U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RILEY W. HANBACK and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, Glynco, GA

Docket No. 99-1525; Submitted on the Record;
Issued July 21, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant sustained a back injury in the performance of duty on October 3, 1995.

On October 4, 1995 appellant, then a 38-year-old border patrol agent, filed a notice of traumatic injury, alleging that he suffered pain in his lower back and right leg when he slipped on some steps and twisted his back on October 3, 1995 while in the course of his federal employment. Appellant stopped work on March 13, 1996.

On November 14, 1995 a physician's assistant recorded that appellant slipped and twisted his back about a month and a half prior. The physician's assistant also indicated that appellant experienced pain in his right hip going down into his leg and sometimes into his right foot.

On December 12, 1995 Dr. Merritt B. Shobe, a Board-certified orthopedic surgeon, treated appellant for back pain and right sciatica. On February 8, 1996 Dr. Shobe treated appellant for severe right sciatica. His examination revealed a loss of lumbar lordosis, lumbar spasm, decreased flexion and extension with bending in the lumbar spine and markedly positive straight leg raising on the right. He noted a loss of sensation on the plantar aspect of the foot. Dr. Shobe stated that a previous x-ray showed a slight narrowing of L5-S1 and a small bony protrusion at the posterior aspect of L5-S1.

On February 22, 1996 Dr. Shobe again treated appellant for right sciatica. His examination revealed restriction of flexion and extension in the lumbar spine. Dr. Shobe noted positive straight leg raising on the right and a very questionable sensory change in the right saddle area.

On March 4, 1996 Dr. Edward F. Downing, a Board-certified neurological surgeon, recorded that appellant had a three-month history of the insidious onset of pain in the right hip,

right low back and right leg radiating down into the right great toe. His neurological examination revealed a right L5 hypalgesia and absent ankle jerks bilaterally with a positive straight leg raising on the right at 45 degrees. Dr. Downing noted a positive Lasegue's sign. Dr. Downing also found a right S1 hypalgesia with loss of lumbar lordosis, right-sided sciatica notch tenderness and mild weakness of the right anterior tibial, extensor hallucis longus and gastroc muscles. His review of the lumbar magnetic resonance imaging (MRI) scan showed a disc bulge at L4-5 and a greater bulge at L5-S1.

On April 3, 1996 Dr. Downing stated that he saw appellant initially on March 4, 1996 with a three-month history of low back pain and right-sided hip and right-sided sciatica pain in the L5 distribution. He stated that appellant was disabled for three months due to the sciatica.

On April 11, 1996 the Office of Workers' Compensation Programs requested that appellant submit additional information, including a physician's rationalized medical opinion addressing the causal relationship between the diagnosed conditions and the alleged October 3, 1995 injury.

On April 20, 1996 Dr. Downing indicated that appellant's right-sided sciatica had worsened.

On May 1, 1996 appellant wrote that he waited six weeks to seek medical treatment because the pain he experienced after the October 3, 1995 accident went away for approximately three weeks. He stated that, when the pain returned, he did not feel that the severity of the pain warranted a doctor's visit.

By decision dated May 23, 1996, the Office found fact of injury was not established. In an accompanying memorandum, the Office noted that appellant failed to submit a medical opinion linking any diagnosis to the October 3, 1995 incident. The Office stated that the evidence supported that the claimed event, incident or exposure occurred at the time, place and in the manner alleged. However, it found that a medical condition resulting from the accepted trauma or factors was not supported by the medical evidence.

On August 9, 1996 appellant requested reconsideration.

In support, appellant submitted a June 28, 1996 report from Dr. Jorge R. Rojero, a Board-certified family practitioner, who stated that, on March 11, 1996, appellant told him that he stumbled on some steps on October 3, 1995 resulting in two herniated discs in the lumbar area. He stated that after he reviewed an MRI and a myelogram that he advised appellant to undergo surgery.

Appellant also submitted a May 15, 1996 report from Dr. Downing indicating that he was doing well following surgery.

