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

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| **KATHERINE J. JONES, Appellant** | ) | |
| | ) | **Docket No. 04-2175** |
| **and** | ) | **Issued: February 10, 2005** |
| **U.S. POSTAL SERVICE, POST OFFICE, Appleton City, MO, Employer** | ) | |

*Appearances:*
*Katherine J. Jones, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

### ***JURISDICTION***

On September 7, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated January 12, 2004 denying her claim for an occupational disease and a June 21, 2004 decision of a hearing representative affirming the denial of her occupational disease claim. Appellant also appealed an August 11, 2004 nonmerit decision of the Office denying her request for reconsideration under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the August 11, 2004 nonmerit decision.

### ***ISSUES***

The issues are: (1) whether appellant has established that she sustained an occupational disease causally related to factors of her federal employment; and (2) whether the Office properly denied her request for reconsideration under section 8128.

## ***FACTUAL HISTORY***

On October 17, 2003 appellant, then a 56-year-old rural letter carrier, filed an occupational disease claim alleging that she sustained chronic pain in the neck, shoulders and left wrist due to driving five hours on her route. She stopped work on October 10, 2003.

In a report dated September 9, 2003, Dr. Charles L. Crist, Board-certified in family practice, noted that he treated appellant for chronic pain and stated that it was in her "best interest if she were to have a few days off from her employment."

In a disability certificate dated October 3, 2003, Dr. Marla L. Brown, a chiropractor, diagnosed back pain. In a duty status report dated October 21, 2003, Dr. Brown diagnosed cervicalgia and opined that appellant was unable to perform her usual employment.[1]

Appellant, in response to the Office's request for additional information, noted that she had periodic arm and shoulder problems over the past three to four years which she attributed to reaching. She described her repetitive shoulder work 8 to 10 years ago and her current work "lifting and loading mail in vehicle for delivery and driving 5 [hours] daily using hands and arms."

Dr. Crist, in a report dated September 4, 2003, noted that appellant worked as a rural letter carrier and had right shoulder pain "due to repetitive motion." He also indicated that appellant had right shoulder weakness which began in December 2002 without a precipitating incident.[2]

In a disability certificate dated November 17, 2003, Dr. Brown diagnosed back pain and found that appellant could return to her regular employment on November 18, 2003.

In a disability certificate dated November 24, 2003, Dr. A.J. Porter, a chiropractor, found that appellant was unable to work until December 2, 2003.

By decision dated January 12, 2004, the Office denied appellant's claim on the grounds that the medical evidence was insufficient to establish a diagnosis due to the accepted employment-related events. The Office informed appellant that the reports submitted from her chiropractor did not constitute medical evidence as the chiropractor did not diagnose a subluxation by x-ray as required for a chiropractor to be considered a physician under the Federal Employees' Compensation Act.[3]

[1] In a letter dated October 27, 2003, Jessica McClure, from Brown Chiropractic, informed the employing establishment of the dates that appellant received treatment for cervicalgia, bursitis of the shoulder and sacroiliac pain.

[2] The record contains procedure notes from Dr. Crist indicating that he gave appellant injections in various tendons and ligaments on September 4 and October 14, 2003.

[3] 5 U.S.C. §§ 8101-8193.

In a letter dated November 21, 2003 and received by the Office on January 30, 2004, Dr. Scott A. Turner, Board-certified in family practice, noted that appellant had received treatment at his clinic. He stated:

> "She was diagnosed at that time with bicipital tendinitis. It is my opinion that the medical condition was caused and is aggravated by the specific physical activities associated with her employment. I am not aware of any preexisting medical condition that could have either caused or aggravated her condition."

Dr. Turner, in a progress note dated January 5, 2004, diagnosed tendinitis of the shoulders, sacroiliac joint dysfunction and back pain and found that she was unable to work "until further notice."[4]

On January 26, 2004 appellant requested a review of the written record by an Office hearing representative. In a decision dated June 21, 2004, the hearing representative affirmed the Office's January 12, 2004 decision.

In a letter dated July 23, 2004, appellant requested reconsideration of her claim and stated that she had enclosed additional evidence from Dr. Crist and Dr. Porter. She related that she used her right shoulder over a thousand times daily delivering mail on her route and also used her shoulders "driving and reaching for mail in my vehicle for [five] hours on mostly gravel roads which requires steering around potholes and various other weather[-]related elements."

By decision dated August 11, 2004, the Office denied reconsideration of appellant's claim and noted that she had not submitted any additional medical evidence with her request for reconsideration.

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

An employee seeking benefits under the Act 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 the Act; that the claim was filed within the applicable time limitation of the Act; that an injury was sustained while in the performance of duty as alleged; and that any disability or specific condition for which compensation is claimed is 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 occupational disease.[5]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, appellant must submit the following: (1) medical evidence establishing the presence or existence of the condition for which compensation is claimed; (2) a factual statement

[4] In a return to work slip dated December 5, 2003, received by the Office on January 30, 2004, Dr. Porter indicated that appellant could resume her regular employment on December 9, 2003.

