U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. LOCKHART and DEPARTMENT OF THE ARMY, FOREIGN LANGUAGE CENTER, Presidio of Monterey, CA

Docket No. 00-1731; Submitted on the Record;
Issued June 18, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has established that his conditions of pain in the lower back, neck, hands, headaches pain in his left leg and loss of memory on June 3, 1993 was causally related to his file clerk position and a December 14, 1989 incident.

This is appellant's third appeal before the Board. Appellant, presently a 52-year-old retired temporary commissary worker, filed an original claim for traumatic injury occurring on March 14, 1988 while moving a pallet of water bottles. The Office of Workers' Compensation Programs accepted that claim for spinal subluxations at C3, T6 and L4.[1] Appellant returned to light duty as a file clerk on October 22, 1989 which did not require heavy lifting.[2] He was restricted by his treating chiropractor from lifting more than 25 pounds occasionally and 20 pounds frequently.[3] On March 12, 1990 appellant requested reassignment to another light-duty position due to the injury he sustained at the commissary. A wage-earning capacity determination was made on July 2, 1990. On October 5, 1990 appellant was discharged from his file clerk position for discourtesy toward his supervisor, failure to properly request leave and for being absent without leave.[4] On January 24, 1991 the Office issued a notice of proposed

[1] This claim was assigned the number A13-857202.

[2] Management indicated that this light-duty position was designed in accordance with the medical restrictions set forth by appellant's physician.

[3] The file clerk job was noted to require lifting of only up to 10 pounds.

[4] A subsequent Merit Systems Protection Board (MSPB) hearing resulted in a settlement agreement wherein the word "resigned" was substituted for the word "discharged," and the phrase "for reasons not related to his physical condition" was inserted.

termination of compensation finding that appellant's disability had ceased.[5] By decision dated March 12, 1991, the Office terminated appellant's monetary compensation entitlement finding that the weight of the medical evidence established that he no longer had any injury residuals or disability due to his employment. This termination decision was affirmed by an Office hearing representative on November 9, 1993. The Board affirmed this decision by decision dated May 29, 1996, finding that the weight of the evidence of record established that appellant had no continuing disability causally related to his accepted subluxations.[6] Thereafter, on July 16, 1998 the Board issued a decision, reversing the Office's September 17, 1996 nonmerit decision finding that appellant had submitted evidence sufficient to warrant a review of the case on its merits under 5 U.S.C. § 8128.[7]

On June 3, 1993 appellant filed the instant occupational illness claim alleging that on December 14, 1989 he realized that he had developed thorolumbarmyospasm causally related to factors of his employment. Appellant alleged that his limited-duty position as a file clerk required frequent bending and stooping, which resulted in him having pain in his lower back, neck, hands and left leg and headaches and loss of memory. He alleged that he performed twisting and reaching, pushing and pulling of carts full of files, that he lifted and carried "groups of files," that he stood and walked for long periods and that he was not granted light-duty status. Appellant claimed compensation entitlement from October 19, 1990 and continuing.[8]

By report dated July 6, 1994, Dr. Michael M. Bronshvag, a Board-certified neurologist, noted that appellant had not worked since September 1990 because of "neck and low back difficulties," and noted his history of the 1988 injury while working at the commissary. Physical examination was reported as revealing no gross abnormalities, no range of motion limitation, full shoulder abduction, no gross grip loss, no pathological reflexes and no sensory or motor deficits. Tenderness to palpation in the neck midline, in the midback, in the left parathoracic region and over the midline low back was noted as well as positive straight leg raising at 60+ degrees and left thoracic pain upon heel and toe walking. Dr. Bronshvag diagnosed neck and low back spinal strain syndrome with left thoracic symptoms, muscle contraction headache syndrome and carpal tunnel syndrome and opined "[Appellant] noted onset of spinal symptoms in March of 1988

