United States Department of Labor
Employees' Compensation Appeals Board

L.H., Appellant	)	
and	)	**Docket No. 16-0868**
	)	**Issued: September 12, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Melrose Park, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 22, 2016 appellant filed a timely appeal of a December 14, 2015 merit decision and a February 17, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish an injury on April 13, 2015 causally related to the accepted employment incident; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted new evidence with her appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

On appeal appellant contends that her chiropractor diagnosed a subluxation by x-ray.

FACTUAL HISTORY

On April 14, 2015 appellant, then a 36-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 13, 2015 she sustained a back sprain while picking up a tub and placing it on a case. She stopped work on April 13, 2015.

In an April 13, 2015 report, Laura Thometz, a physician assistant, diagnosed muscle spasm and thoracic sprain. She noted April 13, 2015 as the date of injury. Appellant was released to return to work that day with restrictions requiring periodic alternating between standing and sitting. Ms. Thometz also completed a duty status form (Form CA-17) with the same date of injury, diagnoses, and restrictions.

In reports dated April 14, September 9, and October 9, 2015, Dr. Michael W. Hausch, a treating chiropractor, reported objective findings including L5, bilateral pelvis, sacrum, thoracic, and cervical spinal restrictions/subluxations; pain/tenderness in lumbosacral, sacral, lower lumbar, upper thoracic, mid to lower cervical, and cervicothoracic areas; moderate muscle spasms in various areas including the lumbar spine, sacroiliac, buttocks, thigh, pelvis/hip, thoracic, trapezius, and neck; and reduced lumbar and cervical range of motion. He diagnosed multiple conditions including: sacrum disorder (ankyloses-instability); cervical, lumbar, sacral, thoracic, and pelvis nonallopathic lesions; thoracalgia; cervicalgia; myalgia and myositis; lumbosacral spinal instabilities; segment and somatic dysfunction of the lumbar, sacral, pelvic, and cervical region; and right shoulder myositis.

On November 3, 2015 OWCP received an April 14, 2015 evaluation and treatment plan and daily notes for the period April 14 to August 12, 2015 from Dr. Hausch. Dr. Hausch, in the November 3, 2015 report, noted that appellant related that on April 13, 2015 she sustained acute back pain at work from lifting a container. He noted that appellant had been seen by Ms. Thometz on April 13, 2015, provided examination findings, a history of injury, and diagnosed multiple segmental somatic dysfunction, spinal disability, and thoracic muscle weakness. The daily notes reported the treatment provided and subjective and objective findings for the period April 14 to August 12, 2015.

By letter dated November 12, 2015, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised as to the medical and factual evidence required and was afforded 30 days to provide this information. OWCP also advised appellant that a chiropractor did not qualify as a "physician" under FECA unless a diagnosed spinal subluxation was demonstrated on x-ray. OWCP also noted that at the time her claim was received her injury was considered minor resulting in no lost or minimal time from work and the merits of the claim had not been formally considered. As her medical bills had exceeded $1,500.00, appellant's claim was reopened for consideration of the merits.

In response to OWCP's letter appellant submitted chart notes dated November 4 and 17, 2015 and myofascial treatment notes covering the period August 12 to November 17, 2015 from Dr. Hausch. These reports reiterated findings and diagnoses from Dr. Hausch's previous reports.

By decision dated December 14, 2015, OWCP denied appellant's claim as it found the evidence of record devoid of any medical opinion by a physician diagnosing a medical condition.

Subsequent to the denial of her claim appellant submitted a December 8, 2015 chart note by Dr. Hausch providing examination findings and reiterating diagnoses from prior reports.

Appellant requested reconsideration in a form dated January 28, 2016, received by OWCP on February 2, 2016.

By decision dated February 17, 2016, OWCP denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] has the burden of proof 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 filed within the applicable time limitation, that an injury was sustained while 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.[4] 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.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty it must first be determined whether a fact of injury has been established.[6] First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged.[7] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.[9] 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

[3] 5 U.S.C. § 8101 *et seq.*

[4] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[5] *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 4.

[7] *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[8] *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 4.

