U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY R. ROSE and DEPARTMENT OF THE ARMY,
ARMY CORPS OF ENGINEERS, Rock Island, IL

Docket No. 99-1919; Submitted on the Record;
Issued November 29, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that he sustained a lower back injury in the performance of duty on January 2, 1997; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of his claim under 5 U.S.C. § 8128(a).

On March 10, 1997 appellant, a 56-year-old crane operator, filed a claim for benefits, alleging that he strained his lower back while prying timbers with a steel bar on January 2, 1997.

In a report dated March 15, 1997, Dr. Peter R. Mitchell, a chiropractor, indicated that he treated appellant for a work-related lower back injury from January 3 through February 7, 1997. Dr. Mitchell stated that he took appellant off work during this period until February 10, 1997, when he released him to return to his normal work duties. He diagnosed a fifth lumbar subluxation, a herniated fifth lumbar disc and severe low back pain.

In a letter to appellant dated April 23, 1997, the Office requested that appellant submit additional information in support of his claim, including a medical report and opinion from a physician, supported by medical reasons, describing the history of the alleged work incident, and indicating how the reported work incident caused or aggravated the claimed injury, plus a diagnosis and clinical course of treatment for the injury. The Office also requested a statement from appellant describing in detail exactly how the injury occurred and the immediate effects of the injury, and providing names and addresses of persons who may have witnessed the work incident or had immediate knowledge of it. The Office informed the employee that he had 30 days to submit the requested information.

Appellant submitted an April 25, 1997 report from Dr. Mitchell, who essentially reiterated his earlier findings and conclusions, and also stated that he took lumbar x-rays on January 3, 1997, which revealed that the fifth lumbar disc was rotated to the right, resulting in a herniated disc and subluxation of his right hip and fifth lumbar disc.

By letter dated May 1, 1997, the Office referred appellant's x-rays to Dr. Dan R. McFarland, a Board-certified radiologist, for an opinion as to whether the x-rays demonstrated a subluxation of the lumbar spine, and provided the definition of subluxation as defined under the Office's regulations.[1] In a report dated May 20. 1997, Dr. McFarland stated with regard to x-ray films of appellant's lumbar spine taken on January 3, 1997:

> "There is no evidence of scoliosis at this time and I believe the previously described scoliosis is due to positioning for the film. The SI joints and sacrum appear normal as does the pelvis. Hip joints are unremarkable."

With regard to lumbar x-rays taken on March 8, 1997, Dr. McFarland stated:

> "They show no evidence of fracture in the dorsal spine and the disc spaces are maintained. There are spurs partially bridging the T11-12 disc space and there appears to be spurring anteriorly at T3-4 and T5-6 with spurs bridging the disc space in this area and these have the appearance of also being longstanding. No other unusual findings identified."
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> "Stable, mild osteoarthritic spurring of the lumbar spine and dorsal spine as described above. There may be fixation at the T5-6 level because of the spur that appears to be fused anteriorly bridging this disc space and this would be a level of subluxation as per the definition of fixation. No other evidence to suggest subluxation noted on this study."

The Office determined that a conflict in the medical evidence existed between the opinions of Drs. Mitchell and McFarland regarding whether the x-rays of appellant's lumbar spine revealed a subluxation. The Office referred the x-rays to Dr. Min S. Chen, a Board-certified radiologist as the impartial medical examiner to resolve this conflict. In a report dated June 30, 1997, Dr. Chen, after reviewing appellant's lumbar x-rays taken January 3 and March 8, 1997, found no radiographic evidence of subluxation corresponding to the definition presented by the Department of Labor.

By decision dated September 11, 1997, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that appellant sustained an injury in the performance of duty. The Office found based on Dr. Chen's referee opinion that Dr. Mitchell's x-rays did not indicate any subluxation, so he was not considered a physician under section 8101(2).[2] As appellant did not submit any additional medical evidence in support of his claim, the Office found that he failed to establish he had sustained a lower back injury in the performance of duty.

[1] 20 C.F.R. § 10.400(e).

[2] 5 U.S.C. § 8101(2).

