U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN L. PRIKOPA and U.S. POSTAL SERVICE,
POST OFFICE, Freehold, NJ

Docket No. 98-1515; Submitted on the Record;
Issued December 1, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained an injury on August 13, 1997.

On August 13, 1997 appellant, then a 51-year-old clerk, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that he sustained an injury while in the performance of duty that same day. He described his injury as sciatica of the upper left leg and explained that while lifting a tub of flats, he felt burning and pain in his left leg. Appellant ceased work at the time of his injury and sought emergency medical treatment shortly thereafter. The employing establishment controverted the claim on the basis that appellant had a preexisting condition of severe sciatica, lumbar plexus disorder and cervical brachia syndrome.

On September 22, 1997 the Office of Workers' Compensation Programs advised appellant of the need for additional factual and medical evidence.

The employing establishment forwarded a September 3, 1997 report from Dr. David A. Lytle, Jr., a chiropractor, who noted that appellant was under his care and that he would be incapacitated from work through September 5, 1997. He also indicated that upon returning to duty, appellant should be restricted from lifting over 30 pounds and he should avoid excessive twisting motions for one month. Additionally, the Office received medical records from the Centrastate Medical Center emergency department concerning appellant's August 13, 1997 treatment for sciatica. The employing establishment noted that the emergency room physician, Dr. Frank Quintero, reported that appellant complained of having "lower back pain approximately [two] days prior to arrival."

In response to the Office's September 22, 1997 request for additional information, appellant submitted a statement dated October 2, 1997. He explained that he did not know the exact weight of the tub he lifted on August 13, 1997, but that it was "extremely heavy." Appellant also indicated that he sustained a prior back injury at home in January 1996 and that he was ultimately cleared to return to work without restriction on March 29, 1997. Appellant

indicated that he was previously treated for lumbar degenerative disc disease and chronic arthritic syndrome involving the cervical spine and thoracic and lumbar spinal regions.

Appellant submitted treatment notes from Dr. Gregg S. Berkowitz for August 14 and August 18, 1997. His August 14, 1997 records noted a history of injury at work the prior day when appellant "lifted something with his back in a funny position and began experiencing pain in the low back." Dr. Berkowitz diagnosed lumbar strain. His August 18, 1997 records indicated that appellant complained of increasing pain mainly in the thigh and buttocks area and that appellant experienced difficulty walking. Appellant was noted to have been using a walker at the time. Additionally, appellant submitted an itemized bill from Dr. Lytle for services rendered.[1] He noted diagnoses of lumbar plexus disorder, lumbago, sciatica and segmental dysfunction-lumbosacral subluxation at level L3-S1. Lastly, appellant submitted an August 13, 1997 duty status report (Form CA-17) prepared by Dr. Quintero, which noted clinical findings of severe sciatica.

By decision dated October 18, 1997, the Office denied appellant's claim on the basis that the evidence of record failed to demonstrate that appellant sustained an injury as alleged. The Office found that while the evidence of file supported that appellant experienced the claimed lifting incident, the medical evidence of record failed to establish that he sustained an injury as alleged.

On November 8, 1997 appellant requested a review of the written record. Additionally, appellant submitted an October 31, 1997 report from Dr. Lytle in which he attributed appellant's injury to his lumbar spine and sciatic nerve to the lifting of a heavy object as described by appellant on August 13, 1997.

In a decision dated March 5, 1998, the Office hearing representative found certain inconsistencies in the file that cast doubt that the injury occurred at the time, place and in the manner alleged by appellant. Particular emphasis was placed on the fact that Dr. Quintero reported a history of back pain for two days prior to the alleged incident of August 13, 1997. The hearing representative further explained that the opinion of appellant's chiropractor, Dr. Lytle was of no probative value as he could not be considered a physician under the Federal Employees' Compensation Act. Consequently, the hearing representative affirmed the Office's October 18, 1997 decision.

The Board has duly reviewed the case record on appeal and finds that the case is not in posture for a decision.

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office 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 to be established is that the employee

[1] Dr. Lytle's bill included charges for x-rays of the lumbocsacral region taken on August 18, 1997 as well as charges for seven office visits between August 18 and September 3, 1997.

actually experienced the employment incident that is alleged to have occurred.[2] The second component in a fact-of-injury analysis is whether the employment incident caused a personal injury. This latter component generally can be established only by rationalized medical opinion evidence.[3]

In the instant case, the Office initially accepted the fact that the employment incident of August 13, 1997 occurred as alleged, however, the hearing representative subsequently concluded that appellant failed to establish that the injury occurred in the time, place and manner alleged by appellant. Notwithstanding the fact that the August 13, 1997 incident was witnessed by one of appellant's coworkers and that appellant sought immediate emergency medical treatment for his condition, the Office hearing representative questioned the reported incident because appellant ostensibly advised the emergency room physician that he had been experiencing lower back pain "approximately [two] days prior to [his] arrival" on August 13, 1997. On appeal, appellant argued that he made no such statement to Dr. Quintero.

