29, 2005 did in fact occur.

The Board, however, finds that appellant did not submit sufficient medical evidence to establish that she sustained a back and neck injury due to the accepted December 29, 2005 employment incident.

As noted, Dr. Cope's January 3, 2006 report provided a history of the December 29, 2005 employment incident. In this report, as well as, his January 9, 2006 report, he stated that appellant sustained lumbar radiculopathy and thoracic and cervical strains on December 29, 2005. Dr. Cope's reports, however, failed to address how the lumbar radiculopathy and thoracic and cervical strains were caused or contributed to by the accepted employment incident. The Board finds that this evidence is insufficient to establish appellant's claim.

The disability certificates, reports and treatment note from Ms. Vecchio, a nurse practitioner, are of no probative value because a nurse practitioner is not considered a physician under the Act.[12] Similarly, the treatment notes from appellant's physical therapists do not constitute probative medical evidence inasmuch as a physical therapist is not considered a physician under the Act.[13] Further, the undated and unsigned reports submitted by appellant have no probative value because they are not signed by a physician.[14] As the reports lack proper identification, the Board finds that they do not constitute probative medical evidence sufficient to establish appellant's burden of proof.[15]

Dr. Cecil's January 24, 2006 report stated that appellant sustained a neck, low back and left leg injury on December 29, 2005. His January 31, 2006 report stated that she was totally disabled and that she could not perform her regular work duties because they involved physical labor. Dr. Cecil failed to provide a diagnosis for appellant's neck, back and left leg conditions. He also failed to provide medical rationale explaining how and why the December 29, 2005 accepted employment incident caused an injury and resultant disability. Dr. Cecil's reports are insufficient to establish appellant's claim.

[12] 5 U.S.C. § 8101(2) which defines "physician" as including surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see also Joseph N. Fassi*, 42 ECAB 231 (1991) (medical evidence signed only by a registered nurse or nurse practitioner is generally not probative evidence).

[13] 5 U.S.C. §§ 8101-8193; 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).

[14] *Ricky S. Storms*, 52 ECAB 349 (2001).

[15] *Vickey C. Randall*, 51 ECAB 357 (2000); *Merton J. Sills*, 39 ECAB 572 (1988) (Reports not signed by a physician lack probative value).

The disability certificates of Drs. Cope, Cecil and Genovese, finding that appellant was totally disabled for work from January 3 through 10 and February 21 through March 27, 2006 are insufficient to establish her claim because they failed to provide a diagnosis and to discuss how the diagnosed condition was caused by the December 29, 2005 employment incident.[16]

Appellant has not submitted rationalized medical evidence establishing that she sustained a back and neck injury in the performance of duty on December 29, 2005. She has failed to meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[17] the Office's regulations provide that 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.[18] 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.[19] 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 of the merits.

ANALYSIS -- ISSUE 2

As previously stated, the Board has found the evidence of record sufficient to establish that the December 29, 2005 incident occurred as alleged, but insufficient to establish that appellant sustained neck and back injuries causally related to this accepted work incident. The relevant underlying issue is whether appellant sustained back and neck injuries causally related to the December 29, 2005 employment incident.

In support of her April 12, 2006 reconsideration request, appellant submitted Dr. Cecil's February 27, 2006 treatment note which stated that she had cervical disc disease. Dr. Salerno's March 27, 2006 prescription note stated that appellant suffered from pain in the cervical spine, left arm and low back. This evidence fails to address whether appellant sustained an injury causally related to the December 29, 2005 employment incident. In a March 27, 2006 report, Dr. Salerno stated that appellant sustained a left C5-6 herniated nucleus pulposus with associated myofascial pain and a lumbar spine sprain/strain status post the December 29, 2005 work injury. Although Dr. Salerno opined that appellant sustained injuries following the December 29, 2005 employment incident, he did not specifically state that these injuries were caused by the accepted employment incident. The Board has held that the submission of evidence which does not

[16] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

[17] 5 U.S.C. §§ 8101-8193. 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).

