United States Department of Labor
Employees' Compensation Appeals Board

ELI A. MORALES, Appellant	)	
and	)	**Docket No. 05-829**
	)	**Issued: August 15, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Evansville, IN, Employer	)	

Appearances:
Eli A. Morales, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 23, 2005 appellant filed a timely appeal of June 29, July 29, August 2 and December 13, 2004 and February 14, 2005 merit decisions of the Office of Workers' Compensation Programs that denied his claims for compensation for partial disability beginning March 19, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant has established that he was partially disabled beginning March 19, 2004 due to his October 13, 2000 employment injury.

FACTUAL HISTORY

On July 2, 2001 appellant, then a 41-year-old physical therapist, filed a claim for compensation for a traumatic injury, a bulging lumbar disc, sustained on October 13, 2000 while transferring a patient. Appellant did not stop work at the time of the injury.

In an April 2, 2001 report, Dr. Chester F. Higdon, a Board-certified neurologist, stated that appellant had no specific radicular deficit on examination, opined that his condition may be a simple lumbar strain and recommended a magnetic resonance imaging (MRI) scan. An MRI done on April 11, 2001 showed disc dessication from L3-5, mild bulges at L3-4 and L4-5 and no root impingement. The Office accepted that appellant sustained a lumbar strain. An April 25, 2002 MRI scan showed no change, and a May 23, 2002 electromyogram and nerve conduction showed no evidence of radiculopathy.

On June 19, 2002 appellant filed a claim for intermittent compensation from July 19, 2001 to May 30, 2002. In a July 24, 2002 report, Dr. Higdon stated that after one hour of work appellant had pain that was becoming increasingly intolerable. He noted that appellant had not sustained relief with physical therapy and that an epidural steroid block afforded no marked improvement. In an August 13, 2002 report, Dr. Steven A. Rupert, an osteopath, stated that examination showed that appellant's pain was not discogenic but rather was more mechanical, either from facet joints or S1.

On August 20, 2002 appellant filed a claim for a recurrence of disability beginning August 20, 2002. On September 4, 2002 Dr. Chetan R. Shukla, Board-certified in anesthesiology and pain medicine, stated that a right L4 epidural steroid injection that day gave appellant 50 percent pain relief. In a September 11, 2002 report, Dr. Higdon stated that appellant's chronic low back pain was, by history, the result of his lifting injury. In a September 18, 2002 report, Dr. Higdon stated that he had advised appellant to work as tolerated up to six hours per day. In an October 23, 2002 report, Dr. Shukla stated that a right L3-S1 facet joint injection on October 2, 2002 afforded no significant pain relief, and that a right sacroiliac joint injection on October 23 gave partial relief. Dr. Shukla administered another lumbar epidural steroid injection on November 15, 2002.

On December 20, 2002 the Office advised appellant that it had accepted his claimed recurrence of his low back condition. The Office authorized payment of intermittent compensation from July 19, 2001 to May 30, 2002.

In a December 26, 2002 report, Dr. Shukla stated that discography showed L4-5 and L5-S1 to be appellant's pain generators; he recommended intradiscal electrothermal therapy (IDET) which the Office authorized on February 19, 2003. Dr. Shukla performed this procedure on March 12, 2003, and stated that the recovery time was 8 to 12 weeks. The Office paid compensation for total disability from March 12 to 26, 2003. Appellant returned to his regular work on May 7, 2003.

In a February 19, 2004 report, Dr. Robert Shugart, a Board-certified orthopedic surgeon, stated that IDET gave appellant pain relief for a few months and diagnosed discogenic back pain. Discography on March 2, 2004 was positive for provocation at L4-5, concordant with appellant's usual pain symptoms. In a March 17, 2004 report, Dr. Shugart stated that appellant could work six hours per day.

On April 2 and 16, 2004 appellant filed claims for compensation from March 19 to April 16, 2004, claiming compensation for two hours per day. On May 13, 2004 appellant reduced his work hours from six to four per day; he filed claims for compensation for the hours

fewer than eight that he worked, and stated that his low back pain radiating down his right leg had progressively worsened and become constant. In a May 11, 2004 report, Dr. Shugart stated that appellant had more back than leg pain, diagnosed discogenic back pain, and recommended that appellant work four hours per day. In a June 5, 2004 report, Dr. Shugart stated that this reduction in work hours was "because he was having trouble secondary to discogenic back pain and right leg pain."

By decision dated June 29, 2004, the Office denied appellant's claim for compensation for partial disability from March 19 to May 14, 2004 on the basis that the medical evidence was insufficient to establish that his condition worsened to the point where he could not work eight hours.

On June 1, 11 and 25, 2004 appellant filed claims for compensation for four hours per day from May 17 to June 25, 2004. In a July 13, 2004 report, Dr. Shugart stated that appellant's discogram showed evidence of gross annular disorganization at L4-5, loss of disc height, and posterior annular disorganization at L5-S1, which showed progressive deterioration of those discs. Dr. Shugart stated that appellant was "developing more back and leg pain secondary to painful levels in the lumbar region. Because of increasing symptoms, based on his discogram and two-level disease, his restrictions were changed on May 11, 2004, to not work more than four hours per day to help resolve his symptoms until surgical options are available for him." On July 5, 2004 appellant requested reconsideration of the Office's June 29, 2004 decision, and contended that the initial injury was much more than a lumbar strain.

