U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GAREY HARRISON and U.S. POSTAL SERVICE,
POST OFFICE, Baltimore, MD

Docket No. 03-128; Submitted on the Record;
Issued May 27, 2003

DECISION and ORDER

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

The issue is whether appellant established that he was totally disabled for work due to his accepted back condition for the periods January 21 through 29 and February 27 through March 9, 1998.

On December 6, 1997 appellant, then a 28-year-old group leader mailhandler, filed a notice of occupational disease and claim for compensation alleging that on November 23, 1997 he felt like he pulled a muscle in his back after lifting and unloading parcels at work. He alleged on his CA-2 form that he sustained an aggravation of a previous work-related lumbar subluxation.[1]

Medical records from Church Hospital indicated that appellant was seen in the emergency room on November 23, 1997. The physician's signature is illegible; however, the words "light duty and RTW [return to work] November 25, 1997" are noted.

In a treatment note and Form CA-17 duty status report dated November 26, 1997, Dr. Paul A. Gemma, a chiropractor, advised that appellant was under his care. He described appellant's back as having snapped and spasmed when he pulled all-purpose containers off an elevator on November 23, 1997. Dr. Gemma recommended that appellant refrain from all work and strenuous activity until November 26, 1997. He opined that appellant would be able to return to light duty with restrictions by December 3, 1997.

In a February 6, 1998 letter, the Office of Workers' Compensation Programs advised appellant of the factual and medical evidence required to establish his claim.

[1] The record indicates that appellant previously sustained a thoracic sprain in the performance of duty on May 13, 1997. He returned to full duty on July 8, 1997. On September 15, 1997 appellant was involved in a nonwork-related car accident and suffered neck and back injuries. He was off work through November 22, 1997. On the day of his first return to regular duty he contends that he reinjured his back.

Appellant next submitted a February 27, 1998 report from Dr. Gemma, wherein the physician related that appellant had been under his care since November 1997. He noted that on November 23, 1997 appellant experienced an injury resulting in back and neck pain from pulling and pushing equipment at work. Dr. Gemma diagnosed L4-5 joint dysfunction, lumbar strain and IVD without myelopathy. He opined that appellant's November 23, 1997 work injury was an exacerbation of an original injury sustained on May 13, 1997. Dr. Gemma indicated that appellant's "course of treatment included thoracic mobilization, manual traction and home cryotherapy for four weeks." He listed appellant's previous treatment dates as follows: November 26 and 28 and December 5, 9, 12, 19, 23 and 30, 1997, January 2, 6, 26 and February 20, 25 and 27, 1998. He further stated that appellant was to be seen on March 4, 7 and 11, 1998.

The record reflects that Dr. Gemma referred appellant to Dr. Constantine A. Misoul, a Board-certified orthopedic surgeon, for a consultation regarding his back condition. Dr. Misoul discussed both of appellant's work-related back injuries in May and November 1997. Physical findings were noted with no sign of radiculopathy. Musculoligamentous injury to the low back was listed under "Impression." He stated that appellant was being discharged back to the care of Dr. Gemma and recommended that he work on a program of flexibility and strengthening exercises.

In a March 13, 1998 statement, Dr. Steven F. Manekin, a family practitioner, noted that appellant was in his office on that date and would be off work until March 16, 1998.

In a report dated March 19, 1998, Dr. Manekin related that appellant was working and felt a pop in his back. He noted that appellant had been under the care of Dr. Gemma and recorded physical findings. Dr. Manekin diagnosed cervical strain, right thoracic rostral mid-caudal strain with no evidence of nerve root involvement. He stated that appellant was to return to Dr. Gemma for intensive chiropractic care.

In various duty status reports dated December 5, 22 and 29, 1997, February 6 and March 9 and 31, 1998, Dr. Gemma maintained appellant's capacity to work under identified work restrictions.

In a decision dated May 1, 1998, the Office denied appellant's claim for compensation on the grounds that the evidence was insufficient to establish fact of injury. The Office specifically noted that the reports from Dr. Gemma, appellant's chiropractor were insufficient to establish that he sustained a work-related back injury on November 23, 1997 since he was not considered to be a "physician" within the meaning of the Federal Employees' Compensation Act.

On May 15, 1998 appellant requested a review of the written record.

In a July 1, 1998 report, Dr. Misoul, a Board-certified orthopedic surgeon, noted that he saw appellant at Dr. Gemma's request for consultation regarding his ongoing back problems. Dr. Misoul diagnosed a lumbar strain and recommended that appellant undergo an exercise program.

Appellant next submitted a July 10, 1998 report from Dr. Gemma, stating that appellant experienced a back injury consisting of L4-5 disc dysfunction, lumbar strain and sprain and IVD

without myelopathy directly related to his work on May 13 and November 23, 1997. Dr. Gemma described the nature of appellant's chiropractic treatment.

