U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK BUSCHOR, III and DEPARTMENT OF THE ARMY, NEW YORK ARMY RESERVE NATIONAL GUARD, ISLIP MacARTHUR AIRPORT, Ronkonkoma, N.Y.

Docket No. 98-1205; Submitted on the Record;
Issued January 21, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that his medical condition on and after October 5, 1995 is causally related to an accepted December 13, 1976 left hip contusion and low back derangement.

This is the second appeal before the Board in this case. By decision and order issued July 15, 1996,[1] the Board affirmed the Office of Workers' Compensation Programs October 5, 1995 decision terminating appellant's compensation benefits effective that day, and a November 22, 1995 decision affirming that termination, on the grounds that appellant had no disabling residuals of his accepted December 13, 1976 left hip contusion and low back derangement as of October 5, 1995. The Board found that the weight of the medical evidence continued to rest with the January 10, 1995 report of Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon and second opinion physician, who opined that appellant no longer had residuals of the December 13, 1976 injuries as of that date. The law and facts of the case as set forth in the Board's July 15, 1996 decision and order are incorporated by reference. Appellant continued to submit medical evidence.

An October 24, 1995 lumbar magnetic resonance image (MRI) scan showed "[e]arly degenerative disc disease without herniation or stenosis."[2]

Chart notes dated February 20 to May 19, 1996 from Dr. George M. Botelho, an attending orthopedic surgeon, note that appellant was neurologically stable, but complained of paresthesias and incoordination in his hands, feet and legs. In an April 12, 1996 note,

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[1] Docket No. 96-609.

[2] The record indicates that appellant applied for Social Security disability benefits through the State of Florida in approximately December 1995.

Dr. Botelho noted appellant's continued low back pain, with hypoesthesia of both feet on examination. Dr. Botelho stated an impression of spinal cord contusion and peripheral ischemia, and prescribed continued medications.[3]

In a July 24, 1996 report, Dr. Myron D. Haas, an osteopath, provided a brief history of injury and treatment, found negative straight leg raising tests bilaterally, "some weakness to dorsiflexion and plantar flexion," difficulty with toe and heel walking, limited lumbar flexion, and tenderness to palpation at L5-S1. Dr. Haas diagnosed a "chronic spinal cord contusion," and recommended medication and physical therapy.

In an August 13, 1996 report, Dr. Botelho noted treating appellant beginning on July 11, 1995 and last examining him on May 14, 1996. He noted that appellant's back pain "all arose from a fall from a helicopter which dated back to 1976." Dr. Botelho described appellant's intermittent low back pain, neck stiffness, "tingling of the upper extremities and hands with a history of spasm and tremulousness," loss of cervical spinal motion, and "evidence of hyperreflexia of the lower extremities" with decreased sensation and strength. He opined that appellant had sustained "a spinal cord contusion which dated back to 1976." Dr. Botelho noted that cervical and lumbar MRI scans did not reveal any disc derangement, and that Dr. Paul Buza, a neurologist, felt that appellant had an "old spinal cord contusion," without focal deficit on electromyography (EMG). Dr. Botelho explained that although "evidence for spinal cord contusion that is old probably would not be identified on [an] MRI at th[at] time," he "believe[d] that [appellant] d[id] suffer from a spinal cord contusion with an element of myelopathy and rigidity with regards to his cervical and lumbar spine," and recommended physical therapy. He criticized Dr. Millheiser's January 10, 1995 report, as it did not discuss appellant's cervical or lumbar range of motion, diminished motor strength in the lower extremities, or hyperreflexia of the ankles." Dr. Botelho noted that appellant remained disabled for work.

