U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAY K. TOMOKIYO and DEPARTMENT OF THE NAVY, PEARL HARBOR NAVAL SHIPYARD, HI

Docket No. 98-447; Submitted on the Record;
Issued March 10, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of November 1, 1996; (2) whether appellant is entitled to compensation under section 8107 of the Federal Employees' Compensation Act based on his accepted lumbar and cervical injuries; (3) whether appellant's treating chiropractor is a "physician" for purposes of section 8101(2) of the Act; and (4) whether appellant is entitled to reimbursement for costs of chiropractic care and physical therapy.

On March 21, 1995 appellant, a 43-year-old electrician, sustained injuries to his head, neck, right upper extremity and chest wall as a result of being assaulted by a coworker. Appellant filed a claim for compensation benefits on March 22, 1995. In a report dated June 8, 1995, Dr. Thomas H. Sakoda, a specialist in neurosurgery, stated that, as a result of the March 21, 1995 work incident, appellant had sustained a right shoulder condition and a right knee condition. Dr. Sakoda stated that the results of a magnetic resonance imaging (MRI) scan of the cervical spine revealed some bulging of the C4-5 disc and that an MRI scan of the lumbar spine only demonstrated some degenerative discs at L2-3 and L3-4. He advised that the lumbar and cervical regions did not appear to pose any problem and did not require any special treatment, but that the shoulder and knee definitely required evaluation and treatment from an orthopedic surgeon.

Dr. Sakoda referred appellant to Dr. Morris M. Mitsunaga, a Board-certified orthopedic surgeon, who examined appellant on July 20, 1995. In a report issued the date of his examination, Dr. Mitsunaga stated that appellant sustained a post-traumatic cervical lumbar strain, post-traumatic adhesive capsulitis of the right shoulder, probable thoracic outlet syndrome of the right shoulder and post-traumatic chondromalacia of the right knee.

By decision dated September 27, 1995, the Office denied benefits, finding appellant failed to submit evidence sufficient to establish that he sustained an injury in the performance of duty. By letter dated October 25, 1995, appellant requested an oral hearing before an Office

hearing representative which was held on March 5, 1996. By decision dated June 7, 1996, the Office hearing representative set aside the previous decision and accepted appellant's claim for right arm contusion and right chest wall contusion.[1] The Office hearing representative remanded for a determination by an appropriate medical specialist as to whether additional medical conditions claimed by appellant were causally related to the March 21, 1995 employment injury.

Appellant was examined by Dr. Lee B. Silver, a Board-certified orthopedic surgeon, on September 18, 1996. Based on his examination of appellant, his review of the medical records and the statement of accepted facts, Dr. Silver diagnosed a resolved right arm contusion, resolved shoulder sprain, resolved right chest wall contusion, cervical musculoligamentous strain/sprain, lumbosacral musculoligamentous strain/sprain and right knee strain. He stated that appellant had sustained work-related conditions to the right upper extremity and chest wall as a result of the March 21, 1995 employment injury, but that these conditions had resolved and that appellant had no residuals from them. Dr. Silver noted that the initial emergency care and treatment report on the date of injury indicated that appellant had sustained orthopedic injury to the neck and lumbosacral spine, but advised that those injuries represented muscular and ligamentous strains and sprains. He advised that diagnostic tests of the cervical and lumbar spine had not demonstrated any significant disc herniation, nerve root impingement, radiculopathy or significant atrophy in the extremities. Dr. Silver related that appellant complained of pain in his right knee, but stated that there were no objective findings in that area and appellant had full range of motion in the knee.

Dr. Silver concluded that appellant had made a satisfactory recovery following the March 21, 1995 employment injury and found that his medical condition was medically stable. He opined that there were no orthopedic, physical limitations due to the March 21, 1995 employment injury and that appellant was capable of performing his full-work duties. Dr. Silver further stated:

> "Although muscular and ligamentous strains and sprains of the cervical and lumbosacral spines often resolve within a period of weeks or months, it appears that [appellant] has sustained some permanent injury with permanent residuals referable to those injuries. He does have persisting subjective complaints referable to the cervical and lumbar spines and there are objective findings of slight limitations of the cervical and lumbar range of motion, as performed by the [The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition)] [the A.M.A., *Guides*]. [Appellant] did pass the validity criterion testing for the lumbar range of motion examination."

