

**United States Department of Labor
Employees' Compensation Appeals Board**

B.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cincinnati, OH, Employer**

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**Docket No. 13-1331
Issued: November 14, 2013**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 15, 2013 appellant, through counsel, filed a timely appeal of a March 29, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on July 3, 2012, as alleged.

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 10, 2012 appellant, then a 30-year-old letter carrier (transitional employee), filed a traumatic injury claim alleging that on July 3, 2012, while walking up stairs delivering mail, his right leg gave out. The employing establishment controverted his claim.

By letter dated August 2, 2012, OWCP asked appellant to submit further information, including medical reports.

Appellant submitted progress reports dated July 12 through August 2, 2012 by Dr. Warren G. Harding, III, a treating Board-certified orthopedic surgeon, who treated appellant for persistent moderate severe pain and loss of mobility in the right hip area and similar, but much less pain, in his left hip. Dr. Harding noted a history that the pain has been present for nine days and that appellant was climbing steps at the time of onset of pain. His primary diagnosis was enthesopathy of the hip region, with secondary diagnoses of back and hip pain. Dr. Harding noted a dramatic improvement in appellant's right hip and lower extremity pain while he was on a steroid dose pack. He released appellant to return to work with restrictions. On August 2, 2012 Dr. Harding noted that he was concerned about appellant's exact diagnoses and recommended a magnetic resonance imaging (MRI) scan and assessment of the hip. He indicated on a work excuse report that appellant was released to modified duty. On August 27, 2012 Dr. Harding noted that appellant was excused for work from July 5 to 12, 2012 to protect his hip.

Appellant also submitted notes from his chiropractor, Dr. Andrea Almond, commencing August 8, 2012. Dr. Almond diagnosed lumbosacral strain, right hip strain, lumbosacral neuritis and radiculitis. She stated that her findings were consistent with the history given by appellant of delivering mail and feeling something pop when going up stairs. On August 10, 2012 Dr. Almond recommended work limitations.

By decision dated September 6, 2012, OWCP denied appellant's claim. It found that the medical evidence did not establish a causal relationship between his hip condition and the accepted July 3, 2012 incident.

On September 24, 2012 appellant requested a telephone hearing before an OWCP hearing representative. At the hearing held on January 10, 2013, he testified that on July 3, 2012, he was walking up concrete steps when his right leg bent inward causing him to lose balance and almost fall. Since the July 3, 2012 incident, appellant had not sustained any further injuries. He testified that his employment with the employing establishment ended in September 2012 and that he was now a truck driver for a private employing establishment. Appellant submitted additional chiropractic treatment notes dated through September 10, 2012.

In a January 29, 2013 report, Dr. Harding noted that appellant was most recently evaluated by him on August 2, 2012 at which point he continued to have pain in the right hip trochanteric and inguinal area, increased by motion and weightbearing and especially internal rotation of the hip. He noted that the diagnosis at that time was unclear and a limited MRI scan of the hip was recommended, but that the test was not accomplished. Dr. Harding noted that the

onset of pain occurred while appellant was working and climbing steps. He further noted that an MRI scan assessment of the hip and lumbosacral spine would be helpful.

By decision dated March 29, 2013, OWCP's hearing representative affirmed OWCP's September 6, 2012 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden to establish 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, 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components. The first component is whether the employee actually experienced the employment incident or exposure which is alleged to have occurred.³ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.⁴

The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant'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 claimant, 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 claimant.⁵

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.⁶ A spinal subluxation is an incomplete dislocation, off-centering, misalignment, fixation or abnormal

²*Jussara L. Arcanjo*, 55 ECAB 281, 283 (2004).

³*See* Federal (FECA) Procedure Manual, Part 2 --Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

⁴*John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

⁵*Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

⁶5 U.S.C. § 8101(2).

spacing of the vertebrae.⁷ If the diagnosis of a subluxation as demonstrated by x-ray is not established, the chiropractor is not a physician as defined under FECA and his or her report is of no probative value to the medical issue presented.⁸

ANALYSIS

OWCP accepted that the employment incident occurred on July 3, 2013, as alleged. The Board finds that appellant has not met his burden of proof to establish his claim for compensation as the medical evidence is not sufficient to establish causal relation. Appellant did not submit rationalized medical evidence that address how his right hip condition is causally related to the accepted employment incident. Dr. Harding noted that the cause of appellant's pain and the diagnosis was not clear, but that the onset occurred while he was working and climbing stairs. This is insufficient to establish causal relationship. Dr. Harding noted that he did not know what caused appellant's pain. The fact that the onset of appellant's pain occurred while he was climbing stairs during his employment is, of itself insufficient to establish his claim. The Board has held that the mere fact that symptoms occur during a workday is not sufficient, in and of itself, to bring an injury within the performance of duty. For compensability, the concomitant requirement of an injury arising out of employment must be shown.⁹

Appellant also submitted reports by a chiropractor, Dr. Almond. Before this evidence can be considered for its probative value, Dr. Almond must be established as a physician under FECA. As defined by statute 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. Dr. Almond did not document that x-rays were obtained or diagnose a spinal subluxation. There is no evidence of record that she qualifies as a physician under 5 U.S.C. § 8101(2). Accordingly, Dr. Almond's reports are of no probative medical value.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment, nor is his belief that his condition was caused by his employment sufficient to establish causal relationship.¹⁰ As he did not submit a rationalized medical opinion establishing a causal relationship between his accepted employment incident and a diagnosed medical condition, OWCP properly denied his claim.

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.

⁷See 20 C.F.R. § 10.5(bb).

⁸See *Jack B. Wood*, 40 ECAB 95, 109 (1988).

⁹*V.P.*, Docket No. 13-714 (issued July 1, 2013).

¹⁰*Walter D. Morehead*, 31 ECAB 188 (1986).

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained an injury in the performance of duty on July 3, 2013, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 29, 2013 is affirmed.

Issued: November 14, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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