In an August 29, 1996 report received by the Office on September 20, 1996, Dr. John Feder, an orthopedic surgeon, provided a history of injury and treatment. On examination, Dr. Feder found that appellant could heel and toe walk without difficulty, was "very tremulous in all motions," had reduced cervical range of motion with rigidity, lumbar paraspinal spasm without mid-line tenderness, symmetrical lower extremity reflexes, limited forward flexion, and positive straight leg raising tests. Dr. Feder diagnosed cervical and lumbar contusions, and recommended home exercises and physical therapy. He noted that appellant remained "disabled from his usual occupation."[4]

In a September 26, 1996 letter, appellant requested reconsideration based on the medical evidence submitted from October 24, 1995 onward. By decision dated September 30, 1996, the Office denied appellant's request for a merit review on the grounds that the evidence submitted

[3] Dr. Botelho referred appellant for physical therapy on May 14, 1996. The Office noted in a June 3, 1996 letter that physical therapy would not be authorized without an explanation as to how and why the accepted December 13, 1976 left hip contusion and low back derangement would cause paresthesias of the hands and feet requiring physical therapy.

[4] Appellant earlier submitted one page of this report.

was cumulative, and insufficient to warrant a merit review of its prior decision.[5] Appellant disagreed with this decision and on October 21, 1996 requested an oral hearing, denied by a November 25, 1996 letter decision on the grounds that he had previously requested reconsideration, and was therefore not entitled to an oral hearing as a matter of right. The Office noted that the issue in the case could be addressed equally well by requesting reconsideration from the Office and submitting new evidence or legal argument.

In a December 28, 1996 letter to appellant, Dr. Millheiser opined that appellant could "perform physical activities as well as prior to the accident taking into account that it was now 18 years since the accident." Dr. Millheiser noted reviewing various reports that appellant sent to him, and that there was "considerable disagreement among [the] physicians," as Dr. Botelho found hyperreflexia while Dr. Feder observed symmetrical lower extremity reflexes and that appellant could heel and toe walk without difficulty, indicating normal foot strength. Dr. Millheiser asserted that his January 1995 examination of appellant was "thorough, complete and fairly done," and that there was no reason to change or amend the January 10, 1995 report on which the Office relied in terminating appellant's compensation.

In letters dated January 6, March 20 and April 20, 1997, appellant requested reconsideration, reiterating that Dr. Millheiser did not perform a thorough examination or prepare an accurate medical report.[6]

By decision dated May 16, 1997, the Office reviewed appellant's claim on the merits and denied modification on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision. The Office noted that causal relationship of appellant's condition on and after October 5, 1995, and the December 13, 1976 injuries, could only be established by new medical evidence, and that appellant' various allegations against Dr. Millheiser did not constitute valid legal arguments for error. The Office found that Dr. Feder's August 29, 1996 report was insufficiently rationalized and based on an inaccurate factual background, and that Dr. Haas' July 24, 1996 report did not address causal relationship, Dr. Botelho's August 13, 1996 report merely reiterated his previous reports and was not based on a current examination. The Office therefore concluded that the weight of the medical evidence continued to rest with Dr. Millheiser.

[5] The Office erroneously found that Dr. Feder's August 29, 1996 report was incomplete and therefore of no probative value, as appellant submitted a complete copy of this report, received by the Office on September 20, 1996. However, this was a harmless, nondispositive error, as Dr. Feder's complete report was considered by the Office in issuing its May 16 and October 2, 1997 decisions. The Office further found that Dr. Botelho's report was essentially the same as an October 20, 1995 report previously of record and considered by the Office, and that Dr. Haas' report did not contain "findings not found in the other reports."

[6] In an April 20, 1997 letter, appellant asserted that Dr. Millheiser was an incompetent physician as he was among the two percent of Florida physicians to have had three or more malpractice suits from 1991 to 1996. He enclosed documents from the Florida Medical Professional Liability Closed Claim division indicating that there were several closed claims involving Dr. Millheiser: failure to treat a postoperative knee infection, improper treatment of two ankle fractures, and aggravation of a preexisting foot drop after casting. The Board notes that as these malpractice claim documents do not pertain to appellant's medical treatment, and do not demonstrate that Dr. Millheiser was not a licensed physician at the time he performed the January 1995 examination and submitted the January 10, 1995 report, these documents are not of probative value in this case.

In a September 2, 1997 letter, appellant requested reconsideration and submitted additional medical evidence.

In chart notes dated June 3 to September 16, 1997, Dr. Botelho noted appellant's low back pain, paresthesias of the hands and feet, and upper extremity tremors. He described appellant as "neurologically stable."