By decision dated September 4, 1996, the Office denied modification of the May 23, 1996 decision. In an accompanying memorandum, the Office indicated that Dr. Rojero's report provided no rationalized opinion explaining how the October 3, 1995 incident caused or contributed to appellant's herniated discs.

On August 11, 1997 appellant again requested reconsideration and submitted an October 30, 1996 letter from Dr. Downing, who indicated that appellant told him that he slipped on a stair three months before their first visit and that appellant reported having pain for about eight weeks prior to that visit. Dr. Downing stated that, because appellant's pain started a month after the slipping incident, he could not relate the injury to the accident. He supported his assertion with a copy of his office questionnaire, which appellant completed.

Appellant also submitted a March 12, 1996 report from Dr. Shobe, who stated that appellant was first seen on December 12, 1995 and that an MRI showed discs at L4-5 and L5-S1. Dr. Shobe recommended multiple disc level surgery.

Finally, appellant submitted progress notes from a physician's assistant dated March 12 and 14, 1996.

By decision dated September 15, 1997, the Office denied modification of the prior decisions. In an accompanying memorandum, the Office indicated that appellant still failed to submit any medical evidence supporting a connection between his back condition and his employment injury.

On August 20, 1998 appellant requested reconsideration.

In support, appellant submitted an August 21, 1998 letter from Dr. Rojero, who stated that, appellant suffered a lower back injury after a fall on April 26, 1992 and was evaluated and treated on May 4, 1992. Dr. Rojero stated that appellant remained symptom free until his last visit on August 16, 1995.

Appellant also submitted an August 26, 1998 note from Dr. Barry Weissglass, a physician Board-certified in family practice and preventive medicine, who stated that appellant was free of pain and fully functional until his injury of October 3, 1995. He stated that since that time appellant had ongoing problems with pain in his low back and right leg. Dr. Weissglass concluded that, given this history, appellant's back and leg pain were a direct result of his injury on October 3, 1995.

By decision dated September 16, 1998, the Office denied modification of the prior decisions. The Office stated that Dr. Rojero failed to provide an opinion on whether the October 3, 1995 work incident caused any condition and that he failed to examine appellant. The Office further noted that Dr. Weissglass failed to provide a diagnosis and failed to explain why he found appellant's pain related to the October 3, 1995 work incident, besides noting that appellant's symptoms appeared after the injury.

On October 15, 1998 appellant requested reconsideration.

Appellant submitted an October 5, 1998 letter from Dr. Weissglass, who stated that an MRI demonstrated postoperative changes at the L4-5 level on the right with a suspected small recurrent disc herniation. He stated that the disc herniation was compatible with the clinical complaints. Dr. Weissglass again noted that appellant was symptom free prior to the injury of October 3, 1995. He stated that appellant had a consistent symptomology compatible with a L5,

S1 disc injury with right leg involvement and restated that an MRI demonstrated a recurrent injury anatomically compatible with appellant's symptoms since October 3, 1995.

By decision dated March 29, 1999, the Office again denied modification of the prior decisions. The Office noted that Dr. Weissglass' opinion was not based on an accurate history since he assumed appellant's pain immediately followed the October 3, 1995 incident. It further noted that Dr. Weissglass did not provide a history of the work injury.

The Board finds that appellant failed to establish that he sustained a back injury in the performance of duty on October 3, 1995.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim[2] including the fact that the individual is an "employee of the United States" within the meaning of the Act,[3] that the claim was timely filed within the applicable time limitation period of the Act,[4] 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.[5] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To determine whether an 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 employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[8]

[1] 5 U.S.C. §§ 8101-8193.

[2] *See Daniel R. Hickman*, 34 ECAB 1220 (1983); *see also* 20 C.F.R. § 10.110.

[3] *See James A. Lynch*, 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101(1).

[4] 5 U.S.C. § 8122.

[5] *See Melinda C. Epperly*, 45 ECAB 196 (1993).

