

On appeal, appellant's representative contends that: (1) an x-ray is not necessary to diagnose a subluxation; (2) only a licensed chiropractor can diagnose a chiropractic subluxation; and (3) OWCP erroneously applied or interpreted a specific point of law.

FACTUAL HISTORY

On March 26, 2010 appellant, then a 59-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained neck, middle and lower back conditions due to factors of her federal employment, including repetitive sweeping, lifting and twisting. She first became aware of her conditions on March 19, 2010 and attributed them to her federal employment on March 23, 2010.

In a March 22, 2010 report, Dr. Sandeep Naidu, a Board-certified radiologist, diagnosed mild degenerative changes in the lower cervical spine and mid-thoracic spine without evidence of fracture based on anteroposterior and lateral views of the thoracic spine. He opined that the thoracic vertebral bodies were unremarkable without fracture or subluxation.

In a March 26, 2010 medical report, Dr. Louis S. Catapano, a chiropractor, diagnosed cervical, thoracic and lumbar subluxations. He opined that appellant was totally disabled and could return to work by April 6, 2010.

In an April 5, 2010 medical report, Dr. Catapano reiterated the diagnoses of cervical, thoracic and lumbar subluxation and reported that x-rays were taken of appellant on March 22, 2010 by Dr. Naidu. He explained that although there was no diagnosis of a medical subluxation by the radiologist, a chiropractor was capable of diagnosing a chiropractic subluxation. Upon review of the x-rays and physical examination, Dr. Catapano found subluxations in the lower cervical spine at C5-6 and in the mid-thoracic spine at T5-7. He added that these diagnoses were substantiated by his physical examination. Dr. Catapano also diagnosed a subluxation of L4-5 in the lumbar spine although he did not have an x-ray report, but noted that one was not necessary to diagnose lumbar subluxation.

By letter dated April 23, 2010, OWCP requested additional factual and medical information from appellant. It allotted her 30 days to submit additional evidence and respond to its inquiries. Appellant resubmitted medical reports from Drs. Naidu and Catapano along with an accident report form.

By decision dated June 24, 2010, OWCP denied the claim for compensation finding that the medical evidence submitted was not sufficient to establish fact of injury. It noted that it only received x-ray results of appellant's thoracic spine which indicated that there was no subluxation and did not receive any x-ray reports concerning her cervical or lumbar spine.

On August 4, 2010 appellant requested reconsideration and submitted new evidence. In a July 23, 2010 report, Dr. Catapano indicated that she submitted thoracic spine x-rays that showed both the lower cervical spine and thoracic spine and revealed subluxations.

By decision dated August 19, 2010, OWCP denied appellant's request for reconsideration. It found that she did not submit sufficient evidence to warrant a merit review of the June 24, 2010 decision because she did not show that OWCP erroneously applied or

interpreted a point of law or “presented a point of law or fact not previously considered,” or submit relevant and pertinent new evidence not previously considered. OWCP explained that Dr. Catapano’s diagnosis of subluxation was different than that required under FECA and OWCP’s regulations.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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 FECA, that the claim was timely filed within the applicable time limitation period of FECA and that an injury⁴ was sustained in the performance of duty. These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, an employee must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on whether there is a causal relationship between the employee’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 employee, 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 employee.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof to establish that federal employment factors caused or aggravated her neck, middle or lower back conditions. While appellant submitted a statement in which she identified the factors of employment that she believed caused the condition, in order to establish a claim that she sustained an employment-

³ 5 U.S.C. §§ 8101-8193.

⁴ OWCP’s regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

⁵ See *Ellen L. Noble*, 55 ECAB 530 (2004); *O.W.*, Docket No. 09-2110 (issued April 22, 2010).

⁶ See *Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989). *D.R.*, Docket No. 09-1723 (issued May 20, 2010).

⁷ *O.W.*, *supra* note 5.

related injury, she must also submit rationalized medical evidence which explains how her medical conditions were caused or aggravated by the implicated employment factors.⁸

In a March 26, 2010 report, Dr. Catapano diagnosed cervical, thoracic and lumbar subluxation. He opined that appellant was totally disabled and advised her to return to work by April 6, 2010. In an April 5, 2010 medical report, Dr. Catapano diagnosed subluxations in the lower cervical spine at C5-6 and in the mid-thoracic spine at T5-7, upon physical examination and a review of March 22, 2010 x-rays. He also diagnosed a subluxation of L4-5 in the lumbar spine without an x-ray report.