[5] The Office found that appellant's treating Board-certified orthopedist, Dr. Timothy R. Heyne, merely listed appellant's subjective complaints but reported no objective findings with respect to any back condition; that a January 11, 1990 bone scan was normal and that laboratory tests revealed an abnormal rheumatoid factor. On December 17, 1990 an Office referral orthopedic specialist, Dr. R.T. Badke, noted no neurologic deficits, solid and well-developed musculature, no atrophy, full range of motion, no reflex changes, no joint deformities, very minimal reversal of the normal cervical lordosis, no evidence of any spinal degenerative changes or old dislocations, no indication of any subsequent aggravation or repeated trauma and no organic pathology to support appellant's subjective complaints. Dr. Badke opined that appellant had no continuing disability as a result of the March 14, 1988 injury and that he could return to his previous work without any limitations.

[6] Docket No. 94-1124 (issued May 29, 1996). X-rays were interpreted as showing no evidence of the accepted spinal subluxations, degenerative changes or old fractures or dislocations. This claim is presently not before the Board on this appeal. *See* 20 C.F.R. § 501.6(c).

[7] Docket No. 97-773 (issued July 16, 1998).

[8] The employing establishment indicated that appellant was absent without leave since September 26, 1990.

while working at the commissary -- Fort Ord and remains symptomatic…. [Appellant's] condition has apparently not changed much in the last many months or few years."

By decision dated August 12, 1994, the Office denied appellant's occupational illness claim finding that causal relation was not established. Thereafter, appellant requested an oral hearing. The hearing was held on December 4, 1996 at which appellant testified.

In support of his claim appellant resubmitted the July 6, 1994 report from Dr. Bronshvag, which had previously been considered for the Office's August 12, 1994 decision.

Appellant also submitted a June 7, 1991 report from Dr. Murtadha Al-Marashi, a Board-certified neurologist, which noted as history that appellant was injured while moving a pallet of water, reported his complaints at that time and opined that appellant had post-traumatic syndrome with cervical spondylosis and possible lumbar disc syndrome and migraines. Dr. Al-Marashi indicated that appellant was not to carry more than 25 to 50 pounds and was not supposed to do continuous pulling, pushing or reaching. A follow-up report from him provided the diagnoses of cervical spondylosis and lumbar disc syndrome.

Appellant also submitted a March 16, 1992 report from Dr. Paul J. Fry, a Board-certified cardiologist, which noted as history appellant's accident on March 14, 1988, noted the results of an orthopedic examination and indicated that appellant had not worked since 1988 when he was injured. Dr. Fry diagnosed mechanical low back pain, chronic cervical strain and left carpal tunnel syndrome and he opined that appellant had been incapacitated since 1988 because of cervical and low back symptomatology and hand tingling, which he opined would continue into the future with prolonged sitting, standing or walking and with overhead use of the upper extremities. Dr. Fry noted that Waddell's signs were definitely positive and he opined that psychological factors were affecting appellant's condition.

In support of his request appellant also submitted an undated Form CA-20 attending physician's report from his treating chiropractor, Dr. J. Michael Weir, which noted diagnoses of "cervical, thoracic and lumbar subluxations with muscle spasms and pain," and indicated that he had been totally disabled from March 14, 1988 through June 10, 1995 and partially disabled from June 10 through September 10, 1995. Dr. Weir indicated that appellant could return to light duty on June 10, 1995.

In a May 23, 1995 CA-20 form report, Dr. Weir noted as history that appellant was maneuvering a hand pallet loaded with water containers and sustained injury when he tried to prevent it from overturning.[9] Total disability was noted from March 14, 1988 through June 10, 1995 and Dr. Weir indicated that appellant could resume regular work on August 10, 1995.