In a letter postmarked September 19, 1997, appellant requested an oral hearing, which was held on July 29, 1998. In support of his claim, appellant submitted an October 6, 1997 report from Dr. Mitchell, in which he essentially expressed his disagreement with the opinions of Drs. Chen and McFarland, indicating that appellant's lumbar x-rays did not reveal subluxation. Appellant also submitted reports dated November 3, 1997 and August 3, 1998 from Dr. Joseph C. Azer, a specialist in general surgery. In a report dated November 3, 1997, Dr. Azer stated:

> "It seems that [appellant] wanted to see if anything in his lumbar spine would justify his absence from work from [January 2 to February 10, 1997]. Clinical examination was [inconclusive], [appellant] walks without a limp and the range of motion of the lumbar spine is within normal for a man of his age and weight. On [October 24, 1997] a CT [computerized tomography] scan of his lumbar spine showed localized herniated disc (some bulging of the disc) in the midline and the left."

Dr. Azer restricted appellant from heavy lifting, up to 40 pounds and advised him to avoid bending of his lower extremities to pick up objects, wear lumbar support during work, and perform muscle strengthening exercises. In his August 3, 1998 report, Dr. Azer diagnosed degenerative changes in the lumbar spine and a bulging disc at L4-5, with a localized herniated disc.

By decision dated October 8, 1998, an Office hearing representative affirmed the Office's September 11, 1997 decision.

By letter dated March 19, 1999, appellant requested reconsideration.

By decision dated May 17, 1999, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing that the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

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.

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[3] 5 U.S.C. § 8101 *et seq*.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *Victor J. Woodhams*, 41 ECAB 345 (1989).

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.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[7] The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[8]

In the present case, it is uncontested that appellant experienced the employment incident at the time, place and in the manner alleged. However, the question of whether an employment incident caused a personal injury generally can be established only by probative medical evidence,[9] and appellant has not submitted rationalized, probative medical evidence to establish that the employment incident on January 2, 1997 caused a personal injury and resultant disability

In the present case, appellant presented reports from Dr. Mitchell, a chiropractor, but his opinion that x-rays of appellant's spine demonstrated subluxation was contradicted by that of Dr. McFarland, and which created a conflict in the medical evidence. In order to resolve this conflict, the Office referred appellant's x-rays to Dr. Chen, a Board-certified radiologist, for an independent medical examination. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[10] Dr. Chen reviewed appellant's January 3 and March 8, 1997 lumbar x-rays and concluded that there was no radiographic evidence of subluxation in accordance with the under the Office's regulations at 20 C.F.R. § 10.400(e). The Board finds that Dr. Chen's opinion is sufficiently probative and well rationalized to merit the special weight accorded a referee medical examiner. Therefore, the Office properly relied on Dr. Chen's opinion in finding that Dr. Mitchell's reports fail to show subluxation by x-ray and therefore do not constitute medical evidence under section 8101(2).

The only other medical evidence submitted by appellant consisted of the reports from Dr. Azer, which did not contain an opinion bearing on causal relationship. In addition, Dr. Azer's CT scan report does not contain a medical opinion from a physician indicating whether appellant's herniated disc or lower back injury was employment related. None of the medical documents submitted by appellant, therefore, provide a probative, rationalized medical

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

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

[8] *Id.*

[9] *See John J. Carlone, supra* note 6.

[10] *Aubrey Belnavis*, 37 ECAB 206 (1985); 5 U.S.C. § 8123(a).

opinion sufficient to demonstrate that appellant's January 2, 1997 employment incident caused a personal injury or resultant disability. Causal relationship must be established by rationalized medical opinion evidence, and appellant failed to submit such evidence in the present case. Appellant did not provide a medical opinion to sufficiently describe or explain the medical process through which the January 2, 1997 work accident would have been competent to cause the claimed injury. Thus, the Office's decision is affirmed.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.607, a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[11] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[12]

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. Although appellant submitted reports from Drs. Mitchell and Azer, these documents were repetitious of evidence which had already been reviewed by the Office in previous decisions. This is important since the outstanding issue in the case -- whether appellant sustained a lower back injury in the performance of duty on January 2, 1997 -- was medical in nature. Thus, his request did not contain any new and relevant medical evidence for the Office to review. All the other medical evidence submitted by appellant was previously of record and considered by the Office in reaching prior decisions. Additionally, appellant's letter failed to show the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Although, he generally contended that he sustained a lower back injury in the performance of duty on January 2, 1997, he failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

[11] 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

[12] *Howard A. Williams*, 45 ECAB 853 (1994).

The May 17, 1999 and October 8, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 29, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member