

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GENE B. KENNY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Memphis, TN

*Docket No. 02-1398; Submitted on the Record;
Issued January 3, 2003*

DECISION and ORDER

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

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

On August 15, 2001 appellant, then a 54-year-old physician's assistant, filed a claim alleging that on March 14, 2001 he fell after being struck by a patient's cane, causing pain to his back and right leg.

On October 5, 2001 the Office advised appellant regarding the type of medical and factual evidence required to support the claim.

In a report dated October 26, 2001, Dr. Roger Gordon Smith, appellant's attending physician and a Board-certified internist, stated that appellant "continues to experience the previously described symptoms with no improvement despite adjustment in current therapy. He is unable to work in severe pain and unable to work while taking Percoset due to marked somnolence."

In an October 30, 2001 report received by the Office on November 1, 2001 appellant authorized James O. Lockard as his attorney representative. He further noted a prior injury which required surgical intervention, and that he was on prescribed medications since that time, and that his condition had worsened over time noting increased radiculopathy into lower extremities. In a report dated October 31, 2001, appellant's counsel stated that appellant did not immediately report the March 14, 2001 incident to his supervisor because he "thought it was the old 1997 injury from the [employing establishment] giving him pain."

By decision dated November 13, 2001, the Office denied appellant's claim on the grounds that the evidence of file was insufficient to establish a relationship between the event and his medical condition.

In a report dated March 23, 2001, Dr. Smith related appellant's history of injury, stating that appellant was struck by a cane protruding out from a wheelchair as a patient wheeled by him, "which swept [appellant's] knee out from under him." Appellant twisted in an attempt to maintain his balance and "immediately noted the new onset of a radicular pain into the left hip which was sharp and burning in nature and increased with standing, sitting or bending." He also related that when appellant tried to maintain his balance "his right upper extremities swung around and he noticed a snap-like sound in the shoulder region. It subsequently became bruised." Upon examination, Dr. Smith noted diminished range of motion of the lumbar spine, extreme paraspinal muscle spasm and tenderness of the sacroiliac joint bilaterally which radiated into both hips and upper thighs. He diagnosed "exacerbation of low back pain secondary to violent twisting motion on March 14, 2001, with exacerbation of [appellant's] chronic back pain."

In a report dated April 4, 2001, Dr. Smith stated that appellant remained symptomatic.

In a report dated May 10, 2001, Dr. Smith stated that a magnetic resonance imaging (MRI) scan taken on April 24, 2001 revealed normal intensity of vertebral bodies, mild wedging at L4, bulging disc at L3-4, bilateral neural foraminal narrowing and a bulging disc at L4-5. He noted that appellant was post status L5-S1 laminectomy. Dr. Smith diagnosed appellant with degenerative disc disease and noted that his lumbar spine remained unchanged since May 2000.

In a report dated June 29, 2001, Dr. Smith stated that "For past week [appellant's] discomfort has been worse." He noted appellant's symptoms of sleeplessness, often awakening up to five times an evening due to pain. Upon examination, Dr. Smith noted thigh atrophy, back pain and noted that appellant's condition "has worsened by subjective pain and objective findings."

In a report dated August 20, 2001, Dr. Smith stated that appellant has degenerative disc disease with radiculopathy and progression of chronic pain syndrome. He noted that appellant was unable to perform his usual job and remains symptomatic with pain even in a light-duty status. Dr. Smith stated that "due to chronic pain and its effects on [appellant], I believe that he has become unemployable."

In a letter dated December 5, 2001, appellant advised the Office that he wished to have the November 13, 2001 decision reconsidered. He also elected an oral hearing based on the same November 13, 2001 decision.

On December 28, 2001 the Office notified appellant that it had his December 5, 2001 letter in which he asked for a reconsideration and an oral hearing. The Office advised appellant that he was entitled to either a reconsideration or a hearing, but not both. The Office then stated that it would take no further action on his claim until he advised it as to what avenue of appeal he chose.

By letter received on April 11, 2002, appellant requested an update on his request for reconsideration.

By decision dated April 23, 2002, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was "both repetitious and lacking any medical support."¹

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of 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.³ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

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.⁵ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused personal injury.⁶ The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence.⁷

In this case, the Office accepted that the March 14, 2001 incident occurred as alleged. Dr. Smith, appellant's treating physician, and a Board-certified internist, provided an accurate, detailed description of the March 14, 2001 incident in his March 23, 2001 report. He diagnosed "exacerbation of low back pain secondary to violent twisting motion on March 14, 2001, with exacerbation of [appellant's] chronic back pain." Dr. Smith also noted that appellant's MRI scan revealed a mild wedging at L4, bulging disc at L3-4, bilateral neural foraminal narrowing and a bulging disc at L4-5. He further noted in his June 29, 2001 report that appellant now had thigh atrophy, continued back pain and opined that appellant's condition "has worsened by subjective pain and objective findings." In his August 20, 2001 report, Dr. Smith noted that appellant could no longer work due to his degenerative disc disease with radiculopathy and progression of chronic pain syndrome.

¹ The Board notes that this case record contains evidence which was submitted subsequent to the Office's April 23, 2002 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; see 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 (1952).

² 5 U.S.C. §§ 8101-8193.

³ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ *Elaine Pendleton*, *supra* note 3.

⁶ *Id.*

⁷ See *Duane B. Harris*, 49 ECAB 170 (1997); *Earl David Seal*, 49 ECAB 152 (1997).

Thus, appellant's physician attributed appellant's exacerbation of chronic low back pain to the March 14, 2001 incident. He further noted additional findings based on an MRI scan, thigh atrophy and increased pain caused by the March 14, 2001 incident. Although the medical evidence is not sufficiently rationalized to meet appellant's burden of proof in establishing his claim, it constitutes probative, uncontroverted supporting evidence that is sufficient to require further development of the evidence. Therefore, the case must be remanded to the Office.⁸

Upon remand of the case, the Office shall refer appellant, the medical record and a statement of accepted facts including reference to appellant's prior injury, to an appropriate specialist or specialists, to obtain a rationalized medical opinion regarding whether the accepted March 14, 2001 incident caused or aggravated appellant's chronic low back pain, degenerative disc disease, wedging at L4, bulging disc at L3-4, bilateral neural foraminal narrowing or a bulging disc at L4-5. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

The April 23, 2002 and November 13, 2001 decisions are set aside and the case remanded to the Office of Workers' Compensation Programs for further development consistent with this decision.

Dated, Washington, DC
January 3, 2003

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ For example, the record does not contain a discussion of appellant's prior injury, alleged to have occurred in 1997 and the possible aggravation of that injury on March 14, 2001. Further, Dr. Smith notes objective findings as revealed by the MRI scan but does not relate those findings to either appellant's prior 1997 injury or the March 14, 2001 incident. Although he notes appellant's degenerative disc disease, he does not specifically state whether this condition was aggravated by the March 14, 2001 incident.