U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALFONSO E. CABALLERO and DEPARTMENT OF THE AIR FORCE, AIR FORCE SYSTEMS COMMAND, BROOKS AIR FORCE BASE, San Antonio, TX

Docket No. 97-2759; Submitted on the Record;
Issued October 18, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that he sustained an injury on September 3, 1996, causally related to factors of his federal employment.

On August 7, 1989 appellant, then a 48-year-old electronics engineer, sustained a back injury. The Office of Workers' Compensation Programs accepted that appellant sustained lumboscral strain and a herniated nucleus pulposus at L5-S1. Appellant did not undergo surgical correction of his L5-S1 disc herniation, but with physical therapy he returned to his regular sedentary work duties. The Office also accepted that he sustained recurrences of disability on July 12, 1991, January 2, 1992 and March 8, 1994.[1] Appellant continued to receive regular orthopedic evaluation and treatment and physical therapy for his back conditions related to his 1989 injury from the date of initial injury at least every three months until his 1997 appeal to the Board.

On September 16, 1996 appellant filed a claim for another recurrence of disability on September 3, 1996. He alleged that on that day he had to move from one office to another carrying books and binders, that he bent to push his chair and felt a twinge in the center of his back, that several hours later driving home from work, both legs started burning and he had tightness around his lower back and that after lying in bed his condition worsened with pain and weakness in his lower back and legs.[2] Appellant indicated that he stopped work on September 4, 1996. The Office determined that the facts of the recurrence indicated that a new

[1] Appellant also filed some unadjudicated recurrence claims for recurrences in 1995, 1996 and 1997, which are not now before the Board on this appeal; *see* 20 C.F.R. § 501.2(c).

[2] Appellant's supervisor noted that as a result of division realignment appellant had to move from one office to another on September 3, 1996, that coworkers put books, files and papers on his chair for him to push to the new office and that appellant related to one coworker that he felt a twinge putting files in drawers and to another that it was while he pushed the chair. Both activities happened within one duty shift.

incident of injury had occurred, such that appellant needed to file a Form CA-1, notice of injury. The Office also advised appellant that his original injury claim file was closed.[3]

On September 16, 1996 appellant filed a Form CA-1 alleging that on September 3, 1996 he sustained lower back pain and tightness of both legs when he was asked by his supervisor to move from one office to another. Appellant alleged that, "[i]n moving books and binders placed on a chair to move, the chair hit the opening of the door wall. At the time, being slightly stooped over on arms of chair, the impact reverberated to my still injured lower back (previous injury)." He stopped work on September 5, 1996 and sought medical treatment on September 13, 1996.

Appellant's acting supervisor, Blanca A. Paredes, noted that on September 3, 1996 several employees moved from one office to another, that on September 4, 1996 appellant told her that his back and leg were hurting as a result of moving from one office to another, and that she did not know she was supposed to report this until the regular supervisor returned the following week.

Appellant also submitted a witness statement from Patricia A. Morales, a coworker, who noted that on September 3, 1996 she discussed appellant's move to a new office with appellant and that later she saw appellant pushing a chair with binders on it past her office, and that they spoke about him using the chair as he passed her office. Another coworker, Earl E. O'Carroll, noted that, in assisting appellant with the move, he loaded appellant's executive chair that had casters with books, file folders and other publication materials to be pushed to the new office down the hall, and that appellant was left to file the materials in his new office. He noted that around 2:30 p.m. on September 3, 1996 he heard appellant remark that his back was giving him fits, and noted that appellant had trouble straightening up after placing some stacks of material in the lower file drawer. Mr. O'Carroll stated that appellant claimed that his back spasmed or "caught" as he bent over to reach into the file drawer, and stated that he probably should have reported the "injury" or incident to the safety office that date, and he opined that appellant gave the impression that he had aggravated a chronic, long-standing back condition.

In response to the Office's request for further information, appellant responded that he did give the acting supervisor, Ms. Paredes, verbal notice of injury on September 4, 1996; that he was asked to move his office from one place to another; that in moving books and binders placed on a chair to facilitate the move, the chair hit the opening of the door wall; and that at that time he was stooped over on the arms of the chair and felt the impact reverberate into his "still injured" lower back. Appellant claimed that on the way home on the date of injury his legs started burning and tightening up, and that he did not delay in seeking medical attention.

[3] This case closing was inappropriate as appellant was still receiving regular medical treatment for his accepted employment injury, and had filed multiple recurrence claims from the date of injury through 1997, including claims for recurrences in 1995 and 1996.

In support of his claim, appellant submitted September 13, 1996 medical progress notes from Dr. Ty H. Goletz, a Board-certified orthopedic surgeon, which stated:

> "Two weeks ago [appellant] was moving his office and was pushing a chair with some heavy weight on it and it stopped, and he felt something go into his back, felt a twinge and then his back got really bad. His back became much more severe in pain, and pain that stayed right in his back. If he would sit in the car, he would get anterior thigh pain. In the last couple of days he noted increased stiffness in his neck."

Dr. Goletz diagnosed "[a]cute low back strain, now affecting the neck causing strain due to lying down."[4]

By decision dated January 6, 1997, the Office rejected appellant's claim finding that the evidence of record failed to establish that the claimed medical condition was causally related to the injury of September 3, 1996. The Office accepted that the incident of September 3, 1996 occurred as alleged but determined that the condition of herniated nucleus pulposus at L5-S1, a condition previously accepted as being causally related to an August 7, 1989 incident, was not related to a September 3, 1996 incident.

