U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GAREY HARRISON and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

Docket No. 99-1721; Submitted on the Record;
Issued August 21, 2000

DECISION and ORDER

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

The issue is whether appellant established that he sustained a back injury on November 23, 1997 in the performance of duty.

On December 6, 1997 appellant, then a 28-year-old group leader mailhandler, filed a notice of occupational disease and claim for compensation alleging that he sustained an aggravation of a previous lumbar strain/sprain subluxation. Appellant stated that he was unloading an elevator full of parcels on November 23, 1997 when he felt his back tighten, spasm and became wrenched with pain. He noted that a fellow employee and his supervisor assisted him in calling an ambulance, where he was sent to Church Hospital for medical treatment.[1] Appellant was off work from November 23 to December 3, 1997, when he returned to limited duty.

In support of his claim for compensation, appellant submitted an emergency admission form dated November 23, 1997. The doctor's signature is eligible; however, the words "light duty" and "RTW [return to work] November 25, 1997" are contained on the form. It appears that appellant was also prescribed medication.

In a note dated November 26, 1994, Dr. Paul A. Gemma, a chiropractor, advised that appellant should refrain from all work and strenuous activity until December 3, 1997. Dr. Gemma also prepared a duty status report on November 26, 1997. He described appellant's November 23, 1997 injury as "pulling APC's [all-purpose containers] off an elevator and loading

[1] Appellant sustained a work injury on May 13, 1997 that was accepted by the Office of Workers' Compensation Programs for a thoracic sprain. Appellant received total disability compensation from May 14 to July 3, 1997. He returned to full duty with no restrictions on July 8, 1997. On September 15, 1997 appellant sustained back and neck injuries due to a nonwork-related car accident. He was off work until November 22, 1997, when he was approved for full duty. On the first day of his return to regular duty on November 23, 1997, appellant alleges that he reinjured his back.

onto elevator back snapped and spasmed." Dr. Gemma indicated that appellant could return to light duty with restrictions on December 3, 1997.

By letter dated February 6, 1998, the Office advised appellant of the nature of the medical evidence required to establish his claim.

In a February 27, 1998 report, Dr. Gemma noted that appellant had been under his care since November 1997. He reported that on November 23, 1997 appellant experienced an injury resulting in back and neck pain from pulling and pushing equipment at work. Dr. Gemma diagnosed L4-5 joint dysfunction, lumbar strain and IVD without myelopathy. He opined that appellant's November 23, 1997 injury was an exacerbation of the original injury sustained on May 13, 1997. Dr. Gemma indicated that appellant's course of treatment included thoracic mobilization, manual traction and home cryotherapy for four weeks.

In a decision dated May 1, 1998, the Office denied compensation on the grounds that the evidence was insufficient to establish that appellant's alleged back condition was causally related to factors of his employment.

By letter dated May 29, 1998, appellant requested a hearing. That request was changed to a request for a review of the written record on November 30, 1998.

Appellant submitted a report dated March 19, 1998 by Dr. Steven F. Manekin, a family practitioner, who noted:

> "[Appellant] states that he was working and he felt a pop in the lower back. There was immediate back pain. He went to the health clinic and x-rays were taken. There is pain radiating down the legs from the low back. He is currently under the care of Dr. Gemma and has had some improvement. He states that on November 23, 1997 he reinjured his back. He has had lumbosacral spine x-rays taken. No similar or antecedent back problems before the accidents."

Dr. Manekin diagnosed cervical strain, right thoracic rostral mid-caudal strain with no evidence of nerve root involvement.

In a July 1, 1998 report, Dr. Constantine A. Misoul, a Board-certified orthopedic surgeon, noted that appellant was referred for consultation by Dr. Gemma. Dr. Misoul noted that appellant had a history of work injuries on May 13 and November 23, 1997. He described appellant's November 23, 1997 injury as having occurred when appellant pulled equipment off an elevator and felt severe pain in his back. Dr. Misoul related that appellant also had a history of a motor vehicle accident in September 1997, at which time injured his back and neck but that appellant considered himself to be fully recovered from that incident. He diagnosed a musculoligamentous injury with no evidence of radiculopathy and prescribed that appellant undergo an exercise program.

