U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS J. WHEELER and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, OH

Docket No. 02-1604; Submitted on the Record;
Issued December 4, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant established that he sustained a recurrence of disability commencing June 13, 2001, causally related to his January 17, 2001 employment injury.

The Office of Workers' Compensation Programs accepted that on January 17, 2001 appellant, then a 46-year-old letter carrier, slipped and fell on icy steps, injuring his back, right shoulder and arm. His claim was accepted for a right shoulder contusion.[1] Appellant did not stop work, but continued in a limited-duty capacity.[2]

A February 8, 2001 health center progress note indicated that appellant's shoulders and back felt better, but noted that he had not been doing manual labor. The note indicated that appellant had a 25-pound lifting limitation such that he would have to break down the weight of his mailbag into two loads for each bag of mail delivered.

On June 27, 2001 appellant filed a Form CA-2a notice of recurrence of disability alleging that his condition and disability on and after June 13, 2001 was causally related to the January 17, 2001 work injury.

In support of his claim, appellant submitted prescriptions and treatment forms from Dr. Thomas DiSalvatore, a chiropractor, dating from June 20 to 27, 2001. He stated that he was treating appellant for "sprain/strain lumbar and lower extremity radiculopathy" and that appellant should be excused from work from June 28 to July 8, 2001.

[1] That was the condition diagnosed at the health center.

[2] Appellant's limited duty consisted of computer work, filing, answering the telephone and other duties within his restrictions. He was given limited duty as the result of his employment injury.

An undated form report from Dr. John Lee, an osteopathic family practitioner, was also submitted which indicated that appellant had "low back pain, [decreased] r[ange] o[f] m[otion], [and] [a] muscle spasm." The form report stated: "[Appellant] off work [two] w[ee]ks."

By decision dated August 14, 2001, the Office rejected appellant's recurrence claim finding that the evidence of record failed to demonstrate that appellant was disabled from work beginning June 13, 2001.

Subsequent to the August 14, 2001 decision, the Office received an August 9, 2001 medical report from Dr. John Lee, an osteopathic physician. He stated: "I have seen [appellant] for low[-]back pain on June 13, 2001. He had pain going down the right lower leg at that time. [Appellant] stated he fell on his upper back on January 17, 2001 when he was at work and since then he started having the pain. He states he had problems sitting for long periods of time because of the pain and he could not stand or lie down for prolonged periods of time because of pain." Dr. Lee noted that appellant had limited range of spinal motion due to pain with diminished right leg reflexes but without neurosensory deficits and continued: "[h]e was given two weeks off work because I felt that he was unable to perform his duties in his job. [Appellant] was given instructions to get physical therapy as well as take medications. He followed up two weeks after on June 27, 2001 with improvement of his low back but stated that he went to a chiropractor instead. [Appellant's] examination[,] at that time[,] did reveal some range of motion restrictions but it was improved. I told him to continue with Dr. DiSalvatore's treatments.... In summary, [appellant] was seen by myself and diagnosed with lumbosacral strain. He was given instruction for physical therapy and given medication. [Appellant] went to a chiropractor and improved. I told him to continue with the chiropractic treatments because it was helping him...."

Appellant disagreed with the August 14, 2001 decision and requested an oral hearing before an Office hearing representative. A hearing was held on January 16, 2002 at which he testified. Appellant also submitted an October 29, 2001 report from Dr. DiSalvatore, in which, he asserted that appellant was suffering from an L4-5 herniated nucleus pulposus with L4 root impingement, lumbar sprain/strain, lower extremity radiculitis and a right lateral L4 subluxation, as revealed by a magnetic resonance imaging (MRI) scan obtained on September 10, 2001. He opined that appellant was unable to work from June 13 to 28, 2001 and that his condition on and after June 13, 2001 was due to the January 17, 2001 work injury with the rationale that the "mechanism of injury," *i.e.*, falling onto his buttocks and back on icy steps, "is consistent with the diagnoses above."

By decision dated April 22, 2002, the hearing representative affirmed the August 14, 2001 Office decision finding that appellant had not established a change in the nature and extent of his injury-related condition or a change in the nature and extent of his limited-duty job requirements. The hearing representative also found that none of the medical evidence established that appellant could not continue to perform his limited-duty job requirements.

The Board finds that appellant has failed to establish that he sustained a recurrence of disability commencing June 13, 2001, causally related to his January 17, 2001 employment injury.

An employee returning to light duty or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of reliable, probative and substantial evidence and to show that he cannot perform the light duty.[3] As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.[4]

In this case, appellant has not met this burden.

The Office accepted that on January 17, 2001 appellant sustained a right shoulder contusion only. No lumbar or spinal injury or condition was accepted as having occurred.

The medical evidence submitted in support of appellant's recurrence claim was mostly from a chiropractor who, in the substance of the evidence, did not obtain x-rays or diagnose a subluxation as demonstrated by x-ray to exist.

Section 8101(2) of the Federal Employees' Compensation 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...."[5] Without diagnosing a subluxation from x-ray, a chiropractor is not a "physician" under the Act and his opinion on causal relationship does not constitute competent medical evidence.[6] As Dr. DiSalvatore did not, in the evidence initially submitted to the Office, diagnose a subluxation or indicate that x-rays were taken which demonstrated this diagnosis, he is not considered to be a physician under the Act and his notes do not constitute competent medical evidence. Therefore, this medical evidence does not establish appellant's recurrence claim.

Also submitted was a form report from Dr. Lee which did not identify an initial injury or a recurrence of a injury-related disability. All the form report noted was the presence of low-back symptomatology and the recommendation that appellant be off work for two weeks. As this report did not address appellant's original accepted right shoulder contusion injury, explain how that injury resulted in his present symptomatology, discuss causal relation or bridging symptoms or support a change in the nature and extent of appellant's right shoulder contusion injury, it is of greatly diminished probative value and is insufficient to establish appellant's recurrence claim.

