

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM T. FIDURSKI and DEPARTMENT OF HEALTH & HUMAN SERVICES, FOOD & DRUG ADMINISTRATION, East Orange, NJ

*Docket No. 98-897; Submitted on the Record;
Issued May 2, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that he sustained a recurrence of disability on or after October 19, 1990 causally related to his accepted employment injuries.

This case has previously been on appeal before the Board. In its July 17, 1995 decision,¹ the Board reversed the decision of the Office of Workers' Compensation Programs finding that the Office had not met its burden of proof to terminate appellant's compensation for chiropractic treatment. The Board also remanded appellant's claim for further development of the issue of whether he sustained a recurrence of disability on or after October 19, 1990 causally related to his accepted employment injuries. The Board noted that appellant had not submitted sufficient medical evidence to establish that he sustained a neurological condition as a result of his injuries, but found that the medical evidence was sufficient to require further development. The facts and circumstances of this case as set forth in the Board's prior decision are hereby incorporated by reference.

Following the Board's July 17, 1995 decision, the Office referred appellant for a second opinion evaluation. Based on this report, on November 2, 1995, the Office denied appellant's claim for a condition of the central nervous system and found that he had no further need for chiropractic treatment. Appellant requested an oral hearing. By decision dated July 18, 1996, the hearing representative set aside the Office's November 2, 1995 decision. After further development of appellant's claim, by decision dated February 11, 1997, the Office found that appellant had cervical subluxations that required further chiropractic treatment. The Office also denied appellant's claim for recurrence of disability on October 19, 1990. He requested an oral hearing and by decision dated November 5, 1997 and finalized November 10, 1997, the hearing representative found that there was a continuing conflict of medical opinion evidence regarding

¹ Docket No. 94-99.

appellant's need for chiropractic treatment² and that appellant had not sustained a recurrence of disability due to his accepted employment injuries.

The Board finds the case not in posture for decision due to an unresolved conflict of medical opinion evidence.

An employee seeking benefits under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of the Act and that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁴

In this case, appellant has submitted medical evidence supporting that he developed a neurological condition as a result of his employment injuries. The Board reviewed the evidence of record at the time of its July 17, 1995 decision and determined that appellant had not met his burden of proof, but that the evidence was sufficient for the Office to undertake further development of the medical evidence to determine if appellant sustained a neurological condition as a result of his employment injury.

Following the Board's decision, the Office referred appellant to Dr. Melvin Vigman, a Board-certified neurologist, for a second opinion evaluation. In his September 12, 1995 report, Dr. Vigman noted appellant's history of injury, his medical treatment and performed a physical examination. Dr. Vigman reviewed the September 9, 1993 magnetic resonance imaging (MRI) scan of appellant's brain and found that it showed minimal white matter signals and that the findings were nonspecific. He stated, "One cannot state that these signals represent contusion or anything else. These are absolutely nonspecific and very minimal." Dr. Vigman stated that convergence insufficiency was not a neurological disease. He stated that appellant had no neurological disease and attributed his symptoms to "a continuous elaboration and magnification which has become all invasive to the entire body." The hearing representative reviewed this report on July 18, 1996 and found that Dr. Vigman did not address whether appellant had a neurological condition in October 1990 as directed by the Board.

² The Board notes that the hearing representative properly found that, while the conflict regarding the existence of appellant's cervical subluxations as of 1989 had been resolved, there remained an issue of whether continuing chiropractic treatment was needed to treat such subluxations.

³ 5 U.S.C. §§ 8101-1893.

⁴ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

In a report dated October 10, 1995, Dr. Nazar H. Haidri, a Board-certified neurologist of professorial rank, noted appellant's history of injury and repeated his earlier diagnosis of postconcussion syndrome, as well as post-traumatic headaches and blurring of vision. He stated: "As per report dated August 12, 1991, in all medical probability, [appellant's] symptoms were related to injuries sustained in a motor vehicle accident dated February 18, 1986 and was subsequently aggravated by the injuries sustained at work on March 18, 1989.... Please note that [he] sustained a concussion in the motor vehicle accident dated February 18, 1986 and another concussion in the accident dated March 18, 1989."