The Board notes that the history reported by Dr. Quintero in his August 13, 1997 treatment record is inconsistent with the information he provided in his similarly dated Form CA-17, which included the following history of injury: "lifting tub of flats, felt pain and burning in left leg." On the Form CA-17 Dr. Quintero indicated that appellant reported a history of injury consistent with the above-quoted history. Additionally, the August 13, 1997 Form CA-17 makes no mention of a history of lower back pain for two days prior to treatment.

The record also includes another August 13, 1997 report from the Centrastate Medical Center emergency department, which bears appellant's signature. This computer generated report lists the "Accident Date" as August 13, 1997 and under the heading "Complaint" appears the following notation: "INJ BACK/WORK RELATED." The report also includes a heading "Onset of Symptoms," however, no corresponding information was included. The time of the report is noted as 7:10 a.m.[4] Additionally, the record indicates that appellant was discharged from the emergency room at 10:10 a.m.

The hearing representative did not address the above-noted inconsistencies, but merely accepted as factual Dr. Quintero's statement that appellant complained of having "lower back pain approximately [two] days prior to arrival." It is possible that Dr. Quintero incorrectly noted the length of time appellant had reportedly been experiencing lower back pain.[5] In view of the discrepancy in the information provided by Dr. Quintero, this evidence is insufficient to call into

[2] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[4] Appellant reported on his Form CA-1 that he was injured at 7:00 a.m.

[5] Appellant arrived at the emergency room shortly after the alleged incident on August 13, 1997 and he remained there for approximately three hours. While one of the emergency room reports notes a time of 7:10 a.m., Dr. Quintero's treatment records do not indicate the time he initially examined appellant and recorded the disputed history of injury. Considering the nature of appellant's injury, it is quite likely that he was not immediately seen by Dr. Quintero. Having perhaps waited for a period of time to see the doctor, it is a likely possibility that appellant complained of having pain for two hours, rather than two days as reported by Dr. Quintero.

question the accuracy of the information reported by appellant and his witness regarding the incident of August 13, 1997. Furthermore, Dr. Berkowitz's statement that appellant "lifted something with his back in a funny position and began experiencing pain in the low back" corroborates appellant's account of the August 13, 1997 incident. The fact that Dr. Berkowitz characterized appellant as being in a "funny position" does not undermine appellant's allegation that he experienced pain after lifting a tub of flats. Accordingly, it is accepted that the employment incident of August 13, 1997 occurred at the time and place and in the manner alleged.

The Board further finds that the Office hearing representative erred in concluding that appellant's chiropractor, Dr. Lytle, could not be considered a physician under the Act. Section 8101(2) of the Act 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] Therefore, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence.[7] In the instant case, Dr. Lylte noted a diagnosis of subluxation at level L3-S1. He also reported that he obtained an x-ray on August 18, 1997. While it is unclear whether Dr. Lytle based his diagnosis on appellant's August 18, 1997 x-ray, the Office hearing representative disregarded his opinion based on the assumption that he did not review appellant's x-ray. Since the Office did not previously advise appellant of the limitations imposed by the Act with respect to the use of chiropractic evidence and in view of the uncertainty of whether Dr. Lytle relied upon appellant's August 18, 1997 x-ray, it is inappropriate at this juncture to conclude that Dr. Lytle cannot be considered a physician under the Act.

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[8] Although the medical reports of record do not contain sufficient rationale to discharge appellant's burden of proving by the weight of the reliable, substantial and probative evidence that his claimed condition is causally related to his August 13, 1997 employment incident, they raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[9]

On remand, the Office should obtain clarification from Dr. Lytle regarding the basis for his diagnosis and then refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an evaluation and a rationalized medical opinion on whether appellant's claimed condition is causally related to the accepted employment incident of

[6] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

[7] *See Kathryn Haggerty*, 45 ECAB 383 (1994).

[8] *William J. Cantrell*, 34 ECAB 1223 (1983).

[9] *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

August 13, 1997. After such development of the case record as the Office deems necessary, a *de novo* decision shall by issued.

Lastly, appellant argues on appeal that he should be reimbursed for the cost of his treatment in the emergency room on August 13, 1997 because the employing establishment insisted that he go to the hospital for examination. While appellant alleges that the employing establishment effectively authorized his emergency treatment on August 13, 1997, the record does not include a Form CA-16 "authorization for medical treatment." The issuance of a properly executed Office Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay the cost for the authorized medical examination regardless of the action taken on the claim.[10] However, in the absence of such authorization, appellant is not entitled to reimbursement at this juncture.

The decisions of the Office of Workers' Compensation Programs dated March 5, 1998 and October 18, 1997 are hereby set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
December 1, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[10] *Danita E. Lindsey*, 40 ECAB 1038 (1989).