U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DENNIS L. SHUSTER and U.S. POSTAL SERVICE,
JACKSON POST OFFICE ANNEX, Jackson, Mich.

*Docket No. 97-2605; Submitted on the Record;*
*Issued June 25, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained a bulging intervertebral disc at L3-5 or other lumbar condition in the performance of duty beginning January 4, 1995 as alleged.

On November 1, 1995 appellant, then a 46-year-old vehicle maintenance mechanic, filed a notice of occupational injury alleging that he sustained a bulging intervertebral discs at L3-4 and L5, with occasional numbness in his arms and legs, on or before January 4, 1995 in the performance of duty, resulting in a chronic lumbar condition since that date. Appellant attributed his condition to repetitive "lifting, stretching, reaching, pulling" at work. On the reverse of the form, appellant's supervisor indicated that appellant did not stop work and first reported his condition on November 1, 1995.[1]

Appellant submitted medical evidence addressing his history of low back injuries and treatment. The Office of Workers' Compensation Programs accepted that appellant sustained a lumbosacral strain in the performance of duty on September 14, 1988.[2] A September 14, 1988 x-ray report prepared for Dr. Brian Adamczyk, an attending family practitioner, showed vertebral bodies of normal height and disc spacing, a small osteophyte at L3, with no interval change new

[1] The record demonstrates that appellant's duties required moderate lifting up to 50 pounds for 1 hour per day, lifting up to 20 pounds for 2 hours a day, kneeling, twisting, pushing and pulling for 2 hours a day, bending and stooping for 1 hour per day, and reaching above the shoulder for 2 hours per day.

[2] Claim No. A9-32357. Appellant also filed a claim for a recurrence of disability beginning February 21, 1989. These claims are not before the Board on the present appeal.

abnormality since a July 22, 1981. In September 19, 1988 form reports, Dr. Adamczyk prescribed physical therapy and held appellant off work from September 14 to 21, 1988.[3]

In a March 15, 1989 report, Dr. Harish Rawal, an attending neurosurgeon, diagnosed lumbar radiculopathy.[4] Dr. Rawal examined appellant several times from February 27 to November 14, 1989, finding appellant disabled for work from February 27 to March 29, 1989 due to the September 14, 1988 injury.

Appellant filed a claim for a second lumbar injury allegedly sustained on March 7, 1991.[5] Dr. Rawal examined appellant and referred him for physical therapy through April 12, 1991. In an April 8, 1992 letter, Dr. S.M. Farhat, a neurosurgeon, opined that a lumbar magnetic resonance imaging (MRI) scan did "not show evidence of a ruptured disc" and that surgery would not benefit appellant.

In an August 23, 1995 report, Dr. Randolph Penn, a chiropractor, noted examining appellant on January 4, 1995 for complaints of "low back pain and numbness to the dorsum of [the] left foot," noted a history of previous injury and treatment, increasing weakness of the left extensor hallucis longus, and bulging discs from L3-5 by MRI and CT scans.[6] Dr. Penn opined that appellant's "condition would be considered preexisting and work-related since these were similar findings from the previous MRI performed four years prior."[7]

In a January 25, 1996 letter, the Office advised appellant of the additional medical and factual evidence needed to establish his claim, including a physician's rationalized report supporting a causal relationship between factors of appellant's federal employment and the claimed back condition. The Office noted the Federal Employees' Compensation Act's limitations on chiropractors as physicians, such that "their reimbursable services [were] limited to" manual manipulation of the spine "to correct a subluxation as demonstrated by x-ray to exist…."

[3] In a September 20, 1988 report, a physical therapist noted that appellant was a vehicle mechanic who several days before "bent over in an awkward, bent and twisted position to pick up a toolbox and suffered a sharp pain in his low back … states that about seven years ago he had an episode of a similar nature."

[4] March 15, 1989 computed tomography (CT) scans and lumbar myelography showed a focal L5-S1 bulge impinging on the thecal sac with a possible central disc herniation, diffuse disc bulging at L4-5 and "[a]ssymetry of the nerve root sheaths at the L5 level."

[5] Claim No. A9-352987. The record does not indicate if the Office accepted this claim. This claim is not before the Board on the present appeal.