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 FECA unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.⁹ OWCP's implementing regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.¹⁰ Dr. Catapano diagnosed cervical and thoracic subluxations in his medical reports dated March 26 and April 5, 2010 medical reports. The Board finds that, as he diagnosed spinal subluxations as demonstrated by x-ray to exist, he is considered a physician under FECA and his medical reports are of probative value on the issue of whether appellant sustained a neck and middle back condition due to factors of her federal employment.¹¹ Although Dr. Catapano is considered a physician under FECA, he did not provide a rationalized medical opinion as to how the implicated factors of her federal employment, including repetitive sweeping, lifting and twisting, caused or aggravated her neck and middle back conditions. Appellant failed to meet her burden of proof.

In a March 22, 2010 radiological report, Dr. Naidu diagnosed mild degenerative changes in the lower cervical spine and mid-thoracic spine without evidence of fracture. He opined that the thoracic vertebral bodies were unremarkable without fracture or subluxation. Dr. Naidu did not provide a rationalized medical opinion as to how the implicated factors of appellant's federal employment caused or aggravated her neck, middle and lower back conditions. Therefore, appellant failed to meet her burden of proof.

As appellant has not submitted any rationalized medical evidence to support her allegation that she sustained an injury causally related to the indicated employment factors, she failed to meet her burden of proof to establish a claim.

⁸ *Donald W. Wenzel*, 56 ECAB 390 (2005); *Leslie C. Moore*, 52 ECAB 132 (2000); A.C., Docket No. 08-1453 (issued November 18, 2008).

⁹ See *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹⁰ 20 C.F.R. § 10.5(bb).

¹¹ As Dr. Catapano's diagnosis of lumbar subluxation was not supported by an x-ray report, his reports are not probative on the issue of whether appellant sustained an employment-related lower back condition.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128 of FECA,¹² OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹³ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.¹⁴

ANALYSIS -- ISSUE 2

On appeal, appellant's representative contends that: (1) an x-ray is not necessary to diagnose a subluxation; (2) only a licensed chiropractor can diagnose a chiropractic subluxation; and (3) OWCP erroneously applied or interpreted a specific point of law. Appellant's August 4, 2010 request for reconsideration did not advance a relevant legal argument not previously considered by OWCP. She is stating that OWCP was incorrect in not considering Dr. Catapano a physician. However, this argument is now moot as the Board finds that Dr. Catapano is considered a physician under FECA. Appellant's contentions on reconsideration do not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, she is not entitled to a review of the merits of her claim under the first two requirements under section 10.606(b)(2).

To the extent appellant argued that the medical record established causation, the Board notes that causal relationship is a medical issue and must be supported by medical evidence.¹⁵ In support of her reconsideration request, she submitted a July 23, 2010 medical report by Dr. Catapano who indicated that the March 22, 2010 thoracic spine x-rays showed both the lower cervical spine and thoracic spine and, in his medical opinion, revealed subluxations. The evidence from Dr. Catapano which was not previously of record, while new is not relevant to the issue of causation as it contains no additional opinion on the cause of appellant's claimed neck and back conditions. The Board has held that the submission of evidence which does not address the particular issue involved in the claim does not constitute a basis for reopening a case for merit review.¹⁶ Consequently, the evidence submitted by appellant on reconsideration does not establish a basis for reopening the claim for a merit review. Thus, the Board finds that OWCP properly denied her August 4, 2010 request for reconsideration.

¹² 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the 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).

¹³ 20 C.F.R. § 10.606(b)(1)-(2). See *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁴ *Id.* at § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006) (when an application for review of the merits of a claim does not meet at least one of the three regulatory requirements OWCP will deny the application for review without reviewing the merits of the claim).

¹⁵ See *Y.J.*, Docket No. 08-1167 (issued October 7, 2008).

¹⁶ See *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained neck, middle and lower back conditions in the performance of duty causally related to factors of her federal employment. Because appellant's request for reconsideration did not meet at least one of the criteria required to reopen a case, the Board finds that OWCP properly denied her request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the August 19 and June 24, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 16, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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