U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NORMAND R. ANNANCE and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Lewiston, Maine

Docket No. 97-935; Submitted on the Record;
Issued January 19, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained a herniated nucleus pulposus at C5-6 in the performance of duty.

The Board has duly reviewed the case record on appeal and finds that this case is not in posture for a determination of whether appellant sustained an injury in the performance of duty. Further development of the medical evidence is required.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of proof to establish the essential elements of his claim.[2] When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[3]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office of Workers' Compensation Programs begins with an analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[4]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *See Margaret A. Donnelley*, 15 ECAB 40 (1963).

[3] *See generally, John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease or illness" defined).

[4] *John J. Carlone, supra*.

On June 7, 1993 appellant filed a notice of traumatic injury, Form CA-1, stating that he injured his back as a result of lifting computers on May 27, 1993. Appellant's condition was initially diagnosed as sciatica and later was more accurately identified as a recurrent L5-S1 disc protrusion and was surgically corrected. Appellant submitted factual and medical evidence in support of his claim. In narrative statements and in his testimony, appellant explained that immediately following the lifting incident, he noticed that he had a sore back, but that he did not think anything of it because he had had backaches before and had had prior back surgery, a right L5 hemilaminectomy for a L5-S1 discectomy in 1987. He explained that the incident occurred on a Thursday and that on that day and the following day, Friday May 28th, he left work early due to his backache. The weekend was a long holiday weekend and he thought that three days of rest would resolve his condition, as it had in the past. On Tuesday June 1, however, his back was still sore and he called in sick in order to give his back another day of rest. He went to work on June 2nd, 3rd and 4th, but experienced twinges of pain down the back of his right leg which felt like a pulled hamstring. Over the following weekend his back and leg pain failed to subside but instead intensified and on Monday June 7th he reported to the emergency room.

In a decision dated August 13, 1993, the Office denied appellant's claim on the grounds that the factual and medical evidence was insufficient to establish that an injury had occurred as alleged. Following an oral hearing held at appellant's request, by decision dated November 29, 1994, an Office hearing representative affirmed the Office's August 13, 1993 decision on the grounds that while it could be accepted that on May 27, 1993 appellant was moving computers, the circumstances surrounding appellant's claim, such as the fact that he did not seek medical treatment or report the injury until more than a week after the alleged incident occurred, cast doubt on the validity of his claim. The hearing representative further found that the medical evidence of record was insufficiently rationalized to support appellant's claim. By letters dated June 16, 1995 and February 21, 1996, appellant requested reconsideration of the Office's November 29, 1994 decision and submitted additional medical evidence from his treating physician. In merit decisions dated September 22, 1995 and May 23, 1996, respectively, the Office found the evidence of record insufficient to warrant modification of the prior decision. By letter dated June 17, 1996, appellant again requested reconsideration and submitted additional evidence in support of his request. In a decision dated September 17, 1996, the Office found that the evidence submitted in support of appellant's request for review was duplicative and immaterial and therefore insufficient to warrant review of the prior decision.

An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment, may cast sufficient doubt on an employee's statements in determining whether he has established a *prima facie* case. The employee has the burden of establishing the occurrence of the alleged injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. An employee has not met this burden when

there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[5]

In the present case, the Office found that the delayed notification and the fact that appellant did not seek immediate medical treatment but instead returned to work following the incident, together with a lack of rationalized medical opinion evidence, raised sufficient doubt to find that appellant had not established that the injury occurred in the performance of duty, as alleged. While there was delayed notification of the May 27, 1993 injury, appellant explained both in his narrative statements and his hearing testimony that immediately following the lifting incident he noticed that he had a sore back, but did not think it was any different from prior minor backaches he had and that he thought the pain would resolve with rest. When the backache did not resolve over the course of the next week, but gradually developed into sciatica and then severe back pain, he sought medical attention. He further stated that while he generally felt very good following his prior surgery in 1987, as compared with the extreme pain beforehand, his minor backaches were too common an occurrence to file a claim every time. Appellant pointed out that while 11 days elapsed between May 27, 1993, the day of the alleged injury and June 7, 1993, the day he sought medical attention and reported his injury, he had in fact only reported for work on 4 days due to intervening weekends, a holiday and a sick day and had left early on one of those days. In addition, appellant's assertion that he felt a pull in his back which gradually increased in severity over the next week until he sought medical attention on June 7, 1993 is corroborated by the histories contained in all of the medical reports of record. In the emergency room treatment notes dated June 7, 1993, the attending physician states that appellant reported lifting heavy computers approximately two weeks prior and began developing sharp pains down his right leg, worsening over time, approximately one week later. Treatment notes dated June 7, 1993 from the Office of Dr. Gerald A. Nadeau, a chiropractor from whom appellant initially sought continuing treatment, note that appellant reported lifting heavy computers at work and further indicated that appellant first became aware of his problem on June 1st and had called in sick to work that day due to his inability to sit comfortably. In his initial report dated June 25, 1993, Dr. Patrick J. Murray, to whom appellant was referred by Dr. Nadeau, stated that appellant's reported history of complaints dated to May 27, 1993, when appellant lifted computer terminals and arranged computer furniture. The physician noted that appellant reported developing, a couple of days later, a pain down the back of his right leg which gradually got worse, prompting him to go to the emergency room. The Board finds that the evidence of record is sufficient to support the sequence of events as related by appellant.