In an August 23, 1997 report, Dr. Botelho provided a detailed history of injury and treatment, reviewed medical reports from 1977 through 1996, and repeated his diagnoses of a "chronic old central cord syndrome and a spinal cord contusion." He commented that medical technology at the time of appellant's fall in 1976 was insufficient to radiographically diagnose a spinal cord contusion, and that therefore such an injury could have been overlooked or misdiagnosed. Dr. Botelho also noted that current MRI findings would likely not show such an old injury. He opined that appellant was totally and permanently disabled due to his long history of "hyperreflexia, limitation of motion, muscle atrophy and muscle fatigability."

By decision dated October 2, 1997, the Office reviewed appellant's case on the merits and denied modification on the grounds that the evidence submitted was insufficient to warrant modification. The Office reviewed the medical record from December 13, 1976 onward, and found Dr. Botelho's August 23, 1997 report insufficiently rationalized "to overcome the prior medical evidence." The Office noted that it was unclear as to how Dr. Botelho or any other physician could diagnose a 20-year-old spinal cord contusion if it could not be demonstrated on an MRI.[7]

The Board finds that appellant has not met his burden of proof in establishing that his medical condition on and after October 5, 1995 is causally related to an accepted December 13, 1976 left hip contusion and low back derangement.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[8] As appellant filed his appeal with the Board on February 27, 1998, the only decisions properly before the Board are the May 16 and October 2, 1997 decisions denying modification.

When an employee claims a continuing disability causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed recurrence of disability is causally related to the accepted injury. As part of this burden, appellant must submit rationalized medical evidence based on a complete and accurate factual and medical background showing causal relationship.[9] The opinion of the physician must be based on a complete factual and medical

[7] Appellant expressed disagreement with the Office's decision in a November 4, 1997 letter, requesting a "fair review" of his case. In a February 6, 1998 letter, the Office advised appellant to consult his appeal rights if he desired further action from the Office.

[8] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[9] *See Armando Colon*, 41 ECAB 563 (1990).

background of the claimant,[10] must be one of reasonable medical certainty,[11] 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.[12] An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on appellant's unsupported belief of causal relation.[13]

As applied to this case, in order to establish causal relationship, appellant must submit sufficient rationalized medical evidence explaining how and why the December 13, 1976 fall, the accepted low back derangement or left hip contusion would cause any medical condition on and after October 5, 1995.

Dr. Botelho, appellant's attending orthopedic surgeon, submitted several reports from February 20, 1996 to August 23, 1997. These reports are largely repetitive of his reports previously of record, in particular those dated October 20 and November 3, 1995 which were considered by the Office in issuing its November 22, 1995 decision, and by the Board in issuing its July 15, 1996 decision and order. The Board notes that neither the November 22, 1995 decision or July 15, 1996 decision and order are before the Board on the present appeal. However, to fully explain why Dr. Botelho's reports from February 20, 1996 to August 23, 1997 are repetitive, his October 20 and November 3, 1995 reports will be discussed for purposes of comparison.

In his October 20, 1995 report, Dr. Botelho noted limitation of cervical and lumbar motion, diffuse lower extremity weakness, slight hyperreflexia and paresthesias of the lower extremities. He diagnosed a possible old central cord syndrome. In a November 3, 1995 report, Dr. Botelho stated that the nature of appellant's December 13, 1976 back injury was "not well defined, and no diagnosis was given," although he "likely … sustained a cervical cord contusion." He also noted in this report that a "cervical cord contusion [in] 1976 would more than likely reveal no abnormalities at this time. This causes nerve injury to the spinal cord with atrophy … which would not be delineated on an MRI at this point in time."

The Board notes that appellant submitted an October 24, 1995 lumbar MRI showing "[e]arly degenerative disc disease without herniation or stenosis." As Dr. Botelho predicted, this report does not mention any abnormality of the spinal cord itself, such as a spinal cord contusion. The Board notes that the absence of radiographic findings is not fatal to appellant's case if causal relationship could be established through other types of medical findings. Absence of a known etiology for a condition does not relieve appellant of the burden of establishing a causal relationship by the weight of the evidence, which includes affirmative medical opinion evidence based on the material facts with supporting rationale.[14]

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

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

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

[13] *Ausberto Guzman*, 25 ECAB 362 (1974).

