U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD J. KNEITINGER and U.S. POSTAL SERVICE,
POST OFFICE, Buffalo, NY

Docket No. 01-223; Submitted on the Record;
Issued November 19, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on October 22, 1996 causally related to his April 24, 1996 employment injury.

On April 24, 1996 appellant, a 45-year-old mailhandler, filed a notice of traumatic injury alleging that he developed pain in the right side of his neck while in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for cervical strain and right trapezius strain. He returned to light-duty work on June 25, 1996.

Appellant filed a notice of recurrence of disability on September 29, 1996 alleging that he sustained a recurrence of disability on August 5, 1996. The Office accepted this claim. Appellant returned to work on October 8, 1996 working four hours a day.

Appellant filed a notice of recurrence of disability on November 13, 1996 alleging a recurrence of disability on October 22, 1996. On February 13, 1997 appellant asked that his claim be expanded to include the additional conditions of disc herniation C5-6 and subluxation. He returned to work four hours a day on March 24, 1997. Appellant returned to full-duty work on April 28, 1997. By decision dated September 30, 1997, the Office denied appellant's claim for recurrence of disability.

Appellant requested an oral hearing on October 14, 1997. By decision dated April 24, 1998, the hearing representative found a conflict of medical opinion evidence between appellant's chiropractor and the Office referral physician, regarding whether appellant had a subluxation of the spine demonstrated by x-ray. The Office developed the medical evidence and, by decision dated August 31, 1998, the Office denied appellant's claim for recurrence on October 22, 1996 due to a subluxation of the spine. Appellant, through his representative, requested reconsideration on November 5, 1998. The Office denied modification of its August 31, 1998 decision on April 8, 1999. Appellant again requested reconsideration on

March 31, 2000. By decision dated July 26, 2000, the Office denied modification of its August 31, 1998 decision.[1]

The Board finds that appellant failed to establish that he sustained a recurrence of disability on October 22, 1996.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[2]

Appellant's attending physician, Dr. David L. Bagnall, a physiatrist, released appellant to return to light-duty work on October 7, 1996. He diagnosed C5-6 annular bulging with bilateral foraminal stenosis and C5 or C6 right radiculopathy. Dr. Bagnall released appellant from his care on November 26, 1996 having last examined him on October 7, 1996.

Appellant alleged that he sustained a recurrence of total disability on October 22, 1996. In support of his claim, appellant submitted a series of reports from Dr. Mark E. Grazen, a chiropractor. He opined that Dr. Bagnall had prematurely returned appellant to work resulting in a recurrence of symptomatology on October 22, 1996. Dr. Grazen stated that appellant had a subluxation of the cervical spine as demonstrated by x-ray and opined that appellant was totally disabled. In a report dated December 16, 1996, Dr. Edward J. Dailey, a chiropractic radiologist, examined the x-rays dated April 29, 1996 and diagnosed multiple chiropractic vertebral subluxation complexes.

Section 8101(2) of the Federal Employees' Compensation Act[3] 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 demonstrated by x-ray to exist. Therefore, before Dr. Grazen was considered a physician for the purposes of the Act and before his reports can establish appellant's total disability for work, appellant's x-rays must demonstrate a subluxation of the spine.

The Office referred appellant for a second opinion evaluation and on May 1, 1997, Dr. Brian Cromwell, a Board-certified radiologist, reviewed the April 29, 1996 x-rays and found no subluxations, mild spondylosis and a small disc herniation at C5-6. The hearing representative properly found that there was a conflict of medical opinion evidence between Drs. Grazen and Dailey. The Office referred the April 29, 1996 x-rays, a statement of accepted

[1] Appellant filed a notice of recurrence of disability on March 9, 1998 alleging that on December 9, 1997 he sustained a recurrence of disability causally related to his April 24, 1996 employment injury. As the Office has not issued a final decision addressing this issue, the Board will not consider it on appeal. 20 C.F.R. § 501.2(c).

[2] *Terry R. Hedman*, 38 ECAB 222 (1986).

[3] 5 U.S.C. §§ 8101-8193, 8101(2).

facts, the accepted definition of subluxation[4] and specific questions to Dr. Albert V. Messina, a Board-certified radiologist, to resolve the conflict of medical opinion evidence.[5]

In a report dated July 28, 1998, Dr. Messina reviewed the x-rays and found no evidence of fracture, dislocation, subluxation, alignment disturbance or motility disturbance. He diagnosed minimal narrowing of the C5-6 interspace. In situations were there are 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 on a proper factual background, must be given special weight.[6]

Dr. Messina's report was based on a proper factual background, including the accepted definition of subluxation and concluded that based on his review of the April 29, 1996 x-rays that appellant did not have a subluxation of the spine. Therefore, his report is entitled to the weight of the medical evidence on this issue.

Following Dr. Messina's July 1998 reports, Dr. Grazen submitted a report dated October 16, 1998. He again opined that the April 29, 1996 x-rays demonstrated a chiropractic subluxation as differentiated from the gross subluxation of two bones traditionally recognized. As Dr. Messina was provided with the accepted definition of a subluxation and concluded that based on this definition that no such subluxation existed, Dr. Grazen's arguments are not persuasive. Furthermore, as Dr. Grazen was on one side of the conflict that Dr. Messina resolved, the additional report from Dr. Grazen is insufficient to overcome the weight accorded Dr. Messina's report as the impartial medical specialist or to create a new conflict with it.[7]

The Office properly found that Dr. Grazen was not a physician for the purposes of the Act, that his reports were, therefore, insufficient to meet appellant's burden of proof and that appellant failed to establish that he sustained a recurrence of total disability on October 22, 1996.

[4] A subluxation is defined 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 individuals trained in the reading of x-rays." FECA Bulletin, 84-71.

[5] Section 8123(a) of the Act, provides, "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).

[6] *Nathan L. Harrell,* 41 ECAB 401, 407 (1990).

[7] *Dorothy Sidwell,* 41 ECAB 857, 874 (1990).

The July 26, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 19, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member