U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY R. KOZAK and U.S. POSTAL SERVICE,
POST OFFICE, Rockford, IL

Docket No. 00-1080; Submitted on the Record;
Issued April 20, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for a recurrence of disability on or after November 13, 1986 due to his June 10, 1985 employment injury.

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

The case has previously been before the Board on three occasions. By decision dated March 13, 1992,[1] the Board found that the Office did not follow its own procedures in referring appellant to an impartial medical specialist to resolve a conflict of medical opinion on the question of whether appellant's x-ray findings demonstrated a subluxation of the spine and that the Office therefore did not properly deny appellant's claim for a recurrence of disability on November 13, 1986 due to his June 10, 1985 employment injury.[1] By decision dated May 1, 1996,[2] the Board found that the radiologist the Office selected as the impartial medical specialist to resolve the conflict of medical opinion regarding the existence of a subluxation of the spine, had previously reviewed appellant's x-ray findings for the Office for the same purpose and could not serve as an impartial medical specialist. The Board remanded the case to the Office for referral of appellant's x-ray findings to a Board-certified radiologist not

[1] Docket No. 91-1294. The Office accepted that appellant sustained a "subluxation of the fourth lumbar vertebra." He submitted reports of Dr. Michael Hulsebus, an attending chiropractor, in support of his claim that he sustained a recurrence of disability on or after November 13, 1986 due to his June 10, 1985 employment injury. Under section 8101(2) of the Federal Employees' Compensation Act, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist. 5 U.S.C. § 8107(a); *see Jack B. Wood*, 40 ECAB 95, 109 (1988).

[2] Docket No. 94-1646.

previously associated with the case, to be followed by an appropriate decision on appellant's claim for compensation beginning November 13, 1986.[3]

In connection with the most recent appeal, the Board issued a decision dated May 17, 1999[4] which set aside the Office's August 14, 1996 decision and remanded the case to the Office for further proceedings to be followed by an appropriate decision. By decision dated August 14, 1996, the Office had found that the evidence submitted by appellant failed to demonstrate a causal relation between appellant's June 10, 1985 injury and his claimed recurrence of disability of November 13, 1986. The Office noted, "we have not received the requested x-ray for review and therefore cannot have it reviewed for further development of the claim." The Board determined that the Office's August 14, 1996 decision was improper in that the evidence of record revealed that the Office had appellant's June 11, 1984 x-ray findings in its possession at the time of its decision. The Board directed the Office to refer these x-ray findings, the other relevant x-ray findings and the computerized tomography scan to an impartial medical specialist for a reasoned medical opinion whether appellant sustained a subluxation of the spine in his June 10, 1985 employment injury. The facts and circumstances of the case up to this point are further set forth in the Board's prior decisions and are incorporated herein by reference.

On remand the Office secured possession of the June 11, 1985 x-ray findings. The Office referred the x-ray findings and the case record to Dr. William Ford, a Board-certified radiologist, for an impartial medical evaluation and an opinion regarding whether appellant sustained a spinal subluxation due to his June 10, 1985 employment injury. In a report dated September 8, 1999, Dr. Ford detailed the findings of his evaluation.

By decision dated October 6, 1999, the Office denied appellant's claim that he sustained a recurrence of disability on November 13, 1986 due to his June 10, 1985 employment injury. The Office determined that the opinion of Dr. Ford failed to show that appellant sustained a spinal subluxation due to his June 10, 1985 employment injury and therefore appellant failed to establish his claim for an employment-related recurrence of disability. Based on the opinion of Dr. Ford, the Office accepted that appellant sustained a herniated disc at L4-5, lumbosacral strain and right wrist strain due to the June 10, 1985 employment injury.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[5] This burden includes the necessity of furnishing medical evidence from a

[3] Section 8123(a) of the Act provides in pertinent part: "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." 5 U.S.C. § 8123(a). In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[4] Docket No. 97-1779.

[5] *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[6] Where no such rationale is present, medical evidence is of diminished probative value.[7]

In his report dated September 8, 1999, Dr. Ford indicated that his review of the evidence, including the June 11, 1985 x-ray findings, showed that appellant had a herniated disc at L4-5; Dr. Ford suggested that the herniated disc at L4-5 was due to the June 10, 1985 employment injury. Based on Dr. Ford's report, the Office accepted that appellant sustained a herniated disc at L4-5 due to the June 10, 1985 employment injury.[8] The Office's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[9]

The Board finds that appellant sustained a subluxation on June 10, 1985. Given the definition of subluxation under the Act, the findings of Dr. Ford's report as well as the Office's acceptance of a herniated disc at L4-5 due to the June 10, 1985 employment injury are sufficient to establish that appellant sustained a subluxation at L4-5 on June 10, 1985.[10] Therefore, appellant has established that he sustained a subluxation at L4-5, herniated disc at L4-5, lumbosacral strain and right wrist strain due to the June 10, 1985 employment injury. The case should be remanded to the Office for an evaluation regarding whether appellant sustained a recurrence of disability on or after November 13, 1986 due to any of the accepted conditions related to his June 10, 1985 employment injury.[11] The case should be referred to an appropriate specialist for an opinion on this matter. After any development deemed necessary, the Office should issue an appropriate decision.

[6] *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[7] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[8] Dr. Ford indicated that there did not appear to be an "appreciable subluxation" of the "vertebral bodies within the films submitted for evaluation." He did not explain how this statement comported with his finding that appellant had a herniated disc at L4-5.

[9] 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

[10] Moreover, the Office initially accepted that appellant sustained a "subluxation of the fourth lumbar vertebra" and it is unclear from the record whether the Office rescinded acceptance of this condition. It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation; *see Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

[11] This evaluation should include consideration of chiropractic reports of record. Such reports would be considered medical evidence in that appellant has established that he sustained an employment-related spinal subluxation on June 10, 1985. *See supra* note 1.

The decision of the Office of Workers' Compensation Programs dated October 6, 1999 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
April 20, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member