United States Department of Labor
Employees' Compensation Appeals Board

M.R., Appellant	)	
and	)	**Docket No. 07-1030**
	)	**Issued: January 7, 2008**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Newark, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 6, 2007 appellant filed a timely appeal from the February 12, 2007 merit decision of the Office of Workers' Compensation Programs, which denied his recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of his claim.

ISSUES

The issues are: (1) whether appellant sustained an L5-S1 disc herniation in the performance of duty on June 4, 1996; and if so, (2) whether the consequences of the chiropractic treatment he received on August 20, 2002 are compensable.

FACTUAL HISTORY

On June 4, 1996 appellant, then a 34-year-old supervisory airways transportation systems specialist, injured his low back in the performance of duty: "While lifting radar display with fellow technician … injured lower back. Display carried from 10th to 11th floor using stairs." He

stated that he had never experienced any problems with his lower back prior to June 4, 1996. A magnetic resonance imaging (MRI) scan on June 11, 1996 showed a very large right-sided L5-S1 herniated disc with focal compression of the right S1 nerve root. The Office accepted appellant's claim but did not notify him that it was accepting only a lumbosacral sprain. Appellant resigned from federal employment effective February 22, 2000.

Appellant filed a claim alleging that he sustained a recurrence of disability on August 20, 2002. He explained that he saw a chiropractor in an attempt to obtain relief from his ongoing low back condition:

> "On August 20, 2002 I had an appointment with a [c]hiropractor (Bufano Family Chiropractor Center). This had been the second of two such visits. The first session was the week prior to August 20, 2002. Upon completion of the first session, I experienced no problems and actually felt some relief to the on-going lower back pain I had been experiencing and which was continually getting worse. On August 20, 2002 after the [c]hiropractor applied some electrical stimulation and adjustments, I was unable to stand due to the severe pain to my lower back. In an attempt to alleviate the pain, I was administered 1500 milligrams of Tylenol at 500 milligram doses every half hour, by the [c]hiropractor. The effects of the Tylenol were negative and subsequently an ambulance was called and I was taken to Rahway Hospital, Rahway, NJ."

On August 28, 2002 Dr. Eric D. Freeman, appellant's pain specialist, completed an attending physician's report, indicating with an affirmative mark that appellant's herniated disc was caused or aggravated by employment activity. Appellant underwent a two-level lumbar hemilaminectomy and discectomy on November 14, 2002. His postoperative diagnosis was herniated disc at L4-5 and L5-S1. Dr. Jay More, the attending orthopedic surgeon, noted that appellant had a motor vehicle accident the night before the surgery:

> "In terms of the role of [appellant's] motor vehicle accident one night prior to surgery, I would state within a reasonable degree of medical certainty that my findings at surgery in terms of his dis[c]ogenic disease were correlated with his previous MRI scans. However, postoperatively, I have found [appellant] to have more back pain than would be expected from routine surgery. [He] did complain to both myself as well as the anesthesiologist that he had increased back pain prior to undergoing the surgery as a consequence of the motor vehicle accident. Clearly, the mechanism is present from such a high force injury as reflected in the police report that disruption of the ligaments and the facet joints in the lumbar spinal region may have been adversely affected and therefore will impact upon on a permanent basis with the patient's long-term back pain as well as will slow down his recovery and limit his chance for a full recovery. This was quite a significant injury by report and I am convinced that [appellant] will be adversely affected."

In a decision dated December 14, 2002, the Office denied appellant's claim of recurrence. The Office found that Dr. Freeman offered no history of injury and no medical rationale. In a November 24, 2003 decision, an Office hearing representative affirmed.

On June 1, 2004 Dr. More related appellant's history of injury and subsequent medical care. He then connected appellant's herniated disc and his disability in 2002 to the June 4, 1996 employment injury:

> "Quite simply, the natural history of herniated disc is consistent with the patient's experience. Within a reasonable degree of medical certainty, the patient sustained the herniated disc in June 1996. Symptoms are related to multiple factors. First, there is a tear in the annulus fibrosis consistent with the pop that the patient described. Then, the patient began having lumbosacral radiculopathy consistent with migration of disc material outside of the annulus causing neurocompression. This is clearly documented on an MRI scan one week after his injury, the direct result, not only of the solid disc material compressing neural elements, but also the chemical mediators which are released during an acute exacerbation of a disc herniation. The constellation of structural and chemical factors equally account for vacillating periods of symptoms."
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> "Simply concluded, within a reasonable degree of medical certainty, the patient sustained a herniated disc as a consequence of a work-related injury in June 1996. He worked through his pain. [The patient] changed his responsibility. Finally, in 2002, [he] sought chiropractic consultation. This began a series of treatments, all as a direct consequence of the work-related June 1996 injury, including physical therapy, epidural steroids and ultimately surgery to treat the herniated disc that he sustained in June 1996. Once again, this disc was proven to exist one week after the injury, based on an MRI scan. Unfortunately, the patient continues to have ongoing pain despite multiple modalities for treatment. This persistent and progressive pain syndrome has limited his ability to maintain meaningful employment."

In a decision dated September 24, 2004, the Office reviewed the merits of appellant's claim and denied modification of its November 24, 2003 decision. The Office found that appellant's chiropractic treatment on August 20, 2002 constituted an intervening injury breaking the chain of causation to the accepted employment injury in 1996. Further, the Office found subsequent intervening injuries in the form of motor vehicle accidents on November 13, 2002 and April 27, 2003.

