United States Department of Labor
Employees' Compensation Appeals Board

P.K., Appellant	)	
and	)	**Docket No. 09-265**
	)	**Issued: October 2, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Clifton, NJ, Employer	)	

Appearances:
Laura Kaplysh, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 5, 2008 appellant, through his representative, filed a timely appeal from a January 16, 2008 decision of an Office of Workers' Compensation Programs' hearing representative and a September 9, 2008 merit decision denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained an injury on January 19, 2007 as alleged.

FACTUAL HISTORY

On April 11, 2007 appellant, then a 55-year-old carrier, filed a traumatic injury claim alleging that on January 19, 2007 he injured the left side of his back when he unloaded a hamper from a truck. He stopped work on January 20, 2007 and returned to work on March 31, 2007. Appellant's supervisor noted that appellant was on leave under the Family and Medical Leave Act (FMLA) from January 20 to March 31, 2007.

In a report dated January 19, 2007, Dr. Salvatore Patti, a chiropractor, diagnosed left sciatica originating in the sacroiliac region. He found that appellant could not deliver mail but could work inside or driving.

In an undated statement received May 21, 2007, appellant related that he did not initially report his injury because he occasionally experienced pain with lifting which subsided with rest. He informed his supervisor on January 19, 2007 before he left work that he was having back pain. Appellant's condition did not improve and a subsequent magnetic resonance imaging (MRI) scan showed a herniated disc. He related that he had not experienced any prior similar injury.

An MRI scan of the lumbar spine, obtained on February 8, 2007, revealed a disc bulge at L4-5 with a "superimposed left posterolateral disc herniation at this level" and a posterior disc bulge at L5-S1.

In a report dated May 2, 2007, Dr. Joseph J. Young, a chiropractor, discussed appellant's history of low back pain beginning January 19, 2007. He diagnosed nonallopathic lesions of the lumbar, sacral, pelvic and thoracic region, lumbar sprain, a muscle spasm and displacement of the lumbar spine without myelopathy.

On May 18, 2007 Dr. MaryAnn Benigno, a Board-certified osteopath, related that appellant provided a history of lifting and pulling large containers at work. Appellant experienced heat in his left hip during the day with pain by evening radiating into his left thigh. The following day the pain was "severe and debilitating." Dr. Benigno noted that the February 8, 2007 MRI scan showed a herniated nucleus pulposus (HNP) on the left posterior at L4-5 and a posterior bulge at L5-S1. She diagnosed an HNP secondary to the injury sustained by pulling, pushing and lifting of items in the mailroom.

By decision dated June 28, 2007, the Office denied appellant's claim, finding that the medical evidence did not establish a condition due to the claimed January 19, 2007 work incident.

On July 23, 2007 appellant requested a telephone hearing. At the telephone hearing, held on November 15, 2007, he described the January 19, 2007 work incident and noted that he sought treatment with a chiropractor on that date. The hearing representative advised that appellant needed to submit a report from a physician who provided the date that the incident occurred and a reasoned opinion on causal relationship. She further described the limitations on chiropractors under the Federal Employees' Compensation Act.[1]

On December 3, 2007 Dr. Benigno related that appellant reported sustaining an injury on January 19, 2007. She diagnosed a herniated disc and stated, "This condition could have worsened from pushing, pulling and lifting items in the mailroom."

In an undated report received on December 17, 2007, Dr. Young indicated that he evaluated appellant on January 22, 2007 for numbness of the left leg which began three days

[1] 5 U.S.C. §§ 8101-8193.

before after he pulled hampers at work. He indicated that an MRI scan showed a left paracentral disc herniation at L4-5 and a disc bulge at L5-S1. Dr. Young found that appellant sustained a permanent injury that occurred "as a direct result of performing his duties at work." In a December 12, 2007 addendum, he related that x-rays revealed misalignments "with left vertebral rotation of the L3-5 vertebral bodies" and a pelvic misalignment.

By decision dated January 16, 2008, the hearing representative affirmed the June 28, 2007 decision. She found that appellant established that the January 19, 2007 employment incident occurred as alleged; however the medical evidence was insufficient to show that he sustained a diagnosed condition resulting from the incident.

