U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LIONEL O. FAUNCE and DEPARTMENT OF VETERANS AFFAIRS, PALO ALTO VETERANS HOSPITAL, Palo Alto, CA

Docket No. 98-553; Submitted on the Record;
Issued November 24, 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 he sustained an employment-related injury to his lower back on May 9, 1995.

On May 11, 1995 appellant, then a 69-year-old volunteer shuttle bus driver filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that he sustained an injury to his lower back in the performance of duty on May 9, 1995. Appellant states that he injured his lower back when he lifted a wheelchair onto a rack on the back of his shuttle bus. The record shows that appellant was a retired building contractor. The employing establishment has controverted appellant's claim.

In a doctor's supplemental report dated December 31, 1995, (approximately seven months after the alleged injury occurred) Dr. Gale J. Asti, a chiropractor, noted that she treated appellant for an injury to the lumbar spine since he was having acute intermittent pain in the lumbar spine causing antalgic posture and difficulty in sitting or standing. Dr. Asti then explained that cryotherapy (chiropractic physical therapy) was being given for three days a week, for four weeks for the reduction of inflammation, heat packs for muscle spasms and intersegmental traction.

In a letter dated April 3, 1996, the Office of Workers' Compensation Programs advised appellant of the type of factual and medical evidence needed to establish his claim for benefits. In particular, appellant was advised to provide a physician's opinion, with medical reasons for such opinion, as to the causal relationship between his diagnosed condition and the injury as reported. Appellant was allotted thirty days within which to submit such evidence.

By letters dated April 12 and May 13, 1996, appellant responded to the Office's April 3, 1996 letter, by indicating that he immediately reported the incident to his supervisor and saw the agencies nurse who refused to treat him because he had too many operations, but advised him to seek medical treatment from his private physician. Appellant explained that he continued to

have pain but went home. Appellant went on to explain that he had planned a vacation a year in advance and decided to drive to his vacation cabin. When he reached the cabin in June 1995, (approximately three months later) appellant explained that he lowered a generator off the back of his truck and hurt his back so bad that he slipped and snap something in his groin. Appellant stated that he later learned that he had sustained a blood clot in his leg.

Appellant also submitted in support of his claim, Dr. Asti's medical report dated May 3, 1996. In the report, Dr. Asti indicated that appellant was first examined on December 8, 1995; that the onset of injury occurred May 9, 1996, (approximately a year following appellant's alleged incident of May 9, 1995) and presented the history of incident as appellant injured his lumbar spinal region while lifting a wheelchair onto a rack on the back of a van. She indicated that her medical finding were frequent moderate with occasional severe pain in the lumbar spinal region and sacral region. Objective findings revealed positive Laseque's, Braggards and Fabere Patrick's on the right, foramina compression positive in the lumbar spine and diminished range of motion with pain in all dorso-lumbar studies. Appellant's x-ray examinations exhibited abnormal deviations. Dr. Asti diagnosed appellant with "847.2 Lumbar Strain (moderate), 839.20 Lumbar Subluxation, 722.10 Lumbar Intervertebral Disc Displacement, 847.3 Sacroiliac Strain (moderate), 839.42 Sacroiliac Subluxation and 724.3 Sciatic." She went on to note that appellant was quarantined and unable to drive due to surgery, specific chiropractic adjustments to correct subluxations and relieve nerve root irritation. Dr. Asti also checked a "Yes" box indicating that her findings and diagnosis are consistent with the history of injury or onset of illness.

In a decision dated May 7, 1996, the Office rejected appellant's claim on the grounds that fact of injury had not been established. The Office also advised appellant of the regulations regarding chiropractic care, the deficiencies in his claim and afforded him an opportunity to provide supportive evidence.

By letter dated May 13, 1996, appellant requested an oral hearing before an Office hearing representative. On September 10 and October 8, 1997 the employing establishment forwarded medical care treatment notes from the agencies health unit dated May 11 and December 14, 1995, along with copies of appellant's billing statements ranging in dates from December 8, 1995 through March 4, 1997. The May 11, 1995 treatment note refers to a "right upper anterior 'pop' sensation with jabbing pain when appellant lifted a wheelchair; and tender upper right anterior chest, right lat? chest and either side upper stretching arm between ribs; probably muscle pain/injury from lifting from a Mary Spring, a registered nurse. The December 14, 1995 report refers to appellant's request for a copy of a traumatic injury claim (CA-1) for the injury he sustained May 4, 1995." Thereafter, a hearing was held in San Francisco, California on September 16, 1997 and appellant testified on his own behalf.

