

FACTUAL HISTORY

Appellant, a 55-year-old equal opportunity specialist, filed a traumatic injury claim (Form CA-1) for a lumbar condition she attributed to an August 13, 2013 employment-related motor vehicle accident (MVA). She was a passenger in a government-owned vehicle that backed into a two-foot pole after refueling at a gas station.² The approximate speed at impact was zero to five miles per hour. Appellant was in the back seat of the vehicle at the time. She first sought treatment for her lower back complaints on August 20, 2013.

Dr. Michael D. Simanovsky, a family practitioner, examined appellant on August 20, 2013 for complaints of low back pain due to a car accident. He noted that she had been involved in a MVA “a few days ago.”³ Appellant was a passenger sitting in the back seat while the car was maneuvering through a gas station lot and hit a pole. Dr. Simanovsky noted complaints of mild pain and discomfort in the lumbar area, and difficulty sleeping at night. On physical examination, appellant was noted to be in no distress. Her vital signs were stable. Palpation of appellant’s low back revealed it to be slightly tender. Dr. Simanovsky further noted that she had good range of motion in the lumbar spine and lower extremities. However, twisting of the lumbar spine elicited pain. Appellant’s neurologic and vascular examinations were unremarkable. Dr. Simanovsky also found a lumbar x-ray to be unremarkable.⁴ His assessment was lumbar strain due to MVA. Under the heading “Impression & Recommendation,” Dr. Simanovsky identified appellant’s problem as low back pain (ICD-9 724.2). He prescribed pain medication (Lortab) and a muscle relaxant (Cyclobenzaprine Hcl), provided back care instructions, and discussed the use of moist heat or ice, activity modification, and stretching/strengthening exercises. Dr. Simanovsky advised appellant to return in two weeks if there was no improvement or sooner if her symptoms worsened. Additionally, he prepared a September 18, 2013 attending physician’s report (Form CA-20) based on his August 20, 2013 findings on examination. Dr. Simanovsky again diagnosed “low back pain” (ICD-9 724.2), which he attributed to appellant’s work-related MVA. According to Dr. Simanovsky, appellant was neither totally disabled nor partially disabled, and he did not expect there to be any permanent effects as a result of her injury.

In an October 10, 2013 decision, OWCP found that the August 13, 2013 employment incident occurred as alleged. However, the medical evidence failed to provide a diagnosis in connection with the accepted event. Consequently, OWCP denied the claim because appellant had not established fact of injury. It explained that pain was a symptom, not a medical diagnosis.

² Appellant was returning to her office following a work-related trip to Fulton, MO.

³ Although the urgent care treatment notes did not identify the date of injury, Dr. Simanovsky also provided an August 20, 2013 work excuse/disability form that indicated appellant was being treated for a back strain injury that occurred on August 13, 2013 due to a MVA.

⁴ Dr. Matthew R. Catherine, a Board-certified diagnostic radiologist, reviewed the August 20, 2013 lumbar x-rays and found “No acute abnormality.” He noted that the vertebral body heights, alignment, and disc spaces were maintained. Dr. Catherine also reported that the pedicles and transverse processes were intact, and there was no evidence of fracture or dislocation. Lastly, he noted that paraspinal soft tissues were unremarkable.

Appellant timely requested reconsideration. She submitted a November 19, 2013 report from Dr. Ronald W. Stitt, a Board-certified orthopedic surgeon, who noted that appellant reported having been in a work-related MVA on August 13, 2013. Dr. Stitt examined appellant and reviewed her lumbar x-rays, which showed a normal lumbar spine. He diagnosed musculoskeletal back pain.

By decision dated March 25, 2014, OWCP denied appellant's request for reconsideration. It considered Dr. Stitt's November 19, 2013 report to be cumulative, noting that he reiterated previous assessments of back pain. Consequently, OWCP found the newly submitted evidence did not warrant reopening appellant's claim for merit review.

On July 18, 2014 appellant requested reconsideration. She submitted a June 25, 2014 report from Dr. Tanya E. Feldkamp, a chiropractor, who diagnosed somatic dysfunction of the lumbar and sacral regions, neuritis, and lumbago. Dr. Feldkamp reported that appellant had been a passenger in a vehicle that backed into a concrete wall.

In an August 15, 2014 decision, OWCP reviewed the merits of appellant's claim, but denied modification. It found that Dr. Feldkamp's June 25, 2014 report was of no probative value because absent x-ray evidence of a subluxation, appellant's chiropractor was not considered a physician under FECA.