[9] *Y.J.*, Docket No. 08-1167 (issued October 7, 2008); *A.D.*, 58 ECAB 149 (2006); *D'Wayne Avila*, 57 ECAB 642 (2006).

compensable employment factors.[10] 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.[11]

ANALYSIS -- ISSUE 1

Appellant filed a claim for traumatic injury alleging that on April 13, 2015 she sustained a back sprain in the performance of duty. OWCP accepted that the April 13, 2015 incident occurred as alleged, but denied the claim as it found she failed to establish that a medical condition resulted from the accepted employment incident. The Board finds that appellant has not met her burden of proof in this matter.

Appellant submitted reports and daily notes from her attending chiropractor, Dr. Hausch discussing his treatment of appellant. Under FECA a chiropractor is considered a physician only to the extent that the reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[12] Dr. Hausch did not document that he obtained x-rays to diagnose a spinal subluxation.[13] Without a diagnosis of spinal subluxation from an x-ray, a chiropractor is not considered a physician under FECA and his opinion does not constitute medical evidence.[14] Thus, Dr. Hausch's reports are insufficient to establish a work-related diagnosis from a qualified physician under FECA.

Appellant also submitted reports from Ms. Thometz, a physician assistant. However, a lay individual, such as a physician assistant, is not competent to provide a medical opinion under FECA.[15] Thus, Ms. Thometz's reports are of no probative medical value and are insufficient to establish appellant's claim.

[10] *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

[11] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[12] Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 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 and subject to regulation by the Secretary. *See R.M.*, 59 ECAB 690 (2008); *Merton J. Sills*, 39 ECAB 572 (1988).

[13] OWCP's implementing regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See* 20 C.F.R. § 10.5(bb).

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

[15] *See J.M.*, 58 ECAB 303 (2007); *Lyle E. Dayberry*, 49 ECAB 369 (1998) (the reports of a physician assistant are entitled to no weight as physician assistants are not considered "physicians" as defined by section 8101(2) of FECA).

As appellant failed to submit a rationalized medical opinion supporting that a diagnosed condition causally related to the accepted April 13, 2015 employment incident, she did not meet her burden of proof to establish an employment-related traumatic injury.

On appeal appellant contends that Dr. Hausch did diagnose a subluxation by x-ray as he reviewed an x-ray taken in April 2015. Contrary to appellant's contention, however, none of the reports or daily notes submitted by Dr. Hausch referenced an April 2015 x-ray interpretation or diagnosis of a subluxation by x-ray. OWCP properly found Dr. Hausch was not considered a physician under FECA as he did not diagnose a subluxation by x-ray.

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.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[16] 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.[17] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received by OWCP within one year of the date of that decision.[18] 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.[19]

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly declined to reopen appellant's case for further merit review. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP.

The underlying issue in this case is whether appellant submitted medical evidence establishing a medical condition due to the accepted April 13, 2015 employment incident. That is a medical issue which must be addressed by relevant new medical evidence.[20] However,

[16] *Supra* note 1. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

[17] 20 C.F.R. § 10.606(b)(3). *See J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

[18] 20 C.F.R. § 10.607(a).

[19] *Id.* at § 10.608(b). *See Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[20] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

appellant did not submit any relevant and pertinent new medical evidence in support of her claim. In support of her reconsideration request, appellant submitted a December 8, 2015 report from Dr. Hausch. As discussed above a chiropractor is only considered a physician under FECA when diagnosing subluxation as demonstrated by x-ray to exist.[21]

While this report is new, it is not relevant or pertinent to the underlying issue as Dr. Hausch did not diagnose a subluxation by x-ray and, therefore is not considered a physician under FECA. This evidence was also duplicative of his previous reports and was insufficient to require OWCP to reopen the claim for a merit review. The Board has held that evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[22]

The Board finds that she did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered by OWCP. Since appellant did not meet a requirement of 20 C.F.R. § 10.606(b)(3), OWCP properly denied merit review of the claim.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury causally related to the accepted April 13, 2015 employment incident. The Board further finds that OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[21] *Merton J. Sills*, 39 ECAB 572 (1988).

[22] *T.K.*, Docket No. 16-0813 (issued July 20, 2016).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 17, 2016 and December 4, 2015 are affirmed.

Issued: September 12, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board