By decision dated July 29, 2004, the Office found that the medical evidence supported that he sustained only a lumbar strain on October 13, 2000, as there was no well-reasoned discussion on how the other diagnosed condition resulted from this injury. By decision dated August 2, 2004, the Office refused to modify its decision denying compensation for partial disability from May 14 to June 25, 2004.

On September 11, 2004 appellant requested reconsideration and contended that his pain was the result of disc lesions. He also filed claims for compensation for partial disability to July 27, 2004. In an August 15, 2004 report, Dr. Shugart stated that he reduced appellant's work hours because of increasing symptoms, and that, "[b]ased on the history I have, it appears that his initial symptoms began lifting a patient on October 13, 2000. Therefore, his continued symptoms are related to his work injury." In a September 14, 2004 report, Dr. Shukla recommended disc decompression at L4-5 and L5-S1 for a diagnosis of lumbar displaced disc. In response to an Office request for an explanation as to how appellant's displaced disc was related to his October 13, 2000 injury, Dr. Shukla stated in an October 19, 2004 report that appellant suffered a disc injury initially that could have progressed to a disc bulge over time, as most disc injuries resulted in disc bulges over time.

By decision dated December 13, 2004, the Office found that the medical evidence failed to support a causal relation between appellant's reduction of work hours and his October 13, 2000 injury. On December 11, 2004 appellant requested reconsideration and submitted a

December 6, 2004 report from Dr. Shukla that diagnosed degenerative disc disease, displaced disc without myelopathy, low back pain and sciatica. Dr. Shukla stated:

> "I am of the opinion that injury from October 13, 2000 caused permanent injury from aggravation of all the above diagnosis. MRI [scan] from April 2001 showed disc desiccation at L3-4, L4-5 and L5-S1, with disc bulges at L3-4 and L4-5 with annular tear at L5-S1. MRI [scan] from November 17, 2003 showed mild bulges at L3-4 and L5-S1 and moderate bulge at L4-5. His original injury which consisted of bending and lifting is known to cause aggravation of lumbar degenerative disc disease and lumbar disc bulges. The only evidence that this aggravation is permanent is his continuing complaints of pain over three years."

By decision dated February 14, 2005, the Office found that there were no objective findings for a permanent aggravation, no explanation as to how appellant went from full duty to partial hours and what objective findings supported this, and no explanation how the diagnosed conditions were aggravated and what objective findings supported this.

LEGAL PRECEDENT

Appellant has the burden of proving by the preponderance of the reliable, probative, and substantial evidence that he or she is disabled for work as a result of an employment injury or condition. This burden includes the necessity of submitting medical opinion evidence, based on a proper factual and medical background, establishing such disability and its relationship to employment.[1] Proceedings under the Federal Employees' Compensation Act are not adversarial in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation benefits, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[2]

ANALYSIS

The Office accepted that appellant's October 13, 2000 injury, which occurred while transferring a patient, resulted in a lumbar strain. Appellant continued to work after the injury, first missing time from work on July 19, 2001. The Office paid compensation for intermittent absences of work from that date to May 30, 2002, for a recurrence of disability beginning August 20, 2002, and for a period of disability from March 12 to 26, 2003.

On March 19, 2004 appellant reduced his hours of work from eight to six per day, based on Dr. Shugart's recommendation. On the same basis, he reduced his hours to four per day on May 13, 2004. These hours of missed work, two, then four, per day are at issue on this appeal. The reports of Drs. Shugart and Shukla do not attribute appellant's need to reduce his work hours to the accepted lumbar strain, but rather to the pain from his discogenic back pain (Dr. Shugart) and his disc bulges (Dr. Shukla). As these are not conditions accepted by the Office as causally

[1] *David H. Goss*, 32 ECAB 24 (1980).

[2] *Isidore J. Gennino*, 35 ECAB 442 (1983).

related to appellant's employment injury, appellant retains the burden of proof to establish such a relationship.

Although the reports of Drs. Shugart and Shukla do not contain sufficient rationale to establish that these conditions are causally related to appellant's employment injury, their reports are sufficient to require the Office to further develop the medical evidence by obtaining further medical opinion evidence.[3] Dr. Shugart concluded in an August 15, 2004 report that appellant's continued symptoms were related to the October 13, 2000 injury, since the symptoms began then. Dr. Shukla stated in an October 19, 2004 report that appellant suffered a disc injury initially that progressed to a disc bulge, as most disc injuries do, and added in a December 6, 2004 report that the type of injury appellant sustained was known to cause aggravation of degenerative disc disease and bulges.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 14, 2005 and December 13, August 2, July 29 and June 29, 2004 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded to the Office for action consistent with this decision of the Board.

Issued: August 15, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[3] *John J. Carlone*, 41 ECAB 354 (1989).