On October 1, 1996 the Office issued a notice of proposed termination of compensation to appellant. Relying on Dr. Silver's opinion, the Office stated that it now accepted the conditions of right shoulder strain, cervical and lumbosacral strain and right knee strain, in addition to the right arm and right chest wall contusions. The Office allowed appellant 30 days

[1] Appellant did not take off any days from work due to the March 21, 1995 assault, and was not placed on total disability. He returned to light-duty work on March 22, 1995.

to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not submit any new evidence within 30 days.

By decision dated November 1, 1996, the Office, finding that Dr. Silver's opinion represented the weight of the medical evidence,[2] terminated appellant's compensation finding that he no longer suffered residuals from the March 21, 1995 employment injury.

On May 7, 1997 appellant filed a Form CA-7, claim for a schedule award based on his lumbar and cervical conditions.

By letter dated July 2, 1997, appellant requested reconsideration. Appellant argued that he was entitled to additional compensation based on Dr. Silver's statement that he had sustained some permanent damage with permanent residuals of the cervical and lumbar spines pursuant to the fourth edition of the A.M.A., *Guides.* Appellant claimed that he continued to suffer residuals related to the March 21, 1995 employment injury, with chronic numbness and chronic weakness.

Appellant submitted a supplemental letter to the Office dated July 23, 1997, in which he claimed that the Office was responsible for outstanding, unpaid medical bills from Dr. Barry N. Nutter, a chiropractor, in the amount of $2,300.00 and from Kuakini Medical Center, for a May 24, 1995 MRI scan authorized by Dr. Nutter, in the amount of $1,615.00, plus interest. In office memoranda of telephone calls dated December 11, 1996, August 13, 22 and 25, 1997, the Office informed Dr. Nutter that none of his outstanding medical bills were payable because none of the chiropractic reports indicated that subluxation had been established. The Office informed appellant that it was also not responsible for payment of the cost of the MRI scan, as it was only authorized to accept a chiropractor's opinion where he diagnosed subluxation as shown by x-ray, not by an MRI scan.[3]

By letters dated July 24 and August 12, 1997, the Office asked Dr. Silver to submit an additional medical report, requesting clarification regarding his statement pertaining to the issue of permanent residuals. The Office indicated to Dr. Silver that, although the only objective findings he noted in his report were slight limitation of the cervical and lumbar range of motion, Dr. Silver subsequently stated in his report that appellant had a permanent injury with permanent residuals. The Office, therefore, asked Dr. Silver to specifically indicate appellant's permanent residuals based on objective findings; whether he was only referring to the slight limitation of motion; whether range of motion was somewhat controlled by the degree of effort put forth by the patient; to explain his statement that appellant passed the validity criterion testing for lumbar range of motion examination; and to provide a rationale for his medical opinion.

[2] The Office noted that appellant's treating physician, Dr. Sakoda, had not submitted any medical reports since August 23, 1995, which indicated that appellant remained in a light-duty status due to his shoulder and knee condition.

[3] By letter dated June 4, 1997, Dr. Nutter's office informed the Office that it was resubmitting notice of unpaid billing claims. In response, an Office claims examiner submitted a letter to Dr. Nutter dated June 11, 1997 in which it stated: "Please be reminded of my December 11, 1996 telephone conversation with you in which I advised you that as this Office did not accept the condition of subluxation, no bills are payable pursuant to [s]ection 8101(2)."