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

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

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

An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that his or her disability and/or specific condition for which compensation is claimed are causally related to the injury.[9]

To accept fact of injury in a traumatic injury case, the Office, in addition to finding that the employment incident occurred in the performance of duty as alleged, must also find that the employment incident resulted in an "injury." The term "injury" as defined by the Act, as commonly used, refers to some physical or mental condition caused either by trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[10] The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.[11]

In this case, there is no dispute that appellant was an "employee" within the meaning of the Act, nor that appellant timely filed his claim for compensation. Moreover, the Office accepted that the October 3, 1995 work incident occurred as alleged.

Appellant, however, has not submitted sufficient medical evidence to establish that he incurred an employment-related injury. In support of his claim for a traumatic injury appellant submitted reports from Dr. Shobe, a Board-certified orthopedic surgeon, dated December 12, 1995, February 8 and 22 and March 12, 1996. Because Dr. Shobe failed to relate appellant's back condition to the October 13, 1995 work incident in any of his reports, they are insufficient to meet appellant's burden of establishing that he sustained an injury in the performance of duty on October 3, 1995. Similarly, Dr. Rojero, a Board-certified family practitioner, failed to relate appellant's back condition to his October 3, 1995 work incident in reports dated June 28, 1996 and April 21, 1998. Moreover, the reports appellant submitted from his physician's assistant failed to address the cause of his back condition and are entitled to no weight, as opinions rendered by physician's assistants cannot constitute competent medical evidence.[12] Appellant also submitted reports from Dr. Downing, a Board-certified neurological surgeon, dated March 4, April 3 and 20 and May 15, 1996. Dr. Downing also failed to address the cause of appellant's back condition in these reports. Moreover, on October 30, 1996 Dr. Downing concluded that appellant's back condition was not related to his October 3, 1995 work incident because his pain symptoms occurred almost a month after the incident. Accordingly, Dr. Downing's opinion is not sufficient to establish that appellant sustained a back injury at work on October 3, 1995.

The only evidence appellant submitted, which supported his assertion that his back condition stemmed from the October 3, 1995 work incident, were the August 26 and October 5, 1998 letters from Dr. Weissglass. In his August 26, 1998 letter, Dr. Weissglass concluded that

[9] As used in the Act, the term "disability" means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; *see Frazier V. Nichol*, 37 ECAB 528 (1986).

[10] *See Elaine Pendleton*, 40 ECAB 1143 (1989).

[11] *See Carlone*, *supra* note 8.

[12] *Robert J. Krstyen*, 44 ECAB 227 (1992).

appellant's back condition was related to the October 3, 1995 work incident because appellant's symptoms emerged at that time. Nevertheless, the opinion of a physician that a condition is causally related to an employment injury because the employee was asymptomatic before the employment injury is insufficient without supporting rationale to establish causal relationship.[13] Consequently, Dr. Weissglass' August 26, 1998 letter is insufficient to meet appellant's burden of proof.

Dr. Weissglass submitted an October 5, 1998 letter in which he noted both that appellant's symptoms began after the October 3, 1995 work incident and that the MRI revealed changes at the L4-5 level consistent with recurrent disc herniation, which was compatible with appellant's symptoms. Dr. Weissglass, however, again failed to provide any explanation of the mechanism of appellant's injury beyond the fact that appellant told him his symptoms began following the October 3, 1995 incident. The fact that the MRI substantiates appellant's symptomatology does not establish the cause of the back condition. Accordingly, Dr. Weissglass' unexplained opinion based solely on the emergence of appellant's symptoms following the October 3, 1995 work incident is entitled to little weight.[14] Appellant, therefore, failed to meet his burden of establishing a back condition causally related to the October 3, 1995 work incident.

The decisions of the Office of Workers' Compensation Programs dated March 29, 1999 and September 16, 1998 are affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[13] *Thomas R. Horsfall*, 48 ECAB 180 (1996).

[14] *Id., see also Ruby I. Fish*, 46 ECAB 276 (1994).