[6] An April 14, 1995 CT scan performed for Dr. Penn showed "mildly bulging discs at L3-4 and L4-5" without "acute abnormalities."

[7] The record contains a list showing approximately 95 dates of treatment from September 7, 1993 to January 22, 1996 by Dr. Penn, a chiropractor. The record does not contain treatment notes or clinical findings by Dr. Penn associated with these dates.

In a January 31, 1996 letter, appellant described frequent lifting floor jacks weighing up to 80 pounds, loading and unloading heavy vehicle parts from his truck and "bending over engines."[8]

By decision dated February 29, 1996, the Office denied appellant's claim on the grounds that causal relationship was not established as appellant submitted insufficient rationalized medical evidence.

Appellant disagreed with this decision, and requested an oral hearing held on May 7, 1997. At the hearing, appellant stated that he sustained lumbar injuries in the performance of duty on September 14, 1988 and March 7, 1991, and missed time from work intermittently through 1995 due to sequelae of these injuries and to the ongoing physical demands of his federal employment.[9]

By decision dated and finalized July 17, 1997, the Office hearing representative affirmed the February 29, 1996 decision, finding that appellant failed to establish a causal relationship. The hearing representative found that while appellant had established that he engaged in frequent heavy lifting, bending, twisting and awkward postures in the performance of duty, he submitted insufficient medical evidence to establish that those work factors caused the claimed back condition on and after January 4, 1995. The hearing representative further found that the only report of record addressing causal relationship was Dr. Penn's August 23, 1995 report, which could not be considered as medical evidence as Dr. Penn was not a physician under the Act for purposes of this case as he did not diagnose a spinal subluxation.[10]

The Board finds that appellant has not established that he sustained bulging intervertebral discs at L3-5 or other lumbar condition in the performance of duty beginning January 4, 1995 as alleged.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[11] (2) a

[8] He also resubmitted Dr. Penn's August 23, 1995 report.

[9] At the hearing, appellant submitted employing establishment leave records showing absences which he attributed to his back condition, and correspondence regarding payment of medical bills. He also submitted a November 27, 1992 note from Dr. John Tallis, a chiropractor, stating that appellant would be off work from November 23 to 29, 1992 due to a low back strain. The record does not contain treatment notes or other reports from Dr. Tallis.

[10] The hearing representative noted, arguendo, that Dr. Penn's report did not distinguish between the two prior traumatic injuries and the ongoing physical demands of appellant's job on the causation issue, and did not provide sufficient medical rationale to establish causal relationship. The hearing representative also noted that the record did not contain "medical reports describing any clinical findings or treatment … from 1992 to January 4, 1995," except for the list of treatment dates from September 7, 1993 to January 22, 1996 from Dr. Penn.

[11] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition[12] and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[13] The medical opinion must be one of reasonable medical certainty[14] 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.[15]

The only report appellant submitted addressing his condition on and after January 4, 1995 is the August 23, 1995 report of Dr. Penn, a chiropractor. 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...."[16] Although Dr. Penn noted examining appellant on January 4, 1995 and reviewing medical records, he did not mention the presence of or diagnose a spinal subluxation. Therefore, he cannot be considered a physician for the purposes of this case. Thus, Dr. Penn's opinion that appellant's condition was work related is of no probative value.

The Board notes that appellant was advised in detail by January 25, 1996 letter of the necessity of submitting rationalized medical evidence in order to establish his claim and of the Act's limitations on chiropractors. Despite this advisement, appellant did not submit such evidence.

Consequently, appellant has failed to established that he sustained a lumbar disc herniation or other back condition as alleged, as he submitted insufficient medical evidence to establish a pathophysiologic causal relationship between specific factors of his federal employment and his claimed condition.

[12] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979). The Office, as part of its adjudicatory function, must make findings of fact and a determination as to whether the implicated working conditions constitute employment factors prior to submitting the case record to a medical expert; *see John A. Snowberger*, 34 ECAB 1262, 1271 (1983); *Rocco Izzo*, 5 ECAB 161, 164 (1952).

[13] *See generally Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

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

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

[16] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

The decision of the Office of Workers' Compensation Programs dated and finalized July 17, 1997 is hereby affirmed.

Dated, Washington, D.C.
June 25, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member