In a September 23, 1998 report, Dr. William C. Sanchez, a family practitioner and Board-certified pediatrician, reported that appellant first visited his office on May 13, 1997 informing the physician "of an injury involving subluxation of the thoracic spine that occurred while

loading mail at his job." Dr. Sanchez indicated that, following traction and adjustment, appellant's back condition had resolved by July 2, 1998. He next described appellant as having been involved in a car accident on September 15, 1997, at which time appellant injured his cervical and thoracic spine. Dr. Sanchez noted that, appellant claimed that he had fully recovered from those injuries until he was involved in a work incident on November 23, 1997. He related that appellant was told by Dr. Gemma's opinion that the November 23, 1997 work injury was an exacerbation of the original May 13, 1997 work injury. Dr. Sanchez, however, did not offer an opinion of his own as etiology of appellant's back condition.

In a decision issued on January 8, 1999, an Office hearing representative affirmed the Office's May 1, 1998 decision.

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

An employee seeking benefits under the Federal Employees' Compensation 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 States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation 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.[3] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

In order to determine whether an employee has sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether a "fact of injury" has been established. There are two components involved in establishing fact of injury that must be considered. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.[6]

In the instant case, the Board notes that, while appellant filed a CA-2 claim for alleging an occupational disease, he cited that he sustained a work injury on November 23, 1997. The Board considers appellant's claim to be one for a traumatic injury as opposed to an occupational disease claim. The Office noted in its May 1, 1998 decision that the evidence of record establish that appellant actually experienced the claimed incident on November 23, 1997. The medical record including the emergency admission form and the reports of Dr. Gemma, a chiropractor, corroborate appellant's allegation that he was pushing parcels into an elevator on November 23,

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.115 (1999); *Joe D Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton* 40 ECAB 1143 (1989).

[4] *Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *Elaine Pendleton, supra* note 3.

[6] *Id.*

1997 when he experienced back pain. Because appellant established that an employment incident occurred at the time and in the manner alleged, the issue to be determined is whether the medical evidence is sufficient to establish a causal relationship between appellant's alleged back condition and the November 23, 1997 work incident.

The Board notes that the various reports of Dr. Gemma, a chiropractor, submitted by appellant in support of his claim, do not include a diagnosis of a subluxation. Section 8101(2) of the Act provides that chiropractors are considered physicians "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."[7] Section 10.311(e) of the implementing federal regulations[8] provides, in part:

> "(a) The services of chiropractors that may be reimbursed are limited by the FECA to treatment to correct a spinal subluxation.
>
> "(b) In accordance with 5 U.S.C. § 8101(3), a diagnosis of spinal 'subluxation as demonstrated by x-ray to exist' must appear in the chiropractor's report before OWCP can consider payment of a chiropractor bill.
>
> "(c) A chiropractor may interpret his or her own x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation."

In this case, Dr. Gemma did not diagnose a spinal subluxation. He indicated only that appellant had a lumbar sprain and that the incident on November 23, 1997 caused an aggravation of appellant's original work injury of May 13, 1997. Because Dr. Gemma did not obtain x-rays or diagnose a spinal subluxation, his opinion does not constitute an opinion from a qualified physician under the Act. Therefore, Dr. Gemma's opinion is not sufficient to establish appellant's claim.

Appellant, however, has submitted reports from Drs. Manekin, Misoul and Sanchez that diagnosed a lumbar sprain and identify the date of injury as November 23, 1997. The record establishes that appellant complained of back pain on November 23, 1997 while performing his work duties and that he was transferred by ambulance to a local emergency room. He has continued with medical care for a back condition since that date. Although he sustained a back injury due to a nonwork-related car accident in September 1997, he had been cleared for regular duty the day prior to the alleged November 23, 1997 work injury. Thus, the issue remains whether appellant sustained a new injury on November 23, 1997 or whether his work duties on November 23, 1997 caused an aggravation of a preexisting back injury.

Although the reports of Drs. Manekin, Misoul and Sanchez are insufficiently reasoned to establish that appellant sustained a back strain on November 23, 1997 in the performance of duty, their opinions at least raise an uncontroverted inference of causal relationship sufficient to

[7] U.S.C. § 8101(2).

[8] 20 C.F.R. § 10.311(a)-(d) (1999).

require further development of the case record by the Office.[9] The medical evidence submitted by appellant is not contradicted by any other medical evidence of record.

On remand, the Office should further develop the evidence by requesting a rationalized opinion from either Dr. Misoul or an equally qualified Board-certified specialist, addressing the causal relationship between appellant's back condition and the alleged November 23, 1997 work incident. After such further development as the Office deems necessary, a *de novo* decision shall be issued.

Accordingly, the decision of the Office of Workers' Compensation Programs issued on January 8, 1999 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
August 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[9] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).