By report dated June 22, 1995, Dr. Weir reviewed the onset of appellant's symptoms on March 14, 1988 and opined that his persistent symptoms, which had some degree of permanent effect, were a direct result of the injury. He diagnosed "Headache, brachial neuralgia, neck pain,

[9] This was the description of the traumatic injury occurring on March 14, 1988 which had been accepted for spinal subluxations at C3, T6 and L4, for which his entitlement to monetary compensation was terminated effective March 12, 1991.

subluxation multiple dorsal, subluxation multiple lumbar spine, sacroiliac subluxation, traumatic chronic late effects of sprain/strain with tendon injury, traumatic chronic moderate thoracic outlet syndrome, traumatic chronic moderate to severe rib neurospinal biomechanical lesion (subluxation complex), traumatic chronic moderate chest pain, unspecified, [and] traumatic moderate sciatic neuropathy."

By report dated December 19, 1996, Dr. Cheryl A. Ellis, a Board-certified physiatrist, noted appellant's history of a March 1988 commissary injury, reviewed his symptoms since that time and indicated that his condition was aggravated by an automobile injury on March 9, 1996. Dr. Ellis reported appellant's present symptoms, performed a physical and neurological examination and diagnosed chronic cervical strain with myofascial pain involving the upper back musculature, chronic low back pain with lumbar degenerative disc disease, bilateral carpal tunnel syndrome and noninsulin-dependent diabetes mellitus. Dr. Ellis opined that appellant had been disabled for the past eight years and had become chronically deconditioned.

By decision dated March 10, 1997, the hearing representative affirmed the August 12, 1994 decision, finding that the evidence did not support that appellant's present condition was causally related to his employment.

By letter dated June 11, 1997, appellant requested reconsideration and in support he submitted a May 15, 1997 medical report from Dr. Scott H. Schneiderman, an osteopath. Dr. Schneiderman opined: "It was [Dr. Ellis's] opinion, the opinion of [appellant] and my opinion as well that [appellant's] problems with his neck and back are directly related to an injury sustained while at work."

By decision dated September 4, 1997, the Office denied a review on its merits of the March 10, 1997 decision, finding that the evidence submitted in support was repetitious and of a cumulative nature and, therefore, insufficient to warrant reopening the case for further review on its merits.

By letter dated September 26, 1997, appellant again requested reconsideration and in support he submitted another report from Dr. Schneiderman dated September 26, 1997, he diagnosed chronic cervical strain with myofascial pain involving the upper back musculature, chronic low back pain with lumbar degenerative disc disease, bilateral carpal tunnel syndrome, chronic deconditioning and noninsulin-dependent diabetes mellitus. Dr. Schneiderman indicated that appellant was unable to return to work as a file clerk due to the prolonged periods of standing, walking, bending, lifting, stooping, pushing and pulling and opined: "[Appellant's] current disability stems from his preexisting degenerative arthritic process that involves his entire spine from the injury that occurred on March 14, 1988…. On December 14, 1989 [appellant] reinjured his back and neck while working in a light-duty job as a file clerk that required long periods of standing, walking, bending, lifting, stooping, pushing and pulling. It also appears that he sustained further aggravation of his preexisting back condition in the injury of December 14, 1989." He opined that appellant sustained a permanent aggravation of his back and neck condition, which limited him to semi-sedentary and light-duty employment.

By decision dated November 26, 1997, the Office denied appellant's request for a further review of his case on its merits finding that the evidence was cumulative in nature and was vague and speculative.

On December 9, 1997 the Office determined that appellant had two workers' compensation claims which he indicated were for the same injury. It noted that appellant did not understand why his occupational claim was denied when it was for the same injury as the accepted traumatic injury claim and merely recurred.

By letter dated December 10, 1997, appellant through his representative, advised that his claim was a recurrence of the prior injury.