In a supplemental report dated September 3, 1997, Dr. Silver stated:

> "It is my opinion that [appellant] does have some objective findings which represent permanent residuals. It is true that range of motion is somewhat under control of the degree of effort put forth by the patient. However, in the examinations performed according to [the *Guides*], repeated testing is performed with the inclinometers and only consistent measurements would be accepted. [Appellant's] cervical spine range of motion measurements did meet the consistency requirements noted in the section of "General Measurement Principles" on page 112 of [the *Guides*]…. In addition, [appellant's] lumbar range of motion measurements did meet the validity criterion testing as the sum of the sacral (hip) flexion and extension was 40 degrees with the tightest straight leg raise examination being 45 degrees. The differences between those two measurements is 5 degrees which is less than the maximum allowable 15 degrees. The validity criterion testing procedure is detailed on pages 126 and 127 of [the *Guides*]…. As [appellant] did pass the consistency and validity testing measures, it does appear that there are truly objective limitations in the cervical and lumbar range of motion present."

In a memorandum dated September 30, 1997, an Office medical adviser was asked to state his opinion regarding whether validity criterion testing for range of motion limitation, as referenced by Dr. Silver, was considered an objective finding. The Office medical adviser stated in response, on October 1, 1997, that the measurements were "valid" only in that they did n[o]t vary much. He further stated that "a more global assessment of range of motion and effort is more valuable."

By decision dated October 8, 1997, the Office affirmed the November 1, 1996 termination finding but modified the decision by finding that appellant was entitled to medical benefits for cervical and lumbar strain. The Office stated that, although the original accepted conditions of cervical and lumbar strains should have resolved three years after the original injury, Dr. Silver provided test results to support his opinion that appellant had permanent residuals from the March 21, 1995 employment injury.

The Board finds that the Office properly terminated appellant's entitlement to wage-loss benefits on November 1, 1996.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5] As used in the Act the term disability means incapacity because of an employment injury to earn the wages the employee

[4] *Mohamed Yunis,* 42 ECAB 325, 334 (1991).

[5] *Id.*

was receiving at the time of injury; that is, a physical impairment resulting in a loss of wage-earning capacity.[6]

In the present case, the Office based its decision to terminate appellant's compensation on the September 18, 1996 medical report of Dr. Silver, who stated that the right upper extremity and chest wall conditions resulting from the March 21, 1995 employment injury had resolved and found that appellant had no residuals from the employment injury. Dr. Silver stated that all of the diagnostic tests appellant underwent involving the cervical and lumbar spine were negative and had not indicated significant atrophy in the extremities. He further advised that appellant had no objective findings in his right knee, which showed full range of motion. Dr. Silver concluded that appellant had no orthopedic, physical limitations due to the March 21, 1995 employment injury and was capable of performing his full-work duties. Therefore, the Office properly found in its November 1, 1996 termination decision that Dr. Silver's opinion, which indicated that appellant had no residuals from his accepted employment injuries preventing him from performing full-duty work, represented the weight of the medical evidence. The Board, therefore, affirms the Office's October 8, 1997 decision affirming its November 1, 1996 termination decision.

The Board finds that appellant is not entitled to compensation under section 8107 based on his accepted lumbar and cervical injuries.

Appellant contends on appeal that he is entitled to additional compensation based on Dr. Silver's statement that he sustained some permanent injury with permanent residuals referable to the cervical and lumbar spines, had objective findings of slight limitations of the cervical and lumbar range of motion and passed the validity criterion testing for the lumbar range of motion examination outlined in the A.M.A., *Guides*. This statement is not sufficient, however, to establish that appellant is entitled to additional compensation; *i.e.*, an award under the schedule at section 8107[7] for permanent partial impairment based on an injury to his cervical or lumbar spine. The Office medical adviser properly noted that the measurements noted by Dr. Silver were valid only to the extent that they indicated a very minor limitation in appellant's lumbar range of motion. No schedule award is payable for permanent loss of, or loss of use of, anatomical members or functions or organ of the body not specified in the Act or in the implementing regulations.[8] As neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole,[9] no claimant is

[6] *Ralph W. Baker*, 39 ECAB 1413 (1988).

[7] 5 U.S.C. § 8107.