On April 22, 2008 Dr. Young discussed his initial treatment of appellant on January 22, 2007 for an injury sustained at work on January 19, 2007. He related that x-rays obtained on January 31, 2007 showed "multiple subluxations throughout the thoracic and lumbar spine as well as the pelvic views. My initial diagnosis of [appellant] was lumbar sprain/strain with spinal subluxations present throughout the thoracic and lumbar spines as well as the right ilium." Dr. Young discussed the findings on MRI scan and stated:

> "Based on these findings, my diagnosis is lumbar disc syndrome with radiculitis at L4-5 and L5-S1 disc levels. Multilevel subluxations were found through the thoracic and lumbar spines with right ilium being subluxated as well which cause[s] increased stresses to the area and contributes to [appellant's] continual state of pain. It is clear that [appellant] has suffered a permanent injury. It is also clear to me that these injuries occurred as a result of on[-]the[-]job duties."

On May 9, 2008 appellant's daughter, as his representative, requested a new hearing or a new review of the case based on newly submitted medical evidence. She submitted an April 10, 2008 report from Dr. Benigno, who stated:

> "To clarify my findings, [appellant] gave a history of being injured at work January 19, 2007 lifting and pulling heavy containers. An MRI scan performed on February 8, 2007 confirmed disc bulge at L4-5. There was disc herniation at L4-5 resulting in thecal sac compression. There was also posterior disc bulge at L5-S1. These findings confirmed my diagnosis of lumbar sacral sprain with bulging and disc herniation as a result of [appellant's] injury at work January 19, 2007."

On January 19, 2008 appellant, through his representative, requested reconsideration. By decision dated September 9, 2008, the Office denied modification of its January 16, 2008 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Act[2] 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

[2] 5 U.S.C. §§ 8101-8193.

States" within the meaning of the Act, that the claim was filed within the applicable time limitation, that an injury was sustained while 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.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[6] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[7]

ANALYSIS

Appellant alleged that he sustained an injury to his back on January 19, 2007 while lifting and pulling hampers. He established that the January 19, 2007 incident occurred at the time, place and in the manner alleged. The issue is whether the medical evidence establishes that appellant sustained a back injury as a result of this incident.

The Board finds that appellant has not established that the January 19, 2007 employment incident resulted in an injury. The determination of whether an employment incident caused an injury is generally established by medical evidence.[8]

In a report dated May 18, 2007, Dr. Benigno discussed appellant's history of experiencing left hip heat and pain progressively worsening and extending into his left leg after he lifted and pulled hampers at work. She noted that an MRI scan showed an HNP at L4-5 on the left and an L5-S1 posterior bulge. Dr. Benigno diagnosed an HNP due to pushing, pulling and lifting at work. She did not, however, provide the date of the lifting incident or provide any rationale for her conclusion. A physician must provide a narrative description of the specific employment incident and a reasoned opinion on whether the employment incident described caused or contributed to appellant's diagnosed medical condition.[9]

[3] *Anthony P. Silva*, 55 ECAB 179 (2003).

[4] *See Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *Delphyne L. Glover*, 51 ECAB 146 (1999).

[6] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[7] *Id.*

[8] *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

[9] *John W. Montoya*, 54 ECAB 306 (2003).

On December 3, 2007 Dr. Benigno noted that appellant described an injury on January 19, 2007. She diagnosed a herniated disc which she found "could have worsened from pushing, pulling and lifting items in the mailroom." Dr. Benigno's opinion that appellant's work pushing and lifting could have worsened a herniated disc is couched in speculative terms and is of diminished probative value.[10] She did not provide any rationale for her causation finding. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet a claimant's burden of proof.[11]

On April 10, 2008 Dr. Benigno noted that appellant provided a history of a work injury on January 19, 2007 after lifting and pulling containers. She related that the MRI scan on February 8, 2007 confirmed her "diagnosis of lumbar sacral sprain with bulging and disc herniation as a result of appellant's injury at work January 19, 2007." Dr. Beningo, however, provided insufficient medical rationale explaining the mechanism by which the January 19, 2007 incident caused a disc herniation. The Board has held that a medical opinion not supported by medical rationale is of little probative value.[12]

On January 19, 2007 Dr. Patti, a chiropractor, diagnosed left sciatica originating in the sacroiliac region and listed work restrictions. Section 8101(2) of the Act provides that the "term 'physician' includes 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…."[13] A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence.[14] As Dr. Patti did not diagnose a subluxation in this report as demonstrated by x-ray, he is not considered a "physician" under the Act and his report is of no probative value.[15]

In a report dated May 2, 2007, Dr. Young, a chiropractor, discussed appellant's history of low back pain beginning January 19, 2007. He diagnosed nonallopathic lesions of the lumbar, sacral, pelvic and thoracic region, lumbar sprain, muscle spasm and displacement of the lumbar spine without myelopathy. In an undated report, Dr. Young indicated that he evaluated appellant on January 22, 2007 for numbness into the left leg that began three days earlier after he pulled hampers at work. He reviewed the findings on MRI scan of a left paracentral disc herniation at L4-5 and a disc bulge at L5-S1. Dr. Young attributed appellant's condition to "performing his duties at work." In a December 12, 2007 addendum, he related that x-rays revealed misalignments "with left vertebral rotation of the L3-5 vertebral bodies" and a pelvic

[10] *Id*.