[14] *Judith A. Peot*, 46 ECAB 1036 (1995).

Dr. Botelho's reports from February 20, 1996 to August 23, 1997 also describe appellant's low back pain, lower extremity paresthesias, weakness and hyperreflexia, and diagnose an old spinal cord contusion that cannot be seen on an MRI scan. In particular, Dr. Botelho's chart notes from February 20 to May 19, 1996 appellant's complaints of weakness and paresthesias in the lower extremities, and his impression of a spinal cord contusion with peripheral ischemia. Dr. Botelho again described appellant's paresthesias and hyperreflexia in detail in his August 13, 1996 report, diagnosing "a spinal cord contusion which dated back to 1976," but that "evidence for spinal cord contusion that old probably would not be identified on MRI …" Chart notes from June 3 to September 16, 1997 again describe appellant's symptoms, noting that appellant remained "neurologically stable." In an August 23, 1997 report, Dr. Botelho repeated his diagnoses of a "chronic old central cord syndrome and a spinal cord contusion." He commented, quite similarly to the November 3, 1995 report, that medical imaging technology at the time of appellant's fall in 1976 was insufficient to radiographically diagnose a spinal cord contusion, and that current MRI findings would likely not show such an old injury.

Thus, Dr. Botelho's reports on and after February 20, 1996 merely reiterate findings set forth in reports on or before October 20, 1995: upper and lower extremity paresthesias, and hyperreflexia and diffuse weakness of the lower extremities. Dr. Botelho also repeats that the suspected spinal cord contusion could not have been diagnosed radiographically at the time of the December 13, 1976 accident, and would likely no longer be appreciable by MRI as nearly 20 years had passed. The Board has held that cumulative, repetitious evidence is an insufficient basis for modifying a prior decision.[15]

A further difficulty with Dr. Botelho's opinion is that it lacks sufficient medical rationale explaining how and why the December 13, 1976 injuries would cause appellant's continuing medical difficulties on and after October 5, 1995. It is not enough for Dr. Botelho to set forth his conclusion that the spinal cord contusion, which he admits cannot be diagnosed with medical certainty, was caused by the December 13, 1976 incident. Dr. Botelho must explain how and why the December 13, 1976 fall, the accepted low back derangement or left hip contusion, would cause a spinal cord contusion, appellant's claimed disability for work on and after October 5, 1995, or any other medical condition. Without such rationale, Dr. Botelho's opinion is of reduced probative value in establishing the critical issue of causal relationship in this case.[16]

Appellant also submitted reports from Dr. John Feder, an orthopedic surgeon, and Dr. Myron Haas, an osteopath. In an August 29, 1996 report, Dr. Feder provided a history of injury and treatment, noted findings on examination indicative of neurologic abnormality, and diagnosed cervical and lumbar contusions. Similarly, in a July 24, 1996 report, Dr. Haas provided a history of injury and treatment, noted findings on examination indicative of neurological abnormality, and diagnosed a "chronic spinal cord contusion." However, Dr. Feder and Dr. Haas did not explain how and why the December 13, 1976 injuries would cause appellant's symptoms and clinical findings nearly 20 years later. Without such supportive

[15] *See Gaetan F. Valenza*, 35 ECAB 763 (1984).

[16] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

rationale, the opinions of Dr. Feder and Dr. Haas are of significantly diminished probative value in establishing causal relationship.[17]

In a December 28, 1996 letter, Dr. Millheiser, the Board-certified orthopedic surgeon and second opinion physician on whose opinion the October 5, 1995 termination decision was based, noted some disagreement in clinical findings described by Dr. Botelho and Dr. Feder, but that this was not a sufficient basis for altering his January 10, 1995 opinion. This report does not contain sufficient, new medical evidence to warrant modification of the prior decision.

Consequently, appellant has not established that his medical condition on and after October 5, 1995 is causally related to the accepted December 13, 1976 low back derangement and left hip contusion, as he submitted insufficient new, rationalized medical evidence to support the alleged causal relationship.

The decisions of the Office of Workers' Compensation Programs dated October 2 and May 16, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 21, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[17] *Id.*