By letter dated March 9, 1998, appellant again requested reconsideration. In support he submitted an excerpt from a medical publication and a March 4, 1998 report from Dr. Mark W. Howard, a Board-certified orthopedist, which noted appellant was seen for back complaints status post motor vehicle accident. Dr. Howard noted appellant's present complaints and current treatment, reported physical examination results, indicated that appellant had four positive Waddell's signs,[10] reviewed the medical reports of record and diagnosed "chronic pain and disability syndrome, chronic generalized axial (spinal) myofascial strain/sprain/pain; historically more significant caudal more so than more cephalad segments, reported past history of evidence of seropositive spondyloarthropathy; certainly cannot rule fibrositis/fibromyalgia syndrome condition, previous magnetic resonance imaging (MRI) scan evidence of minimal caudal lumbar disc degeneration with minimal central degenerative protrusions without significant or critical neural compression or stenosis, multiple Waddell's nonorganic signs accompanying low back pain, [and] caudal cervical spondylosis C5-7." He opined that appellant had no surgical pathology and that the preponderance of subjective symptoms far outweighed any objective evidence of significant structural or orthopedic pathology. Dr. Howard noted that at the time of appellant's office visit post motor vehicle accident, he stated that he did not have any prior neck or significant upper extremity complaints, with normal sensory and motor examination results, which was clearly contradictory to the submitted medical records which indicated a consistently reported history of bilateral hand numbness and a diagnosis of carpal tunnel syndrome and subjective reports of upper extremity axial pain as early as June 29, 1988. Dr. Howard noted: "[T]o whatever extent [appellant's] discogenic pain contributes to his permanent disability … I would causally relate the predominance of [his symptoms] to his 1988 injury. The records I have indicate that the 1989 event could probably be considered a flare-up or exacerbation of the original 1988 injury." He opined that appellant's 1989 reinjury was due to excessive stooping beyond his stated workplace limitations which aggravated his 1988 injury-related complaints.

By decision dated May 11, 1998, the Office denied modification of the prior decision finding that the evidence submitted in support was insufficient to warrant modification. The Office noted that appellant had a claim for the similar conditions currently before the Board on appeal of a termination of compensation due to resolution of disability.

[10] Positive atypical tenderness, positive axial loading test, positive regional disturbances and positive over-reaction.

By letter dated May 10, 1999, appellant through his representative, requested reconsideration of the May 11, 1998 decision.

In support appellant submitted some medical progress noted from Dr. Joseph Hoffman, a Board-certified orthopedist, which noted as history that in March 1988 appellant injured his back while moving a pallet, that when he returned to work in October 1989 he was required to lift x-rays weighing 40 to 50 pounds repetitively and that he reinjured his low back in December 1989 while working light duty. Dr. Hoffman noted that appellant resigned because he could not physically perform his job, that he had not worked since 1990 but developed carpal tunnel syndrome in 1995 and that he had a three-year history of diabetes mellitus. He reported physical examination results and diagnosed "chronic paravertebral myofascitis, cervical and lumbar spine, [and] degenerative disc disease, L4-5 and L5-S1." Dr. Hoffman opined: "I feel [appellant] has a lumbar spine injury which is at present totally disabling. A great deal of this disability represents deconditioning over the last nine years, however. Anatomic changes as evidenced by the MRI scan examination and deficits noted in physical examination are minimal, however. It appears that this spinal problem originated directly as a result of the injury to his lumbar spine of March 1988 which was exacerbated by his injury of December 1989."

By letter dated May 27, 1999, appellant through his representative, requested reconsideration of both cases No. A13-1039560 and No. A13-0857202.[11]

By decision dated September 22, 1999, the Office denied modification of the prior decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that appellant's claim for continuing injury and disability related to his March 1988 injury was denied on March 12, 1991, that the evidence of record demonstrated that in his light-duty capacity he was required to lift and carry only 10 to 20 pounds intermittently for 4 hours per day and that Dr. Hoffman did not mention the factors appellant implicated, bending and stooping, as being causally related to his condition. The Office found that Dr. Hoffman's report was of diminished probative value as it was not based on a complete and accurate factual and medical background.

By letter dated December 14, 1999, appellant, through his representative requested reconsideration and in support submitted an addendum from Dr. Hoffman. In the addendum dated August 31, 1999, Dr. Hoffman stated that he reviewed appellant's medical records dating back to 1988 and noted: "Review of complete medical record[s] dating back to 1988 … leads me to rationalize my opinion in that [appellant] had no prior complaint of musculoskeletal problems prior to the date of his injury in March 1988. It is not only a reasonable assumption but an obvious fact that whatever symptoms remain today result directly from the initial cause."