[11] *See Beverly A. Spencer*, 55 ECAB 501 (2004).

[12] *Caroline Thomas*, 51 ECAB 451 (2000).

[13] 5 U.S.C. § 8101(2); *see also Michelle Salazar*, 54 ECAB 523 (2003).

[14] The Office's regulation, at 20 C.F.R. § 10.5(bb), defines subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See Mary A. Ceglia*, 55 ECAB 626 (2004).

[15] *Isabelle Mitchell*, 55 ECAB 623 (2004).

misalignment. As noted, under section 8101(2) of the 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.[16] The Office's regulations at 20 C.F.R. § 10.5(bb) define subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[17] As Dr. Young diagnosed a misalignment of the spine by x-ray, his report is that of a physician under the Act. However, he attributed a disc herniation at L4-5 and a disc bulge at L5-S1 to appellant's work duties. Chiropractors are considered physicians only to the extent of treating spinal subluxations based on x-ray. A chiropractor is not competent to address other conditions.[18] Dr. Young's opinion on the etiology of appellant's herniated disc and disc bulge thus, does not constitute competent medical evidence.[19]

In a report dated April 22, 2008, Dr. Young reviewed his initial treatment of appellant on January 22, 2007 for an injury sustained at work on January 19, 2007. He indicated that x-rays obtained on January 31, 2007 revealed subluxations in the thoracic and lumbar spine. Dr. Young advised that he initially diagnosed lumbar sprain and spinal subluxations in the thoracic, lumbar and ilium. After reviewing the MRI scan, he diagnosed lumbar disc syndrome with radiculitis at L4-5 and L5-S1. Dr. Young found that the thoracic, lumbar and right ilium subluxations increased the stress on the area and contributed to appellant's pain and concluded that his injuries resulted from his work duties. As the chiropractor diagnosed a subluxation by x-ray, he is considered a physician under the Act.[20] Dr. Young, however, did not explain how the January 19, 2007 work incident caused the spinal subluxation. Medical reports not containing rationale on causal relationship are entitled to little probative value.[21]

On appeal, appellant's representative contends that Dr. Beningo's most recent report attributed appellant's herniated disc to his January 19, 2007 work injury. As noted, however, Dr. Beningo did not provide sufficient medical rationale in support of her opinion. She did not explain her conclusion that the MRI scan "confirmed" her diagnosis of lumbar sprain and a disc herniation due to the January 19, 2007 work incident in view of the speculative finding in her December 3, 2007 report that appellant's disc herniation "could have worsened" from lifting and pulling items in the mailroom. Appellant's representative also maintained that, in a report dated April 22, 2008, Dr. Young diagnosed a subluxation due to his work injury and provided rationale for his opinion. As previously discussed, however, Dr. Young did not explain how the January 19, 2007 employment incident resulted in a subluxation and thus his opinion is of little

[16] 5 U.S.C. § 8101(2); *Paul Foster*, 56 ECAB 208 (2004).

[17] *See supra* note 14.

[18] *See* 5 U.S.C. § 8101(2)-(3); *George E. Williams*, 44 ECAB 530 (1993).

[19] *Ronald Q. Pierce*, 53 ECAB 336 (2002) (as a chiropractor may qualify as a physician only in the diagnosis and treatment of spinal subluxation, his or her opinion is not considered competent medical evidence in evaluation of other disorders).

[20] *Paul Foster*, *supra* note 16.

[21] *Mary E. Marshall*, 56 ECAB 420 (2005).

probative value. An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between his claimed condition and his employment.[22] Appellant must submit a physician's report in which the physician reviews those factors of employment identified by him as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[23] He failed to submit such evidence and did not meet his burden of proof.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury on January 19, 2007 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 9 and January 16, 2008 are affirmed.

Issued: October 2, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[22] *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

[23] *Robert Broome*, 55 ECAB 339 (2004).