[3] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[4] *Id.*

[5] *See* 5 U.S.C. § 8101(2). This subsection defines the term "physician." *See also Linda Holbrook*, 38 ECAB 229 (1986); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[6] *See generally Theresa K. McKenna*, 30 ECAB 702 (1979).

The Office, therefore, denied appellant's recurrence claim.[7]

Thereafter, appellant requested an oral hearing and the August 9, 2001 report from Dr. Lee was considered in conjunction with the October 29, 2001 report from Dr. DiSalvatore. Dr. Lee stated that he saw appellant for low back pain on June 13, 2001, that he had pain going down the right lower leg at that time and that he stated that he fell on his upper back on January 17, 2001 when he was at work and since then he started having the pain. However, the Board notes that this history is not supported by the record, as the reports following injury reveal a cessation of shoulder and back symptomatology. Dr. Lee noted that appellant complained of problems sitting for long periods of time or standing or lying down for prolonged periods of time because of pain, but he did not explain how this caused disability for appellant's limited-duty work assignment commencing June 13, 2001. Dr. Lee noted that appellant had limited range of spinal motion due to pain with diminished right leg reflexes but without neurosensory deficits, but he did not explain how this was a change in the nature and extent of his right shoulder contusion injury. As this report from Dr. Lee was not based upon an accurate factual and medical history, and as it contains no rationale explaining how the lower back conditions he diagnosed on June 13, 2001, which became pathologically symptomatic at that time, were causally related either to the accepted condition of right shoulder contusion or the January 17, 2001 incident itself, such that his August 9, 2001 report is insufficient to establish either that appellant sustained a change in the nature and extent of his injury-related condition or that he suddenly developed disability on June 13, 2001 due to back conditions which were subclinical since January 17, 2001, but which were caused by that incident. Therefore, Dr. Lee's report is insufficient to establish appellant's claimed recurrence of disability.

Appellant also submitted the October 29, 2001 report from Dr. DiSalvatore, his chiropractor,[8] who asserted that appellant was suffering from an L4-5 herniated nucleus pulposus with L4 root impingement, lumbar sprain/strain, lower extremity radiculitis, and a right lateral L4 subluxation and he opined that appellant was unable to work from June 13 to 28, 2001, due to the January 17, 2001 work injury. However, the January 17, 2001 work injury was only accepted for a right shoulder contusion and not for any back condition, as such back injury was not evident at that time, nor became symptomatic for months afterward. Dr. DiSalvatore's rationale that the mechanism of injury, *i.e.*, falling onto his buttocks and back on icy steps, was consistent with the diagnoses above, is not rationalized, nor is it consistent with the facts of the record, as the record supports that appellant fell on his back and right shoulder and arm, not on his buttocks.

The Board has held that medical conclusions unsupported by rationale are of diminished probative value[9] and that medical opinions based on an incomplete and inaccurate factual and medical history have little probative value.[10] In this case, Dr. DiSalvatore's report was

[7] *See William A. Couch*, 41 ECAB 548 (1990). Although, under *Couch*, the Office was required to also consider Dr. Lee's August 9, 2001 report for its August 14, 2001 decision, the Board finds that it was harmless error as that report was fully considered by the hearing representative.

[8] As the Office considered this report on its merits, the Board will briefly reiterate such analysis.

[9] *See Vicky L. Hannis*, 48 ECAB 538 (1997); *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[10] *See Joseph M. Popp*, 48 ECAB 624 (1997); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

unrationalized and was based on an incorrect factual and medical history, such that, from that aspect, it has greatly diminished probative value.

Further, Dr. DiSalvatore did not take x-rays contemporaneously with the January 17, 2001 incident, but waited until September 10, 2001 to obtain an MRI scan which demonstrated the herniated nucleus pulposus at L4-5 with L4 nerve root impingement and a right lateral L4 subluxation.[11]

The Board has explained that, when diagnostic testing is delayed, the uncertainty mounts regarding the cause of the diagnosed condition and a question arises as to whether that testing in fact documents the injury claimed by the employee.[12] As the MRI scan was not taken until eight months after the incident, its results cannot automatically be attributable to that event, due to the intervening time and circumstances. More importantly, however, the Board notes that Dr. DiSalvatore cannot be considered to be a physician under the Act pursuant to 5 U.S.C. § 8101(2) as a chiropractor is only considered a physician for purposes of the Act where he diagnoses a subluxation as demonstrated by x-ray to exist. The Board notes that there is no provision in the Act or the implementing regulations for acceptance of a chiropractor's report as probative medical evidence where a subluxation is diagnosed by an MRI scan.[13] As Dr. DiSalvatore based his diagnoses on an MRI scan without obtaining an x-ray, he cannot be considered to be a physician under the Act and his October 29, 2001 opinion cannot be considered probative medical evidence.

As appellant has not submitted rationalized medical evidence establishing a change in the nature and extent of his injury-related condition, right shoulder contusion or factual evidence supporting a change in the nature and extent of his limited-duty job requirements, he has failed to meet his burden of proof to establish his recurrence claim.

[11] The Board notes, however, that section 10.5(bb) of 20 C.F.R., the Act's implementing regulations, articulates the definition of subluxation as: "an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays."

[12] *See Thomas R. Horsfall*, 48 ECAB 180 (1996) (delayed chiropractic x-rays).

[13] *See Jay K. Tomokiyo*, 51 ECAB 361 (2000).

Accordingly the decisions of the Office of Workers' Compensation Programs dated August 14, 2001 and April 22, 2002 are hereby affirmed.

Dated, Washington, DC
December 4, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member