United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
	)	**Docket No. 10-616**
and	)	**Issued: October 8, 2010**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Buffalo, NY, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 4, 2010 appellant, through her representative, filed a timely appeal from the September 16, 2009 decision of the Office of Workers' Compensation Programs denying her claim for an employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.[1]

ISSUE

The issue is whether appellant established that she sustained an injury in the performance of duty on February 19, 2008, as alleged.

[1] The Board notes that the Office issued subsequent decisions in this case on February 4 and March 1, 2010. In the February 4, 2010 decision, the Office denied appellant's request for reconsideration without conducting a review of the merits. In a decision dated March 1, 2010, it denied appellant's request for a hearing. The Board finds these decisions null and void, as both the Board and the Office cannot have jurisdiction over the same issue in the same case at the same time as these decisions changed the status of the decision on appeal. *Douglas E. Billings*, 41 ECAB 880, 895 (1990); *see also Thomas W. Stevens*, 50 ECAB 288, 289 n.2 (1999) and 20 C.F.R. § 501.2(c).

On appeal appellant, through her attorney, contends that the Office's decision is contrary to fact and law.

FACTUAL HISTORY

On February 21, 2008 appellant, then a 52-year-old mail processor, filed a traumatic injury claim alleging that on February 19, 2008 she was struck by a pie cart and sustained low back pain and soreness in her neck.

On April 1, 2008, Dr. Gerard J. Werder, a chiropractor, advised that appellant presented to his office on February 19, 2008 complaining of pain in her neck as a result of a work injury that occurred that morning when a supervisor pushed a cart that struck her on the right side of the low back. He diagnosed an exacerbation of L4-5 subluxation with lumbosacral strain and sciatic neuralgia with a subluxation at C5-6 and cervical strain-sprain.[2] Dr. Werder stated that the force of the contact, knocking her into the machine and the attempt to catch herself was the competent producing cause of her injury. Dr. Werder stated that appellant's lumbar spine already had a permanent injury and that she would not materially worsen in that region. Appellant's cervical spine was improving, although she still had episodes of pain, stiffness and tingling in her right arm and hand. In an undated report, Dr. Werder recounted appellant's history. He reiterated that the force of the impact of the pie cart against the right side of appellant's body caused her to lurch forward, injuring the right-sided erector muscles of her cervical and lumbar spine. This resulted in muscle spasms of significant force upon her right cervical spine to cause a disc bulge at C3-4 and the reversal of her lordotic curve and forward slippage of C7 upon T1 (anterolisthesis). Dr. Werder stated, "The force of the impact was most certainly the competent producing cause of this injury."[3]

In a December 4, 2008 report, Dr. James G. Egnatchik, a Board-certified neurosurgeon, noted that appellant stated that she had symptoms since February 19, 2008 when she was hit in the upper back by a large cart. He reviewed the magnetic resonance imaging scan which showed spondylosis at C5-6 and C6-7. Dr. Egnatchik also noted stenosis of the central spine due to epidural encroachment from the disc/spur complexes as well as some degenerative changes. He incidentally noted a multinodual thyroid goiter.

By decision dated March 5, 2009, the Office denied appellant's claim for compensation. It accepted that on February 19, 2008 appellant was struck by a pie cart, but denied the claim as the medical evidence did not establish that her condition was either caused or aggravated by the accepted work factors. The Office noted that there was no medical opinion or rationale on how the specific work incident caused the diagnosed medical condition or aggravated the preexisting cervical and lumbar conditions.

[2] Dr. Werder stated that appellant was sent for a magnetic resonance imaging scan of the cervical spine that revealed disc bulge at C3-4 degenerative disc disease at C5-6 and C6-7, with anterolisthesis of C7 on T1.

[3] By letter dated January 28, 2009, the Office advised appellant that chiropractors were deemed a physician under the Act in limited circumstances. It was noted that Dr. Werder had not taken x-rays to diagnose a subluxation and requested additional evidence.

On March 15, 2009 appellant requested an oral hearing. At the hearing held on July 8, 2009 she noted that she had worked at the employing establishment for over 18 years as a mail processor and described her duties. Appellant noted that she sought initial treatment with a nurse at the employing establishment clinic immediately after the incident. She then saw Dr. Werder, who was already her doctor. Appellant noted that she returned to her regular duties after two scheduled days off.

By decision dated September 16, 2009, the hearing representative affirmed the Office's March 5, 2009 decision.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[4] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,[5] including that she is an "employee" within the meaning of the Act[6] and that she filed her claim within the applicable time limitation.[7] The employee must also establish that she sustained an injury in the performance of duty as alleged and that her disability for work, if any, was causally related to the employment injury.[8]

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 or she actually experienced the employment incident at the time, place and in the manner alleged.[9] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[10]

In order to satisfy the burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[11] Neither the fact that the condition became apparent during a period of

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[4] 5 U.S.C. §§ 8101-8193.

[5] *J.P.*, 59 ECAB ___ (Docket No. 07-1159, issued November 15, 2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[6] *See M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

[7] *R.C.*, 59 ECAB ___ (Docket No. 07-1731, issued April 7, 2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

[8] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[9] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[10] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

[11] *Gary L. Fowler*, 45 ECAB 365 (1994).

employment nor appellant's belief that the employment caused nor aggravated her condition is sufficient to establish causal relationship.[12]

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 and subject to regulation by the Secretary.[13]

ANALYSIS

Appellant alleged that she sustained injury when she was struck by a pie cart on February 21, 2008 during the performance of her federal duties. The Board notes that there is no dispute that this incident occurred, as alleged. The Board finds, however, that appellant has not submitted sufficient medical evidence to establish that she sustained an injury to her neck or low back causally related to this incident. As noted, appellant's burden of proof includes the submission of rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship between the employment incident and the diagnosed condition. The record contains no such medical evidence.

Dr. Egnatchik obtained a history from appellant that she was hurt on February 19, 2008, however he never clearly relates this incident to the diagnosis of a medical condition. The reports of Dr. Werder are insufficient as chiropractors are physicians under the Act 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.[14] As there is no evidence that Dr. Werder was manipulating the spine to correct a subluxation as demonstrated by an x-ray, his opinion does not constitute a medical opinion under the Act.

An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.[15] There is insufficient medical evidence to establish that appellant sustained a work-related injury on February 19, 2008. Accordingly, the Board finds that appellant failed to meet her burden of proof.[16]

CONCLUSION

The Board finds that appellant has not established that she sustained an injury in the performance of duty on February 19, 2008, as alleged.

[12] *Phillip L. Barnes*, 55 ECAB 426 (2004); *Jamel A. White*, 54 ECAB 224 (2002).

[13] *Paul Foster*, 56 ECAB 208 (2004)

[14] *Id.*

[15] *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz*, 30 ECAB 57 (1979).

[16] The record on appeal contains evidence submitted after the Office issued its September 16, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 16, 2009 is affirmed.

Issued: October 8, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board