[8] *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies only to body members that are not enumerated in the schedule provision as it read before the 1974 amendment, and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also Ted W. Dieterich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

[9] The Federal Employees' Compensation Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19); *see also Rozella L. Skinner*, 37 ECAB 398 (1986).

entitled to such an award.[10] The Board, therefore, finds that appellant is not entitled to compensation for a permanent impairment based on his cervical and lumbar injuries.[11]

The Board finds that appellant's treating chiropractor is not a "physician" for purposes of section 8101(2).

The Board notes that Congress has imposed a limitation under the statute at section 8101(2) which defines the term "physician" to include 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, and subject to regulation by the Secretary."[12] "The Act at section 8101(3) defines "medical, surgical, and hospital services and supplies" as including services by a chiropractor, but states: "Reimbursable chiropractic services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist, and subject to regulation by the Secretary."[13] Under this authority, the Director has promulgated regulations which specify:

> "Reimbursable chiropractic services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-rays to exist. Also included for payment or reimbursement are physical examinations (and related laboratory tests) and x-rays performed by or required by a chiropractor to diagnose a subluxation of the spinal column.... A chiropractor may interpret his or her x-rays to the same extent as any other physician defined in this section."[14]

In this case, appellant obtained treatment from Dr. Nutter, a chiropractor, beginning on March 22, 1995 and continuing through June 7, 1995. By letter dated April 24, 1995, he referred appellant to an aquatherapy program for eight weeks of thrice-weekly physical therapy. By letter dated April 24, 1995, Dr. Nutter referred appellant for an MRI scan, which took place at Kuakini Medical Center on May 16, 1995. The MRI scan report indicated that appellant had minimal posterior disc bulges at C4-5, C5-6 and C6-7, and minimal posterior disc bulges at L2-3, L3-4 and L4-5. In a report dated May 16, 1995, Dr. Nutter indicated that based on his interpretation of the MRI scan that appellant had a subluxation at vertebral segments C4-5, C5-6 and C6-7 secondary to posterior disc bulges at those levels and a subluxation at vertebral segments L2-3, L3-4, and L4-5 secondary to anterior and posterior disc bulges at those levels. The Office, however, informed Dr. Nutter in telephone conversations dated December 11, 1996, August 13, 22 and 25, 1997, that none of his outstanding medical bills were payable because

[10] *George E. Williams*, 44 ECAB 530 (1993).

[11] The Board also rejects appellant's contentions on appeal that he is entitled to benefits for future worsening of his condition and for pain and suffering, neither of which are compensable under the Act.

[12] 5 U.S.C. § 8101(2).

[13] 5 U.S.C. § 8101(3).

[14] 20 C.F.R. § 10.400(e).

none of the chiropractic reports indicated that a diagnosis of subluxation was shown by x-ray.[15] The Board affirms the Office's finding that Dr. Nutter was not a physician pursuant to section 8101(2), as a chiropractor is only considered a physician for purposes of the Act where he diagnoses subluxation by x-ray; there is no provision in the Act or regulations for acceptance of a chiropractor's report as probative medical evidence where subluxation is diagnosed by MRI scan.

The Board finds that appellant is not entitled to reimbursement for costs of chiropractic care and physical therapy.

As Dr. Nutter does not qualify as "physician" under section 8101(2), the Board finds that pursuant to section 8103(a)[16] that the Office properly denied reimbursement for all chiropractic care and medical expenses related to his treatment of appellant, including the cost of the MRI scan. Further, the provisions of the Act do not foresee nor extend authority to chiropractors to make referrals for or prescribe other forms of treatment for injured federal employees, such as physical therapy treatment.[17] Thus, costs for appellant's treatment by aquatherapy, to which he was referred by Dr. Nutter, are also not reimbursable.

[15] By letter dated May 30, 1995, the Office advised Dr. Nutter that it required a diagnosis of subluxation by x-ray in order for him to be considered a physician under section 8101(2).

[16] Section 8103(a) of the Act states, in pertinent part, "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."

[17] *Beverly G. Akins*, 47 ECAB 647 (1996).

Accordingly, the October 8, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
March 10, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member