U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DALE DRISCOLL and DEPARTMENT OF THE NAVY, NAVAL WEAPONS STATION EARLE, Colts Neck, NJ

Docket No. 00-1339; Submitted on the Record;
Issued March 21, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty on November 3, 1995.

On June 11, 1998 the Office of Workers' Compensation Programs received a traumatic injury claim filed by appellant, then a 50-year-old naval worker, alleging that on November 3, 1995 he "slipped on a door saddle while trying to step down from [the] passenger side of a five-ton box truck, slipped and fell hitting my back, lower and upper right shoulder and neck and left elbow." Appellant claimed that he waited so long to file a claim because he originally thought it was a recurrence of an accepted injury from 1993 and instead filed a CA-2a form on November 14, 1995.[1] Appellant saw a chiropractor on November 3, 1995 the date of the alleged injury and the chiropractor diagnosed appellant with "acute lumbar sprain complicated somewhat by postsurgical degenerative changes."[2]

In support of his claim received on June 11, 1998, appellant submitted a medical report dated November 5, 1997 from Dr. Gordon D. Donald. This report described injuries sustained on December 22, 1991 and June 2, 1993 and appellant's treatment for these injuries. Dr. Donald noted that appellant's back was injured again when he slipped getting out of a truck, but the report did not specifically mention appellant's claimed injury on November 3, 1995. The Office

[1] By letter dated March 10, 1998, appellant's employer stated that his claim for recurrence was denied on July 19, 1996 and affirmed on October 15, 1997. Appellant's request for reconsideration was denied on January 2, 1998. Also, the employer stated that appellant's alleged injury on November 3, 1995 was never reported to his supervisor. The employer was of the opinion that appellant was reporting this as a new injury because it was previously denied as a recurrence.

[2] Appellant has a long history of back injuries. In 1991 appellant hurt his back while carrying a hosepipe. In 1992 appellant's claim was accepted and he underwent back surgery. In 1993 appellant hurt his back again while digging a hole. This injury was accepted for lumbar strain on June 2, 1993.

also received two letters controverting appellant's claim, one from appellant's employer dated March 10, 1998 and one from a Department of Defense liaison dated March 24, 1998.

By letter dated July 6, 1998, the Office requested that appellant submit additional factual information. On August 6, 1998 the Office received two personnel action reports, appellant's narrative answers to factual questions and appellant's attorney's request for a 30-day extension dated August 3, 1998.[3] In appellant's narrative answers, he stated that he spoke to his supervisor after lunch break on the day of the injury.

By decision dated November 27, 1998, appellant's claim was denied since the evidence received did not establish that the injury occurred at the time and in the manner alleged and a medical condition was not diagnosed in connection with the injury.

By letter dated December 4, 1998, appellant's representative requested an oral hearing. An oral hearing was held on May 26, 1999 at which time appellant's representative requested the record be held open for 30 days to submit additional evidence.

On June 8, 1999 the Office received a narrative statement from appellant, in which he stated that the injury occurred on November 1, 1995, not November 3, 1995 and that he did not report the injury to his supervisor at that time because he "didn't think it to be serious." The Office also received a copy of an incomplete transcript from an oral hearing held on July 8, 1997 and a letter from appellant's attorney. In the transcript appellant described his November 1995 injury, but stated that the injury occurred on November 1, 1995. Appellant's attorney stated that the injury was a recurrence of the accepted injury in 1993. Appellant also indicated that he did not inform his supervisor when the alleged injury occurred because he was afraid of "retaliation." On October 1, 1999 the Office also received treatment notes from a chiropractic physician, Dr. Eugene F. Hession, dating from November 3 to December 11, 1995.

By decision dated October 20, 1999, the hearing representative affirmed the Office's November 27, 1998 decision, finding that appellant met his burden of proof in establishing that the incident occurred at the time, place and in the manner alleged, but did not establish a causal relationship between the injury and the specific condition for which compensation was claimed. The Office also noted that appellant's chiropractor who treated appellant on the day of the incident is not considered a "physician" by definition of the Federal Employees' Compensation Act and accordingly his opinion may not be accorded probative value in establishing causal relationship.

The Board finds that appellant has not met his burden of proof in establishing a causal connection between his condition and his federal employment and thus has not established that he sustained an injury in the performance of duty on November 3, 1995.

An employee seeking benefits under the Act[4] 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

[3] A second letter from appellant's employer controverting his claim was received on August 31, 1998.

[4] 5 U.S.C. §§ 8101-8193.

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.[5] These are the 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, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[8] 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 a specific condition for which compensation is claimed are causally related to the injury.[9]

In this case, the Office in its October 20, 1999 decision found that appellant met his burden of proof in establishing that the incident occurred at the time, place and in the manner alleged, but the medical evidence did not establish a causal connection between the injury and the specific condition for which compensation was claimed.

The medical evidence required to establish a causal relationship 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 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.[10]

In appellant's case the only medical evidence of record is the report from Dr. Donald dated November 5, 1997 and the report from his chiropractor, Dr. Hession, dated September 19, 1999. Dr. Donald related that he had initially seen appellant on March 17, 1992 and had initially treated him for a herniated disc at L4-5 and L5-S1. He also related appellant's treatment after his June 1993 injury. Dr. Donald stated when appellant was seen by him on July 25, 1995, his "exam[ination] was essentially unchanged. He continued to have episodic

[5] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

[7] *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).

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

[10] *Delores C. Ellyett*, *supra* note 6; *Ruthie M. Evans*, *supra* note 6.

periods of severe mechanical low back pain with occasional sciatica." Subsequently, Dr. Donald saw appellant several times between January 10, 1996 and August 26, 1997. Each time he stated: "throughout this period his physical examination remained unchanged." There is no specific mention of appellant's alleged November 3, 1995 injury or any worsening of his condition following November 3, 1995. A handwritten annotation to the report indicated that appellant had just reported an injury while climbing from a truck. No date of injury was given and no opinion was offered as to how this incident contributed to appellant's back condition.

Dr. Hession, appellant's chiropractor, stated in his September 19, 1999 report that he saw appellant on November 3, 1995, the day of appellant's incident. He stated: "appellant presents with a chief complaint of low back pain. Earlier today while working at the Earle Naval Pier and retrieving dispatches from a truck while the patient was climbing into the cab of the truck then exiting, he slipped on the floorboard, causing him to twist his low back." Dr. Hession diagnosed appellant with "acute lumbar sprain complicated somewhat by postsurgical degenerative changes." In subsequent visits he opined that there was "some improvement" with appellant's condition, or "no change." Regarding x-ray examination, Dr. Hession indicated:

> "[P]lain film x-rays of the lumbar spine reveal no evidence of any ancient or recent fracture or gross osseous pathology. The previous hemilaminotomies are evident on the [anterior-posterior] film at L4-5 and L5-S1. Mild facet joint arthrosis is noted, no evidence of any gross instability at either the L4-5 or L5-S1 level. No evidence of inflammatory changes."

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 as demonstrated by x-ray to exist. Dr. Hession did not diagnose appellant with subluxation and thus may not be considered a "physician" under the Act.

As appellant did not submit any rationalized medical evidence causally relating his back condition to his alleged November 3, 1995 injury, he did not meet his burden of proof.[11]

[11] *Cheryl L. Veale*, 47 ECAB 607 (1996).

The decision of the Office of Workers' Compensation Programs dated October 20, 1999 is hereby affirmed.

Dated, Washington, DC
March 21, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member