



## **FACTUAL HISTORY**

On June 23, 2011 appellant, then a 38-year-old postal distribution processing clerk, filed an occupational disease claim. She initially injured her neck in a fall in June 2008 but was now having chronic neck pain aggravated by sweeping and reaching duties. Appellant noted that her pain worsened as her shift progressed.

By letter dated July 5, 2011, OWCP asked appellant to submit additional factual and medical evidence in support of her claim.

Appellant submitted a June 24, 2011 statement documenting the history of her chronic neck pain and describing the duties of her position. She also submitted a June 21, 2011 duty status report from Dr. Dennis L. Baker, a chiropractor, who listed a history that she originally hurt her neck in a fall and was now having chronic neck pain in the same area with repetitive motion, such as sweeping and working the sorting machines. Dr. Baker diagnosed cervical subluxation of the spine. He advised that appellant was limited to lifting 5 pounds continuously and 40 pounds intermittently.

Appellant also submitted the results of a July 5, 2011 x-ray of the cervical spine that was interpreted by Dr. David Levitsky, a Board-certified radiologist. The reasons for the study were listed as cervical strain and sprain and cervical subluxation. The x-ray was interpreted as normal and showed a stable cervical spine since July 16, 2008.

By decision dated August 17, 2011, OWCP denied appellant's claim as the medical evidence did not establish causal relationship.

On September 11, 2011 appellant requested reconsideration. She noted that Dr. Baker was sending an additional report in support of her claim; however, no new evidence was received.

By decision dated October 11, 2011, OWCP denied further review of the merits.

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

An employee seeking compensation under FECA<sup>2</sup> has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence,<sup>3</sup> including that she is an "employee" within the meaning of FECA<sup>4</sup> and that she filed her claim within the applicable time limitation.<sup>5</sup> 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

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<sup>2</sup> *Id.* at §§ 8101-8193.

<sup>3</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

<sup>4</sup> *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *See* 5 U.S.C. § 8101(1).

<sup>5</sup> *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

related to the employment injury.<sup>6</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>7</sup>

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (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.<sup>8</sup>

Causal relationship is a medical issue<sup>9</sup> and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>10</sup> must be one of reasonable medical certainty,<sup>11</sup> and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.<sup>12</sup>

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

The Board finds that appellant failed to establish that she sustained an injury in the performance of duty causally related to factors of her federal employment. Appellant alleged that an injury to her neck was aggravated by the duties of her federal employment. Her claim was denied because she failed to establish a causal relationship between the accepted duties of her federal employment and an aggravation of her cervical condition.

The medical evidence does not establish that appellant sustained an injury causally related to the accepted duties of her federal employment. Section 8101(2) of FECA 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>13</sup> The June 21, 2011 duty status form submitted by appellant's

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<sup>6</sup> *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>7</sup> *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>8</sup> *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

<sup>9</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

<sup>10</sup> *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>11</sup> *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

<sup>12</sup> *See William E. Enright*, 31 ECAB 426, 430 (1980).

<sup>13</sup> 5 U.S.C. § 8101(2).

chiropractor, Dr. Baker, noted a subluxation, but did not state that he was treating her with manipulation of the spine or that the subluxation was diagnosed by x-ray. The only x-ray in the record is the July 5, 2011 x-ray obtained after the June 21, 2011 duty status report from Dr. Baker. As Dr. Baker has not diagnosed subluxation by x-ray, he is not a physician as defined under FECA and his report is of no probative value.

The July 5, 2011 radiology report of Dr. Levitsky does not address causal relationship.

Appellant has not meet her burden of proof to establish that she sustained an injury causally related to her federal employment.

### **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>14</sup> OWCP's regulations provide that the evidence or argument submitted by 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.<sup>15</sup> To be entitled to a merit review of an OWCP 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.<sup>16</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

In requesting reconsideration, appellant did not argue that OWCP erroneously interpreted a specific point of law nor did she advance a relevant legal argument not previously considered. Furthermore, she did not submit any new evidence with her reconsideration request. Although appellant referenced a medical report in her reconsideration request, no such report was timely received. Accordingly, the Board finds that OWCP properly declined to reopen her claim for consideration of the merits.

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 and 10.607.<sup>18</sup>

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<sup>14</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>15</sup> 20 C.F.R. § 10.606(b)(2).

<sup>16</sup> *Id.* at § 10.607(a).

<sup>17</sup> *Id.* at § 10.608(b).

<sup>18</sup> On appeal, appellant contends that a September 6, 2011 medical report should be considered. This report was received by OWCP after the issuance of its October 11, 2011 decision. The Board lacks jurisdiction to review evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

**CONCLUSION**

The Board finds that appellant did not establish that she sustained an injury to her neck causally related to factors of her federal employment. The Board further finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 11 and August 17, 2011 are affirmed.

Issued: September 25, 2012  
Washington, DC

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

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

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