[5] *Rebecca LeMaste*r, 50 ECAB 254 (1999).

identifying employment factors alleged to have caused or contributed to the condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[6] The medical evidence required to establish a causal relationship is rationalized medical opinion 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.[7] Such an opinion of the physician 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.[8]

Section 8101(2) of the Act[9] provides that the term "physician," as used therein, "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."[10] Without a diagnosis of a subluxation from x-ray, a chiropractor is not a "physician" under the Act and his or her opinion on causal relationship does not constitute competent medical evidence.[11]

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

In this case, appellant has established that she performed repetitive duties during the course of her employment as a rural letter carrier. The issue, therefore, is whether the medical evidence establishes that these employment activities caused or contributed to any diagnosed condition.

Appellant submitted medical reports from Dr. Brown, a chiropractor, who diagnosed back pain and cervicalgia. She further submitted disability certificates from Dr. Porter, a chiropractor, who opined that she was disabled from employment. Dr. Porter did not provide a diagnosis. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under section 8101(2) of the Act.[12] A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation of the spine as demonstrated by x-ray to exist.[13] Neither Dr. Brown nor Dr. Porter

[6] *Charles E. Burke*, 47 ECAB 185 (1995).

[7] *Leslie C. Moore*, 52 ECAB 132 (2000).

[8] *Id*.

[9] 5 U.S.C. § 8101(2).

[10] *See* 20 C.F.R. § 10.311.

[11] *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[12] 5 U.S.C. § 8101(2).

[13] *Thomas R. Horsfall*, 48 ECAB 180 (1996).

diagnosed a subluxation of the spine by x-ray and thus are not considered physicians under the Act and their opinions are of no probative value.[14]

Appellant also provided a report dated September 4, 2003 from Dr. Crist, who noted that appellant worked as a rural letter carrier and found that she had right shoulder pain which he attributed to repetitive motion. He further discussed appellant's complaints of right shoulder weakness beginning in December 2002. While Dr. Crist attributed appellant's shoulder pain to repetitive motion, he did not specifically find that the repetitive motion was from her employment duties. Further, he did not provide a definite diagnosis but instead merely noted appellant's complaints of right shoulder pain. The Board has frequently explained that statements about appellant's pain, not corroborated by objective findings of disability, does not constitute basis for payment of compensation.[15]

In a disability certificate dated September 9, 2003, Dr. Crist diagnosed chronic pain and advised that appellant should take a few days off work. He did not, however, address the cause of appellant's condition or her disability. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[16]

In a report dated November 21, 2003, Dr. Turner diagnosed bicipital tendinitis which he indicated was caused and aggravated "by the specific physical activities associated with her employment." He did not, however, provide any rationale for his opinion that appellant's work duties caused her bicipital tendinitis. Medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relationship.[17] Further, Dr. Turner did not indicate knowledge of the activities performed by appellant in her employment. Without evidence of a clear understanding of appellant's work duties, his opinion on causal relationship is not based on an accurate factual history or well rationalized.[18]

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between her claimed condition and her employment.[19] To establish causal relationship, appellant must submit a physician's report in which the physician reviews the employment factors identified by appellant as causing her condition and, taking these factors into consideration as well as findings upon examination of appellant, state whether the employment injury caused or aggravated appellant's diagnosed

[14] *Id*.

[15] *See John L. Clark*, 32 ECAB 1618 (1981).

[16] *Michael E. Smith*, 50 ECAB 313 (1999).

[17] *Albert C. Brown*, 52 ECAB 152 (2000).

[18] *See Douglas M. McQuaid*, 52 ECAB 382 (2001); *Leslie C. Moore*, *supra* note 6.

[19] *Kenneth R. Love*, 50 ECAB 193 (1998).

conditions and present medical rationale in support of his or her opinion.[20] Appellant failed to submit such evidence in this case and, therefore, failed to discharge her burden of proof.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[21] the Office's regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[22] Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[23]

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

Appellant, in her July 23, 2004 request for reconsideration, stated that she was enclosing additional medical evidence from Dr. Crist and Dr. Porter. The record, however, does not contain any additional medical evidence submitted by appellant with her request for reconsideration.

In her request for reconsideration, appellant also described the employment duties to which she attributed her condition. The Office, however, accepted the occurrence of the claimed work factors. The pertinent issue in this case is whether appellant has established that she sustained a medical condition resulting from the established employment factors. Appellant's description of her work duties is thus not relevant to the issue at hand and does not constitute a basis for reopening her case.[24]

Appellant did not submit any evidence or advance a legal argument in support of her request for reconsideration. As appellant has not shown that the Office erred in applying a point of law, advanced a relevant legal argument not previously considered or submitted relevant and pertinent new evidence, the Office properly denied her application for review of the merits of her claim.

On appeal, appellant argues that the Office did not consider statements from her physicians and enclosed her July 23, 2004 letter requesting reconsideration by the Office. As noted above, however, the record does not contain any additional medical evidence from Dr. Crist and Dr. Porter submitted with appellant's July 23, 2004 request for reconsideration.

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[20] *Calvin E. King*, 51 ECAB 394 (2000).

[21] 5 U.S.C. § 8128(a).

[22] 20 C.F.R. § 10.606(b)(2).

[23] 20 C.F.R. § 10.608(b).

[24] *Robert P. Mitchell*, 52 ECAB 116 (2000).

## ***CONCLUSION***

The Board finds that appellant has not established that she sustained an occupational disease causally related to factors of her federal employment. The Board further finds that the Office properly denied her request for reconsideration under section 8128.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated August 11, June 21 and January 12, 2004 are affirmed.

Issued: February 10, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member