In a decision dated November 6, 1997, the Office hearing representative affirmed the Office's May 7, 1996 decision. The Office hearing representative stated that appellant's chiropractor took x-rays in December 1995 and treated appellant for subluxation, thus, qualifying her as a "physician" under the Federal Employees' Compensation Act for this claim. The Office hearing representative, however, found that the chiropractor's reports did not contain

substantial and probative medical evidence to establish that appellant sustained a lower back condition as a result of the incident of May 9, 1995.

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury to his lower back in the performance of duty on May 9, 1995.

An employee seeking benefits under the Act[1] has the burden of establishing that the essential elements of his or her claim[2] including the fact that the individual is an "employee of the United States" within the meaning of the Act,[3] that the claim was timely filed within the applicable time limitation period of the Act,[4] that an injury was sustained 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.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

In order to determine whether a federal employee has sustained a traumatic 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 which must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[7] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[8] An employee may establish that an injury occurred in the performance of duty as alleged but failed to establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.[9]

To accept fact of injury in a traumatic injury case, the Office, in addition to finding that the employment incident occurred in the performance of duty as alleged, must also find that the employment incident resulted in an "injury." The term "injury" as defined by the Act, as

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[1] 5 U.S.C. §§ 8101-8193.

[2] *See Daniel R. Hickman*, 34 ECAB 1220 (1983); *see also* 20 C.F.R. § 10.110.

[3] *See James A. Lynch*, 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101(1).

[4] 5 U.S.C. § 8122.

[5] *See Melinda C. Epperly*, 45 ECAB 196 (1993); *Joe Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *David J. Overfield*, 42 ECAB 718 (1991); *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[7] *See John J. Carlone*, 41 ECAB 354 (1989).

[8] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(a)(14).

[9] As used in the Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in the loss of wage-earning capacity; *see Frazier V. Nichol*, 37 ECAB 528 (1986).

commonly used, refers to some physical or mental condition caused either by trauma or by continued or repeated exposure to, or contact with, certain factors, elements or condition.[10] The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.[11]

In this case, the Office found that the alleged work incidents on May 9, 1995 did occur as alleged. The issue is whether the medical evidence establishes an injury causally related to the work incident on May 9, 1995. With respect to the reports from Dr. Asti, 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."[12] She diagnosed subluxation in her December 31, 1995 form report; noted that x-rays had been obtained and diagnosed appellant with "847.2 lumbar strain (moderate), 839.20 Lumbar Subluxation, 722.10 Lumbar Intervertebral Disc Displacement, 847.3 Sacroiliac Strain (moderate), 839.42 Sacroiliac subluxation, [and] 724.3 Sciatic."[13] The Board, therefore, finds that the December 31, 1995 report is from a "physician" under the Act, however, this form report does not provide a reasoned medical opinion as to causal relationship. The checking of a box "yes" in a form report, without additional explanation or rationale, is not sufficient to establish causal relationship.[14]

Additionally, as indicated by the Office hearing representative, Ms. Spring being a registered nurse is not a "physician" as defined under Act and the treatment notes from the agencies health unit dated May 11 and December 14, 1995, cannot supply the medical opinion evidence necessary to establish appellant's claim.[15] The Board, therefore, finds that appellant has not submitted sufficient medical evidence to establish his claim.

The decision of the Office of Workers' Compensation Programs dated November 6, 1997 is affirmed.

Dated, Washington, D.C.
November 24, 1999

[10] *See Elaine Pendleton*, *supra* note 5.

[11] *See John J. Carlone*, *supra* note 7.

[12] 5 U.S.C. § 8101(2).

[13] The term subluxation means an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae. 20 C.F.R. § 10.400(e).

[14] *Barbara J. Williams*, 40 ECAB 649 (1989).

[15] A registered nurse is not a "physician" as defined in the Act; *see* 5 U.S.C. § 8101(2). Lay individuals such as physician assistants, registered nurses, nurse practitioners and social workers are not competent to render a medical opinion.

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member