By decision dated February 1, 2000, the Office denied the September 22, 1999 decision, finding that the evidence submitted in support was insufficient to warrant modification. The Office found that appellant's prior claim for the work-related injury on March 14, 1988 was accepted only for subluxations of C3, T6 and L4 and that his benefits were terminated on

[11] As case No. A13-0857202 is not now before the Board on this appeal under this docket number, it will not be addressed. *See* 20 C.F.R. § 501.2 (c).

March 12, 1991 for the reason that he was no long suffering disability or further residuals causally related to that injury. It noted that this termination was affirmed by the Board. The Office noted that appellant was working light duty when he was terminated for cause, which after a MSPB hearing was modified to reflect that he resigned for personal reasons. The Office found that Dr. Hoffman's opinions were not based on a complete and accurate history of injury and appellant's duties as a file clerk were not establish as having caused the conditions alleged on June 3, 1993.

The Board finds that appellant has failed to establish that his medical condition on June 3, 1993 was causally related to factors of his federal employment or to a December 14, 1989 employment incident.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[12] (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[13] and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[14] The medical evidence required to establish causal relationship, generally, is rationalized medical opinion 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 and accurate factual and medical background of the claimant,[15] must be one of reasonable medical certainty,[16] and must be supported by medical rationale explaining the pathophysiological nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[17] The opinion of a physician that a condition is causally related to an employment injury or incident because the employee was asymptomatic before the employment injury or incident is insufficient, without supporting medical rationale, to establish causal relation.[18]

[12] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979).

[13] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

[14] *See generally Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

[15] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[16] *See Morris Scanlon*, 11 ECAB 384-85 (1960).

[17] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[18] *Thomas D. Petrylak*, 39 ECAB 276 (1987); *Charles A. Massenzo*, 30 ECAB 844 (1979); *see also Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996); *Kimper Lee*, 45 ECAB 565 (1994); *Mildred D. Thomas*, 42 ECAB 888 (1991); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

In this case, the record supports that appellant worked light duty from October 22, 1989 through October 5, 1990 when he was terminated for cause. He did not stop work on October 5, 1990 due to his medical condition. Appellant further did not file a claim for an occupational illness/injury until June 3, 1993, almost three and one half years after he allegedly became aware of the occupational illness/injury. The factors of employment appellant implicated were walking, standing, twisting, reaching, pushing, pulling, bending, stooping and lifting, while performing his file clerk duties. Appellant just generally alleged that all of these activities caused an occupational injury around December 14, 1989, but an injury not severe enough to require that he cease light duty.[19]

None of the medical evidence provide a rationalized medical explanation as to how events on or around December 14, 1989 or appellant file clerk duties caused the medical conditions appellant alleged caused him to become disabled.

Dr. Bronshvag identified appellant's March 14, 1988 commissary injury as the causative factor in his present condition. The Board notes, however, that appellant's claim for the March 14, 1988 injury was terminated effective March 12, 1991 on the grounds that he was no longer disabled from his accepted employment-related injuries and had no injury-related residuals. As appellant was asymptomatic and without residuals as of March 12, 1991, the recurrence of such spinal symptomatology after appellant had completely left federal employment has not been adequately explained and its relationship to a December 14, 1989 event or series of events is unsupported. Therefore, Dr. Bronshvag's report is of diminished probative value.

Dr. Al-Marashi reported the history of the March 14, 1988 injury, which was found to have resolved as of March 12, 1991, opined that appellant had post-traumatic syndrome, but failed to provide any reasoned opinion supporting causal relation with events of December 1989. Therefore, Dr. Al-Marashi's report is of diminished probative value.