In a September 23, 1998 report, Dr. William C. Sanchez, a family practitioner and Board-certified pediatrician, related that appellant was first seen in his office on May 13, 1997 informing the physician "of an injury involving subluxation of the thoracic spine that occurred while loading mail at his job." He stated that after a course of chiropractic treatment appellant's condition resolved by July 2, 1998. Dr. Sanchez noted that appellant had also been involved in a car accident on September 15, 1997 and a second work injury on November 23, 1997, which Dr. Gemma had informed appellant was an aggravation of the original work injury. Dr. Sanchez did not offer an opinion regarding causation of appellant's back condition on or after November 23, 1997.

In a decision dated January 8, 1999, an Office hearing representative affirmed the Office's May 1, 1998 decision. The Office hearing representative, however, noted that there was no rationalized medical evidence of record, from which to conclude that appellant's back condition was causally related to work factors.

Appellant subsequently filed an appeal with the Board. In a decision dated August 21, 2001, the Board vacated the Office's January 8, 1999 decision and remanded the claim for further medical development. The Board directed the Office to ascertain whether or not appellant was seeking compensation for a traumatic injury on November 23, 1997 or an occupational disease claim. The Board's decision dated August 21, 2000 is incorporated herein.[2]

On remand the Office accepted that appellant sustained a traumatic injury in the form of a lumbar sprain/strain on November 23, 1997. Appellant was advised by letter dated March 15, 2001, that he was entitled to receive wage-loss compensation from November 23 through December 3, 1997, the date he returned to work under medical restrictions. The Office, however, refused to reimburse appellant's medical expenses incurred from Dr. Gemma based on his status as a chiropractor. The Office noted that, since appellant had not received treatment for subluxation of the spine, Dr. Gemma's medical services were not reimbursable as he was not a physician under the Act.

On September 12, 2001 appellant filed a CA-7 form claiming compensation for wage loss for the periods January 21 to 29 and February 27 through March 9, 1998 when he allegedly received chiropractic care from Dr. Gemma.

In support of his claim for wage loss, appellant submitted an October 3, 2001 report signed by Dr. Gary A. Desimone, a Board-certified internist and Robert Dodge, an adult nurse practitioner. Dr. Desimone reported appellant's history of pushing and pulling equipment on November 23, 1997, which resulted in L4-5 joint dysfunction and a lumbar sprain/strain. Dr. Desimone indicated that appellant had returned to work on December 3, 1997 with a 20-pound lifting restriction and no pushing, pulling or reaching above the shoulder. On physical examination, the physician noted that appellant had decreased lumbar range of motion with pain, moderate bilateral lumbosacral hyper tonicity/trigger points, joint dysfunction at L4-5 and

[2] *Garey Harrison*, Docket No. 99-1721 (August 21, 1990).

positive straight leg raise bilaterally. Dr. Desimone indicated that, when appellant returned to work on December 3, 1997 "with noticeable restrictions," he was to follow-up with chiropractic care with Dr. Gemma on a routine and frequent basis to maintain his range of motion and muscle strength. He specifically stated as follows: "Presently, [appellant] has residual impairment of [the] November 23, 1997 injury of the L4-5 joint dysfunction, lumbar sprain/strain, IVD without myelopathy. He has not returned to his prelevel of functionality as of November 23, 1997 due to lack of necessary treatment."[3]

In a December 3, 2001 letter, Dr. Gemma wrote the Office seeking payment for chiropractic services rendered beginning October 13, 1997 and ending March 11, 1998. It was noted that the treatment was for appellant's "work-related injuries."

In a February 7, 2002 letter, the Office advised appellant of the factual and medical evidence required to establish his claim for compensation for wage loss causally related to the accepted work injury.

In a decision dated March 8, 2002, the Office denied appellant's claim for compensation for wage loss on the grounds that the medical evidence failed to establish that appellant was disabled for work as a result of the accepted work injury for the periods claimed on his CA-7 form. The Office stated that the October 3, 2001 report, was insufficient to support the claim for the periods alleged, citing the definition of "physician" under the Act.

In an April 9, 2002 letter, appellant by counsel argued that the Office's March 8, 2002 decision was in error as the October 3, 2001 report from Dr. Desimone was from a qualified physician and not a chiropractor. Appellant also requested a review of the written record.

In a decision dated September 20, 2002, an Office hearing representative affirmed the Office's March 28, 2002 decision. The Office hearing representative noted that, while Dr. Desimone was a qualified physician, he appeared to have merely copied the treatment dates listed in Dr. Gemma's reports as dates when appellant was seen. Similarly, the Office hearing representative found that Dr. Manekin failed to address whether appellant required chiropractic care on the dates alleged.

The Board finds that appellant has failed to establish that he is entitled to total disability wage loss due to his accepted back condition for the periods January 21 through 29 and February 27 through March 9, 1998.

