United States Department of Labor
Employees' Compensation Appeals Board

L.R., Appellant	)	
and	)	**Docket No. 08-675**
	)	**Issued: September 4, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Alexandria, VA, Employer	)	

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument July 22, 2008

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 9, 2008 appellant filed a timely appeal from a November 30, 2007 decision of the Office of Workers' Compensation Programs, denying her claim for a recurrence of disability, and a December 21, 2007 decision denying her request for reconsideration. 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 sustained a recurrence of disability on July 16, 2007 causally related to her September 18, 2002 accepted lumbar strain; and (2) whether the Office abused its discretion in denying her request for reconsideration.

FACTUAL HISTORY

On September 30, 2002 appellant, then a 27-year-old letter carrier, filed an occupational disease claim alleging that, beginning on September 18, 2002, she sustained a low back injury due to carrying a heavy mailbag. The Office accepted her claim for a lumbar strain. She was

released to return to work with restrictions on September 30, 2002. On December 9, 2002 she returned to regular work.

On August 30, 2007 appellant filed a claim for a recurrence of disability as of July 16, 2007 causally related to her September 18, 2002 accepted lumbar strain.

In a disability certificate dated July 30, 2007, a physician indicated that appellant was disabled until August 6, 2007 due to neck and back pain.

In disability certificates and reports dated August 6 to 17, 2007, Dr. J. Beauchamp, a chiropractor, described his clinical findings as restricted motion, painful spasm and a positive neurovascular test. He diagnosed "lumbar" and indicated that appellant experienced gradually increasing neck pain worsened by her work. Dr. Beauchamp stated that appellant could resume restricted work on August 27, 2007.

In reports dated July 18 and October 4, 2007, Virginia M. Vesay, a physician's assistant, stated that appellant was seen on July 16, 2007 for severe leg and back pain. X-rays of her cervical and lumbar spine were normal. Appellant was advised to consult an orthopedic specialist.

By letter dated September 20, 2007, the Office requested additional evidence, including a comprehensive medical report addressing the history of appellant's condition, clinical examination findings including a discussion of any diagnostic test results, a firm diagnosis, the course of treatment followed, the results of x-ray and laboratory studies and the physician's opinion on the causal relationship between the claimed July 16, 2007 recurrence of disability and the September 18, 2002 employment-related lumbar strain. No further medical reports were submitted.

By decision dated November 30, 2007, the Office denied appellant's claim on the grounds that the medical evidence failed to establish that she sustained a recurrence of disability on July 16, 2007 causally related to her September 18, 2002 accepted lumbar strain.

Appellant requested reconsideration and submitted additional evidence which included a bill from a physician and reports from her chiropractor dated August 6 to October 8, 2007. The chiropractic reports contained no firm diagnosis, just an indication of cervical and lumbar spine problems. Dr. Beauchamp noted that appellant was involved in a motor vehicle accident in March 2007. Appellant also submitted evidence previously of record.

By decision dated December 21, 2007, the Office denied appellant's request for reconsideration on the grounds that the evidence did not warrant further merit review.[1]

[1] Subsequent to the December 21, 2007 decision, appellant submitted additional evidence. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

LEGAL PRECEDENT -- ISSUE 1

An employee who claims a recurrence of disability under the Federal Employees' Compensation Act[2] due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[3] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[4] Where no such rationale is present, medical evidence is of diminished probative value.[5]

"*Recurrence of disability* means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."[6]

ANALYSIS -- ISSUE 1

Appellant has the burden to provide medical evidence establishing that she sustained a recurrence of disability beginning July 16, 2007 causally related to her accepted September 18, 2002 lumbar strain.

In a disability certificate dated July 30, 2007, a physician indicated that appellant was disabled until August 6, 2007 due to neck and back pain. There was no diagnosis or any explanation as to how her condition and disability were causally related to her September 18, 2002 accepted lumbar strain. Therefore, this disability certificate is not sufficient to establish that appellant sustained a recurrence of disability on July 16, 2007 causally related to her September 18, 2002 employment injury.

Dr. Beauchamp, a chiropractor, described clinical findings of restricted motion, painful spasm and a positive neurovascular test. His only diagnosis was the word "lumbar." Dr. Beauchamp indicated that appellant experienced gradually increasing neck pain worsened by her work. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under 5 U.S.C. § 8101(2). A chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.[7] The Office's implementing regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the

[2] 5 U.S.C. §§ 8101-8193.

[3] *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

[4] *Lourdes Davila*, 45 ECAB 139 (1993).

[5] *Michael Stockert*, 39 ECAB 1186 (1988).

[6] 20 C.F.R. § 10.5(x).

[7] *See Mary A. Ceglia*, 55 ECAB 626 (2004).

vertebrae which must be demonstrated on any x-ray film to an individual trained in the reading of x-rays.[8] Dr. Beauchamp did not diagnosis a subluxation demonstrated by x-ray. Therefore, he is not a physician as defined in the Act and his reports are not probative on the issue of whether appellant sustained a work-related recurrence of disability on July 16, 2007.

Ms. Vesay, a physician's assistant, stated that appellant was seen on July 16, 2007 for severe leg and back pain. Reports from a physician's assistant are of no probative value. Registered nurses, licensed practical nurses and physician's assistants are not "physicians" as defined under the Act and their opinions are of no probative value.[9] Therefore, Ms. Vesay's reports are insufficient to establish that appellant sustained a recurrence of disability on July 16, 2007 causally related to her September 18, 2002 accepted lumbar strain.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[10] vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by setting forth arguments that either: (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 new pertinent evidence not previously considered by the Office.[11] When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[12]

[8] 20 C.F.R. § 10.5(bb) (2006).

[9] *See* 5 U.S.C. § 8101(2) which provides: "physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law"; *see also Roy L. Humphrey*, 57 ECAB 238 (2005).

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(2).

[12] *Id*. at § 10.608(b).

ANALYSIS -- ISSUE 2

In support of her request for reconsideration, appellant submitted a medical bill which did not address the issue of causal relationship. This bill does not constitute relevant and pertinent evidence not previously considered by the Office. She also submitted additional reports from her chiropractor. As noted, a chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist. These additional chiropractic reports did not diagnose a subluxation as shown on x-ray. Consequently, the chiropractor does not meet the definition of a physician under the Act. His reports are therefore not probative and do not constitute relevant and pertinent evidence not previously considered by the Office. Appellant also submitted evidence previously of record. Because this evidence was previously considered by the Office, it does not meet the criteria for granting a request for reconsideration and reopening a case for further merit review.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained a recurrence of disability on July 16, 2007 causally related to her September 18, 2002 accepted lumbar strain. The Board further finds that the Office did not abuse its discretion in denying her request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 21 and November 30, 2007 are affirmed.

Issued: September 4, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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