

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHERRILL B. REID and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Canandaigua, NY

*Docket No. 98-224; Submitted on the Record;
Issued September 14, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained a recurrence of disability on October 15, 1996 causally related to her June 26, 1996 employment injury; and (2) whether appellant is entitled to reimbursement of chiropractic expenses.

On June 26, 1996 appellant filed a traumatic injury claim alleging that on that date she injured her back assisting a patient to sit on the "edge of [the] bed." The Office of Workers' Compensation Programs accepted appellant's claim for back sprain. Appellant began working limited duty in accordance with the instructions of physicians with the employing establishment's clinic.

On October 11, 1996 appellant filed a notice of recurrence of disability alleging disability recurred on October 3, 1996 causally related to her June 26, 1996 employment injury. Appellant stopped work on October 15, 1996.

In a treatment note dated October 11, 1996, Dr. David A. Herd, a chiropractor, indicated that appellant had improved after a one-week vacation from work and should remain off work for four weeks.

In a treatment note received by the Office on October 25, 1996, Dr. Herd stated that appellant was permanently restricted from lifting patients due to "repeated back injuries."

Dr. Kwang-Joon Nam, a Board-certified radiologist with the employing establishment, interpreted a July 12, 1996 x-ray of appellant's lumbosacral spine as normal and an x-ray of her thoracic spine obtained on the same date as unremarkable except for possible marginal spurring.

In a report dated November 22, 1996, Dr. Herd related that he initially treated appellant on April 26, 1997. He discussed appellant's June 26, 1996 employment injury and opined that x-

rays taken July 12, 1996 showed subluxations at L4-5, and T12, L1, T11 and T12. He indicated that he performed manual manipulation of the spine to correct the subluxations. Dr. Herd stated:

“[Appellant] returned to work November 11, 1996, having shown moderate improvement during her time out of work. There was no intervening injury between the original injury of June 26, 1996 and the time which she was held out of work, and her present back complaints are directly attributed to the incident of June 26, 1996.”

In a report dated December 16, 1996, Dr. Sylvia A. Firary stated that she initially treated appellant on August 26, 1996, discussed her June 1996 employment injury and related findings on the August 1996 examination. Dr. Firary stated:

“I referred her to Dr. David Herd who is a chiropractic doctor in August for treatment of her acute lower back pain. I recommended at that time that she continue light duty.... Apparently in October through mid November, she was actually removed from work entirely and then more recently has been told that she needs to return to her duties as a nursing assistant.”

She concluded that appellant “most likely” had a work-related injury and should obtain follow-up care with the employing establishment.

In a treatment note and form report dated December 6, 1996, Dr. Herd opined that appellant should work light duty from December 9 to 23, 1996.

By letter dated January 21, 1997, the Office requested that appellant submit the July 12, 1996 x-ray reports.

In a report received by the Office February 6, 1997, Dr. Herd indicated that he treated appellant on December 6, 1996 for “an acute exacerbation of low back pain. The exacerbation occurred while working in the laundry department at the [employing establishment.] The repetitive bending, lifting and twisting involved in the performance of laundry duties resulted in intense low back pain.”

In an evaluation dated April 24, 1997, a physician with the employing establishment noted that a computerized tomography (CT) scan and x-rays of the lumbosacral spine were negative. The physician listed normal findings on examination but indicated that appellant’s symptoms “seem real” and opined that she could have chronic lumbosacral strain.

In a report dated August 21, 1997, Dr. Mary McLarnon, a Board-certified radiologist and Office medical adviser, reviewed appellant’s CT scan and the July 12, 1996 x-rays and found that they did not “reveal any evidence of subluxations as this condition is defined for purposes of [the Federal Employees’ Compensation Act]. The only abnormality seen is very mild spurring of the anterior margins of [the] lower thoracic vertebra.”

By decision dated September 19, 1997, the Office denied appellant’s claim on the grounds that the evidence did not establish that she sustained a recurrence of disability causally

related to her June 26, 1996 employment injury. The Office found that the reports of Dr. Herd did not constitute those of a “physician” under the Act as the weight of the evidence revealed no subluxation by x-ray.