[18] 20 C.F.R. § 10.606(b)(1)-(2).

[19] *Id*. at § 10.607(a).

address the particular issue involved does not constitute a basis for reopening a case.[20] Because neither Dr. Cecil nor Dr. Salerno addressed the relevant issue in this case, their treatment and prescription notes and report are insufficient to warrant reopening appellant's claim for further merit review.[21]

Dr. Anderson, a chiropractor, stated in reports dated January 2 and March 31, 2006, that appellant sustained an acute moderate lumbar strain/sprain with associated acute moderate sacroiliac sprain/strain, acute moderate cervical sprain/strain with associated cervical disc displacement and acute moderate thoracic sprain/strain with associated thoracic somatic dysfunction causally related to the December 29, 2005 employment incident. However, Dr. Anderson's reports are irrelevant and do not constitute a basis for reopening appellant's claim for further merit review because 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 demonstrated by x-ray to exist.[22] There is no indication that Dr. Anderson treated a spinal subluxation as demonstrated by x-ray to exist and, therefore, these nonmedical documents would have no bearing on the main issue of the present case which is medical in nature. The Board finds that Dr. Anderson's reports do not constitute a basis for reopening appellant's claim for further merit review.

As noted, a nurse and physical therapist are not considered physicians under the Act. Therefore, Ms. Vecchio's January 25, 2006 report and the treatment notes from appellant's physical therapists are insufficient to warrant reopening her claim for further merit review.[23]

The March 29 and 30 and April 3, 2006 form reports of Drs. Salerno, Cecil and Cope indicated with an affirmative mark that appellant's lumbar and cervical conditions were caused by the December 29, 2005 employment incident. The Board finds that these reports constitute pertinent new and relevant medical evidence not previously considered by the Office, which requires reopening of appellant's claim for merit review. The Board also finds that Dr. Cope's May 16, 2006 report, which was submitted in support of appellant's May 24, 2006 reconsideration request, and states that her cervical, thoracic and lumbar conditions were causally related to the December 29, 2005 employment incident constitutes pertinent new and relevant medical evidence, which requires reopening of appellant's claim for merit review. The underlying issue in the present case is whether appellant established that she sustained neck and back injuries due to the December 29, 2005 employment incident. Drs. Salerno, Cecil and Cope stated that appellant sustained cervical spine pain with left upper extremity pain symptoms, cervical, lumbar and thoracic strains, lumbar contusion, lumbar radiculopathy and left lateral herniated nucleus pulposus at C5-6 due to the December 29, 2005 work incident.

[20] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[21] *Id.*

[22] 5 U.S.C. § 8101(2), 20 C.F.R. § 10.311(a). *See Thomas W. Stevens*, 50 ECAB 288 (1999); *George E. Williams*, 44 ECAB 530 (1993).

[23] *See supra* notes 12 and 13.

Dr. Cope's May 2, 2006 report which was submitted in support of appellant's May 24, 2006 reconsideration request diagnosed left lateral herniated nucleus pulposus at C5-6 and cervical, thoracic and lumbosacral strains. Because Dr. Cope did not address the relevant issue of whether the diagnosed conditions were caused by the accepted employment incident, this report is insufficient to warrant reopening appellant's claim for further merit review.[24]

Since appellant has submitted evidence in support of her April 12 and May 24, 2006, 2006 reconsideration requests which meets the third standard for obtaining a merit review of her case, the Board finds that the Office should have reopened the case for a review on the merits. Accordingly, the Board will remand the case to the Office for a review on the merits.

CONCLUSION

The Board finds that appellant has failed to establish that she sustained a back and neck injury in the performance of duty on December 29, 2005. The Board, however, finds that the Office improperly denied her April 12 and May 24, 2006 requests for merit review of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs March 23, 2006 decision is affirmed. The decisions of the Office dated August 25 and April 26, 2006 are reversed and the case is remanded for further action consistent with this decision.

Issued: April 9, 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

[24] *Edward Matthew Diekemper*, *supra* note 20.