The question therefore becomes whether the duties he performed at work caused or aggravated the conditions for which he seeks compensation.

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

Causal relationship is a medical issue[6] and the medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[7] must be one of reasonable medical certainty[8] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incidents or factors of employment.[9]

In a September 1, 1993 report, Dr. Murray stated that appellant had suffered a recurrent L5-S1 disc protrusion and that it was his information and belief that this condition was "either caused or exacerbated by a work-related event." In a report dated April 1, 1994, Dr. Murray attempted to further explain his conclusions. He initially reiterated his diagnosis of a recurrent L5-S1 disk protrusion and noted that appellant had previously had a discectomy at L5, S1 in approximately 1987. Regarding the cause of appellant's back condition, Dr. Murray stated:

> "The patient stated to me that he did well following that [prior] disc protrusion and subsequent surgical treatment. The patient stated to me that the event precipitating his recurrent symptoms was lifting a heavy computer in the course of his work with [the employing establishment]. It is therefore my opinion that this event caused his recurrent disc protrusion. It is also my opinion that this event caused the need for his second operation.
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> "As you may know, there is a natural recurrence of between 5 and 10 percent in lumbar disc disease. Any patient who has had a lumbar disc protrusion stands a 10 percent chance of recurrence. This occurs more commonly in the first year following surgery than at a later date. Nonetheless, there is this small risk.
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> "[Appellant] was doing very well and was in his usual state of health until he lifted the heavy computers and caused his recurrent disc protrusion. It is my opinion therefore that despite the natural history of the disease that this lifting event, more likely than not, is the cause of his recurrence and need for subsequent surgery."

In a letter dated February 7, 1996, Dr. Murray attempted to respond to the Office's expressed concern that the fact that appellant continued to work following the initial work incident seemed to indicate that he had not seriously injured his back at that time. Dr. Murray stated:

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[6] *Mary J. Briggs*, 37 ECAB 578 (1986).

[7] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[8] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[9] *See William E. Enright*, 31 ECAB 426, 430 (1980).

> "… your suggestion, that since the patient continued to work for a period of [11] days prior to seeking medical help, he could not have had a serious injury, is false and in error. The patient, indeed, could have suffered a lumbar disc protrusion which gradually increases in severity over a period of time. This is the natural history of the disease. This is well in keeping with the patient's diagnosis.
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> "Once again I state that the patient's lumbar disc protrusion was caused by his work-related event recently alluded to and that his need for surgery was secondary to that work-related event."

While Dr. Murray provided some rationale for his opinion that appellant's back condition is causally related to the work incident of May 27, 1993, he did not address the fact that appellant reported that following his initial surgery in approximately 1987, he continued to have numerous backaches, although not as severe as those prior to his initial surgery. As Dr. Murray did not address the relationship between these backaches and appellant's diagnosed recurrent L5-S1 disc protrusion, his opinion is not sufficiently rationalized to establish that appellant's diagnosed condition is causally related to the May 27, 1993 employment incident. Nonetheless, the Board finds that the medical reports submitted by appellant, taken as a whole, raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.[10] Additionally, the Board notes that in this case the record contains no medical opinion contrary to appellant's claim and further notes that the Office did not seek advice from an Office medical advisor or refer the case to an Office referral physician for a second opinion. The Board will set aside the Office's September 17 and May 23, 1996 decisions and remand the case for further development of the medical evidence. Following such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's claim.

[10] *See John J. Carlone, supra* note 3 (finding that the medical evidence was not sufficient to discharge appellant's burden of proof but remanding the case for further development of the medical evidence given the uncontroverted inference of causal relationship raised).

The September 17 and May 23, 1996 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, D.C.
January 19, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member