Under the Act, the term "disability" means incapacity, because of employment injury to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages she was receiving at the time of injury, has no disability as that term is used in the Act.[4]

[3] Dr. Desimone noted the same dates of chiropractic treatment as reported by Dr. Gemma.

[4] *Maxine J. Sanders*, 46 ECAB 835 (1995).

The Board initially notes that appellant has not carried his burden of proof to establish his total disability for work for the periods claimed on his CA-7 claim form. There is no physician of record who has opined that appellant was totally disabled for work on or after December 3, 1997, when appellant was approved for regular duty with restrictions. The issue remains, however, whether appellant is entitled to compensation for wage loss incurred as a result of obtaining medical treatment for his work injury during any of the periods identified by appellant on his CA-7 claim forms.

Section 8103 of the Act[5] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree of the periods of any disability or aid in lessening the amount of any monthly compensation.[6] These services, appliances and supplies shall be furnished by or on the order of the United States medical officers and hospital or at the employee's option by or on the order of physicians and hospitals designated or approved by the Secretary.[7] The employee may be furnished necessary and reasonable transportation and expenses incidental to the securing of such services, appliances and supplies.[8] The Board has previously interpreted this provision of the Act, which requires payment of expenses incidental to the securing of medical services, as authorizing payment for loss of wages incurred while obtaining medical services. Case law makes clear that an employee is entitled to disability compensation for any loss of wages incurred during the time he or she receives authorized treatment and for loss of wages for time spent incidental to such treatment.[9] The rationale for this entitlement is that, during such required examinations and treatment and during the time incidental to undergoing such treatment, an employee did not receive his or her regular pay.[10]

Services rendered by chiropractors are generally not payable by the Office except "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…."[11] In the present case, there is no evidence that appellant's chiropractor, Dr. Gemma treated appellant for a subluxation of the spine as demonstrated by x-ray to exist. Dr. Gemma, therefore, cannot be considered a "physician" within the meaning of the Act.

[5] 5 U.S.C. § 8103.

[6] *Id.*

[7] *Daniel J. Perea*, 42 ECAB 214 (1990).

[8] *See Debra S. King*, 44 ECAB 203 (1992); *Bertha L. Arnold*, 38 ECAB 282 (1986).

[9] 5 U.S.C. § 8123; *see Shirley L. Steib*, 46 ECAB 309 (1994).

[10] *Beverly A. Scott*, 37 ECAB 838 (1986).

[11] Section 8101(2) of the Act provides that chiropractors are considered physicians "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 and subject to regulation by the Secretary." *See* 5 U.S.C. § 8101(2).

There are exceptions to the general rule that services rendered by a chiropractor are not payable when they do not consist of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. These exceptions are for physical therapy rendered by a chiropractor under the direction of an authorized physician and for chiropractic treatment authorized without limitations by the Office or the employing establishment.

In the instant case, appellant immediately sought treatment with Dr. Gemma following his work injury of November 27, 1997. In a February 27, 1998 report, Dr. Gemma outlined that appellant received chiropractic care on the following dates: November 26 and 28, December 5, 9, 12, 19, 23 and 30, 1997, January 2, 6 and 26, February 20, 25 and 27, 1998. There are only four dates that correspond with appellant's CA-7 claim form and the physician's report, which are January 26 and February 20, 25 and 27, 1998. Thus, the issue is whether appellant is entitled to compensation for chiropractic treatment he received on the four days identified.

The Board finds that the evidence in this case fails to establish that the treatment provided by Dr. Gemma was under the direction of an authorized physician as contemplated by section 8101(2) of the Act. While a referral by an authorized physician is sufficient to obligate the Office to pay for reasonable and necessary treatment for an employment-related condition by another physician,[12] the Board has recognized that where a physician refers a claimant to a nonphysician for treatment, some degree of control and direction by the referring physician must be shown.[13] There is clearly no physician of record who directed appellant to Dr. Gemma for treatment or otherwise oversaw Dr. Gemma's treatment of appellant. Appellant sought Dr. Gemma for his initial treatment so there was never any type of technical referral for chiropractic care. Although Dr. Desimone generally approved, some three years after the fact, the general chiropractic treatment received by appellant with respect to his work injury, he did not specifically approve or discuss the nature of appellant's chiropractic treatment on the specific dates in question. Because Dr. Desimone did not approve, monitor or even discuss the propriety of the chiropractic care received by appellant on the specific dates outlined in the CA-7 form, the Board finds that the evidence of record fails to establish that a qualified physician prescribed, recommended or directed chiropractic services by Dr. Gemma as required under section 8101(2) of the Act.

[12] *David L. Sala*, 38 ECAB 419 (1987).

[13] *See Rebecca Ortiz*, 42 ECAB 134, 138 (1990); *David Deloatch*, 41 ECAB 212, 215 (1989) (Reimbursement denied on the basis that was "not rendered upon the direction of any authorized physician)."

The September 20 and March 8, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
May 27, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member