U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY J. GUEST and VETERANS ADMINISTRATION, MEDICAL CENTER, Waco, TX

Docket No. 99-840; Submitted on the Record;
Issued June 26, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant established that her back condition was caused or aggravated by an employment incident on December 13, 1995.

On December 18, 1995 appellant, then a 50-year-old registered nurse, filed a notice of traumatic injury and claim for compensation, alleging that she strained her back on December 13, 1995 while moving a rack of charts to her desk. Appellant stopped work on December 14, 1995 and has not returned.

The record indicates that appellant was diagnosed with degenerative disc disease at L4-5 with congenital spondylolisthesis at L5-S1 as early as August 1991. Appellant had been under the care of Drs. Robert H. Saxton and Gary Becker, both of whom are Board-certified orthopedic surgeons. She underwent a lumbar decompression and Gill procedure with posterolateral fusion, segmental fixation with Islola rods and Stefee screws from L4-5 to the sacrum on September 5, 1991.

In intermittent treatment notes dating from August 2, 1991 to January 6, 1994, Dr. Saxton chronicled appellant's complaints of continuing back pain for which she was prescribed a back brace and medication.

In a treatment note dated January 4, 1994, Dr. Saxton noted that appellant had watched a television program titled "The Secret of the Spine Screws" and was terrified that her spinal screws were broken. To alleviate appellant's concerns, the doctor ordered an x-ray. In his next treatment note dated January 6, 1994, Dr. Saxton reviewed the x-ray results and stated that "it looks like one of the screws in [appellant's construct] is indeed broken.[1] The sacral screw on the

[1] Cervical and lumbar spine x-rays dated January 4, 1994 indicated a slight anterior subluxation at L4 on L5 and L5 on S1, as well as narrowing of the L5-S1 disc space.

right appears to me to be broken but it is lined up very nicely." He indicated that appellant was very alarmed about the situation and complained of neck and shoulder pain.

Following the alleged work incident on December 13, 1995, appellant had an x-ray taken on December 14, 1995, which revealed "steffee plate in place, lumbar sacral area with a questionable hairline crack in the left lower screw."

In support of her claim for compensation, appellant submitted a January 5, 1996 report from Dr. David J. Schickner, a Board-certified neurosurgeon, who noted that appellant injured her back on December 13, 1995, while lifting a heavy rack of charts and that her pain radiated from her lower back and into her legs, the left more affected than the right. He diagnosed that appellant had post laminectomy syndrome with a fracture of the left S1 screw. Dr. Schickner prescribed medication, recommended a myelogram and placed appellant off work until further notice.

By letter dated March 14, 1996, the Office of Workers' Compensation Programs advised appellant of the type of factual and medical evidence required to establish her claim.

Appellant next submitted an April 4, 1996 report from Dr. Schickner. He related that there was some question as to whether appellant's rod was fractured a year prior whether it was broken during events of moving the rack of charts on December 13, 1995. Dr. Schickner recommended that the instrumentation be removed and not be replaced given the inherent flaws in the screw system. He noted that appellant may not need any instrumentation system if there was adequate fusion or else he would replace the screws with a hook system.

In an April 18, 1996 report, Dr. Schickner stated appellant had a fracture of the left S1 pedicle screw based on the film dated January 5, 1996 and that the x-ray finding appeared to be a new finding directly related to appellant's work injury.[2]

In a decision dated May 21, 1996, the Office denied compensation on the grounds that the medical evidence of record was insufficient to establish that appellant's work injury on December 13, 1995 was causally related to her claimed back condition.

On June 5, 1996 appellant underwent a myelogram for "post laminectomy syndrome with fraction of instrumentation." The myelogram confirmed a broken screw at the S1 level but the spine was noted as being otherwise maintained with no evidence of spinal stenosis.

In a series of intermittent patient notes dating from August 6 to 28, 1996, Dr. Marcial G. Lewin indicated that she was seeing appellant for a second surgical consultation arranged by Dr. Schickner. Dr. Lewin noted that, after reviewing the treatment records from Dr. Saxton, particularly the January 6, 1994 treatment note, it was her opinion that the break in the screw was nothing recent and was something that had been there since at least January 1994.

[2] In a CA-20 attending physician's report dated January 5, 1996, Dr. Schickner check marked a box indicating that appellant's diagnosed condition of a "broken [instrumentation] in lumbar spine" was causally related to the December 13, 1995 work injury.

On September 5, 1996 appellant underwent surgery to remove the instrumentation hardware post laminectomy. The surgical report noted that the hardware consisted of six screws measuring 6 centimeters in length by 0.6 centimeters in diameter and that one of the screws appeared to be broken in half.

Appellant requested a hearing, which was held on June 25, 1998.

Subsequent to the hearing, the Office hearing representative left the record open for submission of additional medical evidence.

