U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HAROLD OLSON, JR. and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Boston, MA

Docket No. 01-190; Submitted on the Record;
Issued July 24, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant sustained an injury to his low back in the performance of duty on September 24, 1998.

On September 29, 1998 appellant, then a 46-year-old kinesiotherapist, filed a notice of traumatic injury alleging that on September 24, 1998 he experienced low back pain after riding in a shuttle van to his duty station. He noted that the shuttle van caused a jolting and bouncing motion due to poor support and shock absorption in the rear of the van where appellant was riding.[1] Appellant was off work from September 25 to 29, 1998.

A treatment note from Margaret Thornton, a registered nurse practitioner, dated September 24, 1998, reported that appellant was seen that day for complaints of aggravated back pain from riding in a van from the hospital. She indicated that appellant had a long-standing history of back problems since the 1970's for which appellant had been treated by a chiropractor. On physical examination appellant was unable to raise his legs, there was tenderness noted in the spine and apparently walked very slowly. As assessment was listed as exacerbation of chronic back pain. Appellant was advised not to do any heavy lifting.

In a November 2, 1998 letter, the Office of Workers' Compensation Programs requested additional factual and medical information with respect to appellant's traumatic injury claim, but no response was received from appellant.

In a decision dated December 11, 1998, the Office denied compensation on the grounds that appellant had failed to submit medical evidence to establish that an injury was sustained in the performance of duty as alleged.

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[1] Appellant's supervisor indicated that appellant was in the performance of duty when he was on the shuttle as he was riding from Boston Veteran's Area Medical Center to Causeway Street Clinic.

Appellant requested a hearing, which was held on July 20, 1999.[2] An exhibit to the hearing included a copy of a repair sheet indicating that shocks were replaced in a vehicle on January 27, 1999.

In a report dated October 11, 1998, Dr. Kirk J. Shilts, a chiropractor, noted that he treated appellant on September 30, 1998. He related appellant's description of a back injury on September 24, 1998 stating that appellant's "work van drove over a road defect and caused a 'bouncing' of his lower spine into compression." Dr. Shilts noted a prior history of chronic mid-thoracic osteoarthritis with episodic achy pain and/or stiffness isolated to the T9-T10 spinal region. He reported that appellant had acute right sacroiliac pain with overlying joint effusion and loss of range of motion. The diagnosis was acute sacroiliac subluxation and right sacroiliac pain, for which he prescribed spinal manipulative therapy, soft tissue trigger point therapy and cyrotherapy.

In a December 17, 1998 report, Dr. Shilts advised that appellant had concluded his treatment for a work-related injury on September 24, 1998.

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty on September 24, 1998.

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing 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 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 essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

In order to determine whether an employee has sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether a "fact of injury" has been established. There are two components involved in establishing fact of injury which must be considered. First, the employee must submit sufficient evidence to establish that he 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

[2] At the hearing, appellant's supervisor testified that when appellant returned from the van ride he "most assuredly had a deviated gait." He related appellant's description of a 15 seat van and stated that appellant had been forced to sit in the back of the van where he had absorbed all of the road bumps.

[3] 5 U.S.C. §§ 8101-8193.

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

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

[6] *Elaine Pendleton*, *supra* note 4.

establish that the employment incident caused personal injury.[7] The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence.

An award of compensation may not be based on surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between his condition and his employment.[8] To establish causal relationship, appellant must submit a physician's report, in which the physician reviews the factors of employment identified by appellant as causing his injury and, taking these into consideration as well as findings upon examination of appellant and appellant's medical history, state whether these employment factors caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his opinion.[9]

In this case, the Office properly found that appellant provided no rationalized medical opinion evidence supporting any causal relationship between his diagnosed condition and the September 24, 1998 work incident. In support of his claim, appellant submitted a treatment note signed by a registered nurse practitioner indicating that he was treated for an exacerbation of low back pain on September 24, 1998. The Board, however, finds the treatment note to be of no probative value inasmuch as a nurse is not considered a "physician" under the Act and, therefore, is not competent to give a medical opinion.[10]

Appellant also submitted a report from his chiropractor diagnosing that he sustained a subluxation as a result of riding in the back of a van where he was jolted and bounced by defects in the road. 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 demonstrated by x-ray to exist.[11] The new Office regulations at 20 C.F.R. § 10.311 (1999), which went into effect on January 4, 1999 and are controlling in this claim, provide that "a diagnosis of subluxation must appear in the chiropractor's report" and that "to be given any weight, the medical report must state that x-rays support the finding of spinal subluxation."[12] The Office does not require a claimant to submit an x-ray or report of x-ray; however, the report must be available for submittal on request.[13]

With respect to Dr. Shilts' October 11, 1998 report, although there is a diagnosis of right sacroiliac subluxation, he did not reference an x-ray. When the requirements of section 10.311 have not been meet (where x-rays do not demonstrate a subluxation or where a diagnosis of subluxation based on x-rays has not been made), a chiropractor is not considered a "physician"

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[7] *Id*.

[8] *See Victor J. Woodhams, supra* note 5.

[9] *Id*.

[10] *See* 5 U.S.C. § 8101(2); *Thomas R. Horsfall*, 48 ECAB 180 (1996).

[11] 5.U.S.C. § 8101(2); *see Samuel Theriault*, 45 ECAB 586 (1994).

[12] 20 C.F.R. § 10.311(b) (1999).

[13] 20 C.F.R. § 10.311(c) (1999).

and his or her report cannot be considered as competent medical evidence under the Act.[14] Accordingly, Dr. Shilts' is not considered a physician for the purpose of this claim and his report is not competent medical evidence to carry appellant's burden of proof in establishing his claim. In the absence of medical evidence to establish that appellant sustained an injury in the performance of duty on September 24, 1998, the Board finds that the Office properly denied compensation.[15]

The October 13, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
July 24, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[14] *Samuel Theriault, supra* note 11.

[15] The Board's decision does not preclude appellant from submitting medical evidence to the Office along with a request for reconsideration.