Dr. Freeman addressed causal relationship on September 11, 2004:

> "I do believe with a reasonable degree of medical certainty that there is a causal relationship between the work-related injury on June 4, 1996 and subsequent disability on August 20, 2002 as well as surgery that resulted.
>
> "[Appellant] suffered a herniated disc at L5-S1 which was work related. This was confirmed by the incident, MRI [scan] documentation and orthopedic treatment at the time of injury."

Dr. Freeman then explained the anatomy of an intervertebral disc and how herniated nuclear material can irritate surrounding structures. He discussed the development of a herniated disc from the acute inflammatory phase to the probability of later multiple exacerbations. Dr. Freeman indicated that disc herniations do not "heal." He added:

> "[Appellant] continued to seek medical and chiropractic care for his persistent lumbar disc pain. His constellation of symptoms is common to this patient population and without proper treatment they may be subjected to a vicious cycle of pain and disability. This cycle may be repeated for years affecting outcomes.
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> "There is no question [that appellant] in August 2002 was seeking care for his low back pain. Unfortunately, in his treatment attempt, the result was a worsening of his clinical symptoms. After an appropriate trial of conservative care surgery was considered as a next viable option in the treatment plan. Regrettably his condition is unchanged.
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> "Prior to August he suffered with continuous low back pain which may often occur in patients with a lumbar herniated disc untreated. It is quite reasonable to consider that this is a typical patient pattern and is related to the work-related injury that occurred in June 1996."

In decisions dated May 27 and October 28, 2005 and February 12, 2007, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office noted that there was clearly an intervening injury, as an August 21, 2002 MRI scan showed a second herniated disc that was not present on the June 11, 1996 MRI scan and appellant claimed his condition worsened after the second chiropractic treatment. The Office found that this was a new injury that was not causally related to the June 4, 1996 employment injury.

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.[1] A claimant seeking compensation has the burden of proof to establish the essential elements of his claim by the weight of the evidence.[2] When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[3]

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[1] 5 U.S.C. § 8102(a).

[2] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[3] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979) (occupational disease or illness); *Max Haber*, 19 ECAB 243, 247 (1967) (traumatic injury). *See generally John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

Causal relationship is a medical issue[4] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[5] must be one of reasonable medical certainty[6] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[7]

ANALYSIS -- ISSUE 1

The facts of this case appear consistent with a lumbar disc injury on June 4, 1996. Appellant injured his low back on June 4, 1996 while helping to lift and carry a heavy piece of equipment up at least one flight of stairs at work. An MRI scan one week later showed a very large L5-S1 herniation with focal compression of the right S1 nerve root. Under these circumstances, the Office should have further developed whether this herniated disc was causally related to the June 4, 1996 work incident.

Dr. More, appellant's orthopedic surgeon, related the history of injury and explained that it was consistent with the natural history of a herniated disc. He noted that appellant began having lumbosacral radiculopathy consistent with neurocompression caused by disc material and that this was documented by the MRI scan obtained one week after the injury. Dr. More explained that the constellation of structural and chemical factors equally accounted for appellant's vacillating periods of symptoms. He concluded to a reasonable degree of medical certainty that appellant herniated his disc on June 4, 1996.

Dr. Freeman, the pain specialist, also supported a disc herniation on June 4, 1996. He described the anatomy of intervertebral discs and what happens when they herniate. It was his opinion that appellant sustained such a herniation at work, as confirmed not only by the incident itself, but by the MRI scan and orthopedic treatment he received. Dr. Freeman noted that appellant's constellation of symptoms was common to the population of patients with herniated discs.

The physicians do not appear to agree on whether appellant received treatment for his herniated disc from 1996 to 2002. Dr. More described "vacillating periods of symptoms" and reported that appellant worked through his pain. Dr. Freeman stated that appellant continued to seek medical and chiropractic care for his persistent lumbar disc pain. Neither addressed the significance of the L4-5 herniation found during the November 14, 2002 surgery. The Board finds that the evidence is sufficiently supportive of an L5-S1 herniation on June 4, 1996 that

[4] *Mary J. Briggs*, 37 ECAB 578 (1986).

[5] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[6] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[7] *See William E. Enright*, 31 ECAB 426, 430 (1980).

further development of the evidence is warranted.[8] The Board will set aside the Office's February 12, 2007 decision denying compensation and will remand the case for development of the medical evidence. After such further development as may be necessary, the Office shall issue a *de novo* decision on appellant's claim for compensation.[9]

CONCLUSION

The Board finds that this case is not in posture for decision. Further, development of the medical evidence is warranted on whether appellant sustained an L5-S1 disc herniation in the performance of duty on June 4, 1996.

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: January 7, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[8] *See John J. Carlone*, 41 ECAB 345, 358 (1989) (finding that the medical evidence was not sufficient to discharge the claimant's burden of proof but was sufficiently supportive, given the uncontroverted inference of causal relationship, to warrant further development).

[9] Whether the consequences of the August 20, 2002 chiropractic treatment are compensable is wholly dependent on whether appellant sustained an L5-S1 disc herniation in the performance of duty on June 4, 1996 and on whether the August 20, 2002 treatment was independent of the June 4, 1996 employment injury or was instead a natural consequence of it, such that the consequential effect does not constitute a new, separate or independent injury. *Marjorie D. Striepeke (Edward J. Striepeke)*, 14 ECAB 446 (1963). The Office should address these issues on remand.