On April 1, 1997 appellant requested reconsideration of the denial of his reinjury claim and in support he submitted further evidence.

Appellant submitted a January 6, 1997 report from Dr. Robert G. Johnson, a Board-certified orthopedic surgeon, which noted as history that appellant "reinjured his back in September of 1996. Appellant was moving a chair at work, he felt a twinge in his low back, two hours later it was a burning sensation into the left buttock. He limped and the pain went down into his left leg." No specific diagnosis was given.

Dr. Goletz diagnosed in a March 10, 1997 recheck of the lumbar spine:

> "Acute low back pain and sciatica related to his previous injury. It corresponds to the pain that he has had since 1989. He has a lateral disc in 1989 and that has persisted and caused intermittent symptoms. This is nothing more than exacerbation of that injury and it should be considered part of the first injury."

Appellant also submitted a March 11, 1997 report from Dr. Allen B. Gruber, a Board-certified neurologist, which noted that an electromyogram (EMG) study demonstrated:

> "[C]onsiderable change of right L5 radiculopathy. There are some changes in the right S1 nerve root and in the left L5 dermatome. There are some changes in the

[4] This report regarding appellant's September 1996 injury was received by the Office on December 19, 1996 but was put in the record of appellant's 1989 allegedly "closed" claim. The only medical evidence filed in the record of appellant's 1996 claim and evidently considered by the Office were a prescription and a work and medical status certificate from Dr. Goletz which noted a diagnosis of "HNP L5-S1."

L3 dermatome with irritability in the upper lumbar paraspinous on needle EMG studies."

* * *

"The MRI [magnetic resonance imaging] scan shows a disc herniation at L5-S1 that seems to have migrated upward, affecting the right L5 nerve root.[5] Also, there is some spinal stenosis at L3-4 with a protruding disc. Also there are some changes at L4-5 on the left, but they were not severe."

On April 16, 1997 Dr. Goletz completed an attending physician's supplemental report which noted that dates on injury as September 3 and December 31, 1996 and stated a diagnosis of "extreme back pain and leg pain." He checked "yes" to the question of whether appellant's present condition was due to the injury for which compensation was claimed, and noted the nature of impairment as "herniated nucleus pulposus to L5-S1 level."

By decision dated June 26, 1997, the Office denied modification of the prior decision finding that the evidence submitted in support was insufficient to warrant modification. The Office accepted that the incident occurred as alleged but determined that none of the physicians provided a rationalized medical opinion causally relating appellant's previously accepted L5-S1 herniated nucleus pulposus to the incident of September 3, 1996.[6] The Office however, neglected to consider whether appellant sustained low back strain on September 3, 1996 as diagnosed by Dr. Goletz in his September 13, 1996 report, or whether the accepted incident of September 3, 1996 caused an aggravation or exacerbation of his preexisting condition, as is suggested by the other medical evidence of record.

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

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[7] Second, the

[5] The radiological report noted that the L5-S1 level revealed a severe right parasagittal disc extrusion with free fragment dissecting posterior to L5 and compressing the thecal sac as well as the right L5 nerve root sleeve and thecal sac. Severe narrowing of the right neural foramen is noted with moderate narrowing seen on the left.

[6] This is an illogical determination as the Office had previously determined that the herniated L5-S1 nucleus pulposus was causally related to appellant's August 7, 1989 injury.

[7] *John J. Carlone*, 41 ECAB 354 (1989). To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a prima facie case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met this burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim. *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); *see also George W. Glavis*, 5 ECAB 363 (1953). Appellant, however, has met this burden in the instant case.

employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[8]

In this case, the Office accepted that appellant experienced the employment incident at the time, place and in the manner alleged, but determined that there was no medical evidence supporting that appellant sustained a personal injury. However, the Board finds that the Office neglected to consider all of the applicable medical evidence and incorrectly evaluated the evidence considered as to whether it supported that a personal injury was sustained as alleged. The Board finds that, although the medical evidence submitted is not totally clear and convincing as to the exact nature and extent of the disabling condition which resulted, it clearly supports that some sort of aggravation, exacerbation or superimposed injury occurred to appellant and his previously accepted preexisting HNP at L5-S1 on September 3, 1996, that is sufficient to warrant further development.

Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[9] In the instant case, although none of appellant's treating physicians' reports contain rationale sufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that he sustained a low back strain and/or an aggravation or exacerbation of his preexisting lumbar condition on September 3, 1996, causally related to factors of his federal employment, they constitute substantial, uncontradicted evidence in support of appellant's claim and raise an uncontroverted inference of causal relationship between his allegedly disabling complaints and the September 3, 1996 accepted employment incident, that is sufficient to require further development of the case record by the Office.[10] Additionally, there is no opposing medical evidence in the record.

Therefore the case must be remanded to the Office for the preparation of an updated statement of accepted facts including details of the accepted September 3, 1996 incident, and for referral, together with specific questions to be answered and the complete case record, to an appropriate specialist, for a rationalized opinion on the nature and extent of the injury or condition which resulted from the incidents of September 3, 1996.

[8] *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

[9] *William J. Cantrell*, 34 ECAB 1223 (1983).

[10] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978); *see also Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987) (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity).

Consequently, the decisions of the Office of Workers' Compensation Programs dated June 26 and January 6, 1997 are hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.
October 18, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member