Dr. Haidri defined a concussion as a brief alteration of consciousness resulting from direct injury to the head or an indirect injury resulting from neck injuries such as a whiplash in which accelerating and decelerating forces are set up in the brain resulting in injury to the cerebral hemispheres or the ascending reticular activating system resulting in transient alteration of consciousness such as being stunned, dazed, confused, disoriented or loss of consciousness.

The Office referred appellant for a second opinion evaluation with Dr. Joseph F. Schneider, a Board-certified neurologist, to determine if appellant had any neurological condition and disability on or after October 1990. In his December 6, 1996 report, Dr. Schneider noted appellant's history of injury and reviewed the medical records. He performed a neurological evaluation and found that this was normal with no evidence of focal, lateralizing signs. Dr. Schneider stated that appellant's headaches might be explained as a manifestation of post-traumatic syndrome. He stated, "[Appellant] did not lose consciousness following either of the accidents (February 18, 1986 and March 17, 1989) and therefore his headaches cannot be regarded as manifestation of a postconcussion syndrome as indicated by Drs. Haidri and Crane." Dr. Schneider further stated that post-traumatic headache in the majority of instances resolved in 6 months and that it was extremely unlikely that the symptom would persist for 10 years as asserted by appellant. He stated that appellant had a post-traumatic headache following his accidents but that his current condition was maintained by psychological and not organic factors. Dr. Schneider stated, "The intensity of the headache cannot be objectively evaluated but in neither of the reports provided to me is there any reference that his headache in itself would have been severe enough to interfere with his work performance and [be] incapacitating." He reviewed appellant's brain MRI scan and found that the changes were nonspecific and all probability consistent with an age-related change. Dr. Schneider stated, "At the present time findings from topographic mapping of cerebral activity cannot be used as clinical evidence for brain dysfunction in the absence of significant changes by routine testing methods. [Appellant] had no changes whatsoever using routine testing methods." He concluded that appellant had no neurological disease and no disability secondary to any neurological condition.

Section 8123(a) of the Federal Employees' Compensation Act,⁵ 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 5 U.S.C. §§ 8101-8193, 8123(a).

In this case, there is an unresolved conflict of medical opinion evidence between Drs. Haidri and Crane, who found that appellant developed postconcussion syndrome as a result of the employment injuries despite the loss of consciousness and Dr. Schneider who found that appellant could not have sustained postconcussion syndrome as he did not lose consciousness and that he sustained post-traumatic headaches which should not have been disabling in 1990 and which did not continue currently. Due to the unresolved conflict of the medical opinion regarding the nature and extent of appellant's neurological condition and any resulting disability, the Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified neurologist to resolve these issues. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

Appellant submitted a report dated October 11, 1993 from Dr. Larry Frohman, a Board-certified ophthalmologist of professorial rank. He noted that appellant felt his eyes were not working together well. Dr. Frohman diagnosed convergence insufficiency. He stated that this diagnosis "could" be related to appellant's injuries. In an August 12, 1997 report, Dr. Frohman stated, "Whereas convergence insufficiency is not uncommon in the population, [you] stated that you had no symptoms of it before your head injury of February 1986. It may be seen after direct head injury or we have seen several cases after flexion-extension injuries. Thus, we assume that [your] injuries could cause your double vision."

These reports are not sufficient to meet appellant's burden of proof in establishing that he developed convergence insufficiency as a result of his accepted employment injuries. Dr. Frohman does not provide a clear opinion on the causal relationship between appellant's condition and his employment injuries. Instead his report indicates that it is possible that appellant's convergence insufficiency "could" have been caused by the 1986 employment injury. Dr. Frohman notes that appellant stated that his symptoms of double vision arose after the employment injury. However, the Board has held that a temporal relationship alone is insufficient to establish causal relationship. Neither the fact that the condition became apparent during a period of employment nor the belief that the employment caused or aggravated a condition is sufficient to establish causal relationship.⁶ As appellant has not submitted sufficient rationalized medical opinion evidence to establish a causal relationship between his convergence insufficiency and his employment injury, he has failed to meet his burden of proof to establish that this condition resulted from his employment injuries.

⁶ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

The November 10, 1997 decision of the Office of Workers' Compensation Programs is hereby set aside and remanded for further development consistent with this opinion.

Dated, Washington, D.C.
May 2, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member