Dr. Fry noted as history the March 14, 1988 injury, which was found to have resolved by March 12, 1991, indicated that appellant had not worked since 1988, which was inaccurate and opined that appellant was incapacitated since 1988 due to cervical and low back problems, which was also inaccurate. Further, he noted definitely positive Waddell's signs but did not comment on how these nonanatomic responses influenced appellant's manifest functional capacity. Due to these inaccuracies and omissions, Dr. Fry's report is of diminished probative value.

Dr. Weir, appellant's treating chiropractor, opined that appellant was totally disabled from March 14, 1988 to June 10, 1995 and partially disabled thereafter. However, appellant's disability from his March 14, 1988 injury was determined to have ceased by March 12, 1991 without residuals. Further, as this is inconsistent with the facts of record, including appellant's

[19] Appellant alleged that he had to carry stacks of x-rays weighing 40 to 50 pounds, but this was refuted by the employing establishment who noted that his job required lifting or carrying no more than 20 pounds and further, appellant failed to explain why stacks of x-rays could not be broken down and carried piecemeal in 5 to 10 pound increments if the need arose.

period of light-duty employment through October 5, 1990, Dr. Weir's opinion is of diminished probative value and insufficient to support appellant's occupational injury claim.

Dr. Ellis also reported as history appellant's March 14, 1988 injury, which was determined to have resolved without residuals as of March 12, 1991, noted that his symptoms were aggravated by a 1996 automobile accident and opined that appellant had been disabled for the preceding eight years. As this opinion does not discuss contribution by the intervening injurious circumstances and is inconsistent with the facts of record, including appellant's period of light duty, it is of diminished probative value.

Dr. Schneiderman related appellant's present condition to his March 14, 1988 injury, which had completely resolved without residuals by March 12, 1991, mentioned a December 14, 1989 reinjury, but did not discuss the facts or circumstances of this reinjury. He opined that appellant's condition was aggravated by prolonged periods of standing, walking, bending, lifting, stooping, pushing and pulling, but the employing establishment did not support that these were the circumstances of appellant's light-duty requirements. This factual inconsistency diminishes the probative value of Dr. Schneiderman's report. Further, Dr. Schneiderman opined that on December 14, 1989 appellant's condition was permanently aggravated, but this does not explain how he was found to have no disability or injury residuals as of March 12, 1991. These inconsistencies further diminish the probative value of Dr. Schneiderman's report.

Dr. Howard reviewed appellant's records, noted a number of positive Waddell's signs but did not discuss their import or contribution and opined without explanation that appellant's present condition was causally related to the March 14, 1998 injury, which was determined to have resolved by March 12, 1991. He failed to explain how these conditions recurred after March 21, 1991, since appellant ceased work on October 5, 1990, but claimed that appellant's 1989 reinjury was due to excessive stooping beyond his limitations, an allegation which was not supported by the record. Due to these omissions and inconsistencies, Dr. Howard's report is of diminished probative value.

Dr. Hoffman dated appellant's problems from the March 14, 1988 injury, which had been determined to have resolved without residuals as of March 12, 1991, noted as history that appellant was required to lift 40 to 50 pounds, which is inconsistent with the evidence of record, noted that appellant reinjured his back in December 1989, but omitted the details and indicated that appellant had not worked since 1990 due to his physical inability to perform the duties of his job. However, the Board notes that appellant was dismissed for cause and not due to his physical condition or incapability of carrying out his light duties. Dr. Hoffman indicated that appellant developed carpal tunnel syndrome in 1995, but did not relate this to his employment, which ceased on October 5, 1990 and opined without rationale that appellant's current "spinal problem" originated directly as a result of his March 14, 1988 "lumbar spine" injuries, which the Board notes were subluxations at C3, T6 and L4, only one of which was in the lumbar region. Dr. Hoffman's reports were based on an inaccurate factual and medical history and failed to explain how appellant's employment duties as a file clerk caused any of the conditions resulting in disability, appellant has failed to meet his burden of proof.

The February 1, 2000 and September 22, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 18, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member