United States Department of Labor
Employees' Compensation Appeals Board

JOSEPH A. YANNERELLA, Appellant	)	
and	)	**Docket No. 04-1063**
	)	**Issued: August 17, 2004**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Brecksville, OH, Employer	)	

Appearances:
Allan Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 15, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative's decision dated February 18, 2004, which denied his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue on appeal is whether appellant has met his burden of proof to establish that he sustained an injury in the performance of duty.

FACTUAL HISTORY

On December 4, 2002 appellant, then a 59-year-old nurse, filed a recurrence of disability claim alleging that on November 20, 2002 he sustained a recurrence of his March 16, 2000

injury.[1] He explained that, on his return to work, after three weeks of continued walking, standing and lifting, he was progressively worse. Appellant stopped work on November 23, 2002 and returned on November 25, 2002.

In support of his claim, appellant submitted unsigned treatment notes dating from December 4 to 16, 2002. No physician's name was associated with these treatment notes. Additionally, he included physical therapy notes. He included form reports from Dr. John A. Kostoglou, a chiropractor, noting appellant's status.

In a letter dated March 25, 2003, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office requested that he submit additional supportive factual and medical evidence. A copy of the letter was also provided to the employing establishment.

By decision dated May 1, 2003, the Office denied appellant's claim. The Office found that appellant had not identified a specific event, incident or employment exposure that allegedly caused his injury. Further, there was no medical evidence that provided a diagnosis which could be connected to the claimed events. The Office also advised appellant that a physician included a chiropractor only to the extent that a subluxation of the spine was diagnosed as demonstrated by x-ray.

By letter dated May 14, 2003, appellant, through his representative, requested a hearing which was held on November 19, 2003.[2]

By decision dated February 18, 2004, the Office hearing representative affirmed the May 1, 2003 decision.

LEGAL PRECEDENT

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 period 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 the

[1] The Office determined that appellant's claim described a new injury and began development of the matter as a claim for a new occupational disease. The present appeal does not pertain to any prior claims that appellant may have filed.

[2] During the hearing, appellant described the activities which he believed contributed to his condition. He indicated that he worked in a locked psychiatric ward and, at any minute, he could be embroiled in a fight with the patients. He indicated that he would occasionally have to roll on the ground and hold them down to give them medication, put them in restraints, put them in seclusion and twist and wrestle with patients on the floor on a daily basis, or at least four times a week. Appellant indicated that it could have been any of those factors that caused his injury to his lower back.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

In order to establish that an injury was sustained in the performance of duty, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[6] Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.[7]

ANALYSIS

In this case, the record establishes that appellant was a nurse in a locked psychiatric ward who dealt with psychiatric patients in the performance of his federal duties. The Board finds that it is not disputed that appellant engaged in various physical activities such as walking, standing and lifting that were noted on his December 4, 2002 claim form. At his November 19, 2003 hearing, appellant testified that his interactions with patients sometimes entailed rolling on the ground, holding them down to medicate them and putting them in restraints. The Board finds that, in the absence of any probative evidence to the contrary, the claimed incidents occurred as alleged. The issue, therefore, is whether the medical evidence establishes that these employment activities caused or contributed to a medical condition.

Appellant did not provide the required medical evidence to establish his claim for a medical condition in the performance of duty. Although appellant generally alleged a back condition, he did not provide a medical report to establish that the condition for which he claimed he sought treatment was related to his employment. The only reports submitted by appellant were from Dr. John A. Kostoglou, a chiropractor. However, a chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.[8] In this case, there is no indication in the record that a spinal subluxation was demonstrated by x-ray. Therefore, Dr. Kostoglou is not considered a "physician" as defined under the Act and his reports are of no probative value.[9] Also, treatment

[5] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *Victor J. Woodhams*, *supra* note 5.

[7] *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant. *Victor J. Woodhams, supra* note 5. Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and claimant's specific employment factors. *Id.*

[8] *Thomas R. Horsfall*, 48 ECAB 180 (1996). *See* 5 U.S.C. § 8101(2).

[9] *Id.*

notes dated from December 4 to 16, 2002 do not constitute medical evidence as they give no indication as to whether they were issued by a physician.[10]

The record also contains physical therapy reports. However, a physical therapist is not a physician for the purposes of the Act; therefore, the physical therapy notes do not constitute medical evidence.[11]

Consequently, there is insufficient medical evidence in the record to establish appellant's claim. As the record is devoid of any medical evidence to support the instant claim, appellant failed to establish that he sustained an injury in the performance of duty.

CONCLUSION

Under the circumstances described above, the Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 18, 2004 is affirmed as modified.

Issued: August 17, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[10] *See Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[11] *See Jennifer L. Sharp*, 48 ECAB 209 (1996).