In a January 2, 1997 report, Dr. Schickner noted that he had last examined appellant on December 2, 1996 for persistent complaints of lower back pain related to a work injury on December 13, 1995 when appellant fractured a metal screw in her back while moving a metal chart rack. He noted that appellant was using a back brace and a TENS unit for pain. Dr. Schickner diagnosed chronic pain from post laminectomy syndrome with nerve root injury and opined that appellant was disabled from work.

In a decision dated September 11, 1997, an Office hearing representative vacated the Office's May 21, 1996 decision and remanded the case for further medical development including an examination by a Board-certified physician.

The Office referred appellant to Dr. William E. Blair, a Board-certified orthopedist, for a second opinion evaluation. In a report dated October 20 and November 12, 1997, he reported physical findings and discussed appellant's work and medical history. Dr. Blair diagnosed that appellant was status post lumbar discectomy decompression fusion and failure of internal fixation device with subsequent chronic low back pain, chronic pain behavior and a marked symptom magnification syndrome. He stated "there is no medical evidence that the failure of the internal fixation device was a direct result of the injury of December 13, 1995 ... the usual causation of a fractured internal fixation device is associated with motion, which in fact incurs lack of stability of a fusion mass. It is not uncommon for instrumentation to break even in the presence of a solid fusion mass simply from micromotion." Dr. Blair also suggested that, while appellant experienced pain on December 13, 1995, while moving a chart rack, it was an administrative and not a medical determination as to whether appellant sustained a work injury. He suggested that given appellant's history of degenerative disc disease it was possible for appellant to experience back pain with "any given activity or even at rest." Dr. Blair concluded that appellant's disabling factors were a result of chronic pain behavior and her perception that she was unable to work."

In a November 11, 1997 decision, the Office denied compensation on the grounds that the weight of the medical evidence, residing with the Office's second opinion physician established that appellant's back condition was not causally related to her December 13, 1995 work injury.

On December 16, 1997 appellant requested a hearing, which was held on June 25, 1998.

In a decision dated September 3, 1998, an Office hearing representative affirmed the Office's November 19, 1997 decision.

The Board finds that the case is not in posture for a decision.

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

In order to determine whether an employee has sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether a "fact of injury" has been established. There are two components involved in establishing fact of injury that must be considered. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.[7]

In the instant case, the Office has accepted that appellant was moving a rack of charts to her desk on December 13, 1995 when she began experiencing increased back pain. Thus, the Office has accepted that appellant established a work incident at the time, place and in the manner alleged on her application for compensation.

With respect to the second prong of inquiry related to fact of injury, the Board finds that there is a conflict in the medical evidence as to whether appellant's back condition was caused or aggravated to the December 13, 1995 work incident.

The record establishes that appellant has a preexisting degenerative back condition. Appellant's treating physician, Dr. Schickner opined that the work incident on December 15, 1995 caused appellant to sustain a fracture in one of the Stefee screws placed in her spine following a September 5, 1991 lumbar decompression and fusion. Although Dr. Schickner does not specifically address the fact that appellant had evidence for at least a hairline fracture in one

[3] 5 U.S.C. §§ 8101-8193.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton* 40 ECAB 1143 (1989).

[5] *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *Elaine Pendleton*, *supra* note 4.

[7] *Id*.

of her back screws[8] almost a year prior to her work injury, the doctor's opinion supports that appellant at least aggravated her preexisting back condition when she moved the rack of charts to her desk. On the other hand, the Office referral physician, Dr. Blair, opined that there was no medical evidence of record from which to conclude that the failure of the internal fixation device was a direct result of appellant's December 13, 1995 work injury.

Contrary to the Office's analysis, the Board does not consider Dr. Blair's report to be sufficiently reasoned as to entitle the physician's opinion to controlling weight. The Board notes that Dr. Blair conceded that an internal fixation device can be fractured with even micro motion. Dr. Blair's statements in this regard raise the possibility that moving a rack of charts as described by appellant would be sufficient to cause a fractured screw. Dr. Blair also did not address whether the employment incident aggravated appellant's back condition, presuming that she had a preexisting condition of a hairline fracture.

Given that the opinions of Drs. Schickner and Blair are equally probative, the Board finds a conflict in the medical record that must be resolved. Section 8123(a) of the Act provides that, "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[9] The case is, therefore, remanded for the Office to obtain an impartial medical evaluation with a Board-certified specialist and further medical development as the Office deems necessary. Thereafter, the Office must issue a *de novo* decision.

[8] The Board notes that none of the physicians of record discuss that the evidence prior to the December 18, 1995 work incident suggests that appellant had a broke screw on the right side while the September 5, 1996 surgery confirmed that appellant had a broken screw on the left side. This discrepancy suggests either that the medical reports contain typographical errors or that appellant may have had a preexisting broken screw on the right side prior to the December 18, 1995 work incident and that moving the rack of charts on December 18, 1995 resulted in a broken screw on the left.

[9] 5 U.S.C. § 8123.

The decision of the Office of Workers' Compensation Programs dated September 3, 1998 is hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.
June 26, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member