On September 23, 2014 appellant requested reconsideration. She referenced a September 15, 2014 report from an orthopedist who reportedly diagnosed lumbar sprain due to the August 13, 2013 MVA. The September 23, 2014 request indicated that there was an "Enclosure." However, no additional evidence was noted to have been received by OWCP on or about September 26, 2014.

By decision dated October 17, 2014, OWCP denied appellant's latest request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁵

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁶ The second component is whether the employment incident caused a

⁵ 20 C.F.R. § 10.115(e), (f); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁶ *Elaine Pendleton*, 40 ECAB 1143 (1989).

personal injury.⁷ An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.⁸

ANALYSIS -- ISSUE 1

Appellant claims to have injured her lower back in an employment-related MVA. OWCP accepted that the August 13, 2013 MVA occurred as alleged. However, appellant's claim has repeatedly been denied because the evidence of record was deemed insufficient to establish a medical diagnosis in connection with the accepted August 13, 2013 employment incident.

Dr. Simanovsky was the first physician to treat appellant for her low back complaints. He examined her on August 20, 2013 and diagnosed low back pain (ICD-9 724.2/Lumbago) attributable to the August 13, 2013 MVA. Dr. Simanovsky provided the same diagnosis in his September 18, 2013 attending physician's report (Form CA-20). Dr. Stitt similarly diagnosed musculoskeletal back pain when he examined appellant on November 19, 2013. OWCP properly noted that back pain is a symptom, not a medical diagnosis. Subjective complaints of pain are not sufficient, in and of themselves, to support compensation benefits under FECA.⁹

OWCP also correctly found that Dr. Feldkamp's June 25, 2014 report was not probative. Appellant's chiropractor diagnosed somatic dysfunction of the lumbar and sacral regions (ICD-9 739.3, 739.4), neuritis (ICD-9 724.4), and lumbago (ICD-9 724.2). Although Dr. Feldkamp noted subluxations at L4 and L5, she did not reference any x-rays in her June 25, 2014 report. Moreover, Dr. Catherine, a radiologist, did not identify any subluxations on appellant's August 20, 2013 lumbar x-rays.¹⁰ Because Dr. Feldkamp's diagnoses were not based on x-ray evidence of subluxation, her opinion is insufficient for purposes of establishing entitlement to FECA benefits.¹¹

The Board finds that the evidence of record does not establish a medical diagnosis in connection with appellant's August 13, 2013 MVA. Consequently, appellant failed to establish fact of injury.

⁷ *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. See *Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition, and appellant's specific employment factor(s). *Id.*

⁸ *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

⁹ 20 C.F.R. § 10.501(a)(3).

¹⁰ See *supra* note 4.

¹¹ Under FECA 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. 5 U.S.C. § 8101(2); see *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹² OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹³ One such limitation is that the application for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹⁴ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁵ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁶

ANALYSIS -- ISSUE 2

OWCP received appellant's latest request for reconsideration on September 26, 2014. Appellant submitted the appeal request form that accompanied its August 15, 2014 merit decision. She also provided a September 23, 2014 letter explaining, *inter alia*, that she was seeking reimbursement for her past chiropractic care, including restoration of her sick leave. The September 23, 2014 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance any relevant legal arguments not previously considered by OWCP. The Board finds that she is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(2).¹⁷

Appellant also failed to submit any "relevant and pertinent new evidence" with her September 23, 2014 request for reconsideration. She mentioned she had enclosed a September 15, 2014 diagnosis from an orthopedist, but the record does not include such a report. Because appellant did not provide any "relevant and pertinent new evidence," she is not entitled

¹² This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.607.

¹⁴ *Id.* at § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System. *See also* Chapter 2.1602.4b.

¹⁵ *Id.* at § 10.606(b)(2).

¹⁶ *Id.* at §§ 10.607(b), 10.608(b).

¹⁷ *Id.* at § 10.606(b)(2)(1) and (2).

to a review of the merits based on the third requirement under section 10.606(b)(2).¹⁸ Accordingly, OWCP properly declined to reopen her case under 5 U.S.C. § 8128(a).

CONCLUSION

Appellant failed to establish that she sustained an injury in the performance of duty on August 13, 2013. The Board also finds that OWCP properly denied further merit review with respect to appellant's September 23, 2014 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the October 17 and August 15, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 2, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁸ *Id.* at § 10.606(b)(2)(3).