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of disability on October 15, 1996 causally related to her June 26, 1996 employment injury.

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 total disability and to show that he or she 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 job requirements.¹

In the present case, appellant sustained a back strain due to an injury on June 26, 1996, following which she returned to work in a limited-duty capacity. Appellant has submitted no evidence which would establish any change in the nature and extent of her light-duty position as a cause of her claimed disability after October 15, 1996.

Appellant further has not submitted sufficient medical evidence to establish that she sustained a recurrence of disability on October 15, 1996 causally related to her June 26, 1996 employment injury. In support of her claim, appellant submitted reports from Dr. Herd, a chiropractor. In a report dated November 22, 1996, Dr. Herd indicated that he began treating appellant in April 1997 for a June 1996 employment injury. He stated that x-rays obtained on July 12, 1996 revealed multiple subluxations.

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.”² The regulations state that a chiropractor may interpret his or her x-rays to the same extent as any other physicians.³

In the instant case, Dr. Herd did not indicate that he himself took x-rays. The July 12, 1996 x-rays were ordered by a physician with the employing establishment and interpreted by Dr. Nam, a Board-certified radiologist with the employing establishment, as normal except for minimal marginal spurring. An Office medical adviser reviewed the July 12, 1996 x-rays and specifically found no evidence of subluxation as defined by the Act. The Board finds, therefore, the weight of the medical evidence rests with the opinion of the Office medical adviser and

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² *See Linda Holbrook*, 38 ECAB 229 (1986).

³ 20 C.F.R. § 10.400(e).

Dr. Nam, as Board-certified radiologists trained in the reading of x-rays.⁴ Thus, Dr. Herd's reports do not constitute those of a "physician" under the Act.

The remaining reports of record are insufficient to establish that appellant sustained a recurrence of disability due to her employment injury. In a report dated December 16, 1996, Dr. Firary noted that appellant was "apparently" removed from work in October through mid November and that she "most likely" had a work-related injury. A physician's opinion that appellant "most likely" had an employment injury is speculative in nature and insufficient to establish causal relationship.⁵ In an April 24, 1997 evaluation, a physician with the employing establishment opined that appellant could have chronic lumbosacral strain. This report is of little probative value as it is speculative in nature and does not address the relevant issue of whether appellant was disabled from her employment injury beginning October 15, 1996. Appellant, therefore, has failed to meet her burden of proof.

The Board further finds that appellant is not entitled to reimbursement of chiropractic expenses.

The Board notes that it has created exceptions to the general rule that services rendered by a chiropractor are not payable when they do not consist of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.⁶ These exceptions are for physical therapy rendered by a chiropractor under the direction of an authorized physician,⁷ and for chiropractic treatment authorized pursuant to a Form CA-16 without limitations by the Office or the employing establishment.⁸ In the instant case, the record contains no evidence which would establish that Dr. Herd's services are payable under any of these exceptions. Following her employment injury, appellant sought treatment at the employing establishment's clinic. As appellant voluntarily returned to a physician at the employing establishment for treatment, she chose that physician as her initial choice of physician pursuant to 5 U.S.C. § 8103.⁹ Dr. Firary, the physician who referred appellant to Dr. Herd, was not authorized by the Office to treat appellant, and the record contains no form from the Office or the employing establishment authorizing treatment of appellant by a chiropractor. Thus, appellant is not entitled to reimbursement for Dr. Herd's chiropractic expenses.

The decision of the Office of Workers' Compensation Programs dated September 19, 1997 is hereby affirmed.

Dated, Washington, D.C.

⁴ See *Elmer Fields*, 20 ECAB 250 (1969).

⁵ *Alberta S. Williamson*, 47 ECAB 569 (1996).

⁶ *Edward Schoening*, 41 ECAB 977 (1990).

⁷ *Eleanor B. Loomis*, 37 ECAB 792 (1986).

⁸ *Beverly A. Scott*, 37 ECAB 838 (1986).

⁹ See *Elizabeth J. Davis-Wright*, 39 ECAB 1232 (1988).

September 14, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member