United States Department of Labor
Employees' Compensation Appeals Board

THOMAS F. LADRIGUE, Appellant	)	
and	)	**Docket No. 04-204**
	)	**Issued: April 13, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Saginaw, MI, Employer	)	

Appearances:
Thomas F. Ladrigue, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 27, 2003 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs, dated August 6, 2003, which denied his request for reconsideration. The Office also issued a merit decision dated October 28, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on April 13, 2001; and (2) whether the Office properly refused to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 17, 2001 appellant, then a 51-year-old modified clerk, filed a notice of traumatic injury (Form CA-1), alleging that on April 13, 2001 he injured his hip when he sat in a chair on rollers, which he claimed was unstable. Appellant stated that, when he sat down, the seat of the chair collapsed which caused the chair to roll away and his hip to twist. He stopped

work the same day and sought medical attention on April 16, 2001. Appellant has not returned to work. Accompanying his claim was a copy of the April 13, 2001 accident report with pictures of a chair on wheels, notes from the employing establishment concerning the incident and medical reports dated June 27, 2000 and March 6, 2001 from Dr. James R. Weir, a Board-certified orthopedic surgeon and appellant's treating physician, concerning his restrictions.

By letter dated April 27, 2001, the Office advised appellant that no medical evidence in support of his current claim had been received. He was requested to arrange for the submission of the medical records for any medical treatment he received for this injury, including a physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated the claimed injury. The Office advised that a physician's opinion was necessary and crucial to his claim. The Office allotted appellant 30 days within which to submit the requested information.

Appellant submitted an April 19, 2001 report by Dr. Dale A. Flora, a chiropractor, which stated that he was seen for a reexacerbation of his hip condition. He was noted to be in a different job and had gone to sit on a chair when he felt the chair give way when he sat down. Examination findings revealed muscle splinting on the right quadriceps femoris, tensor fascia lata, gluteals, hamstrings, sacrospinalis and quadratus lumborum muscles. The chiropractor noted that appellant was seen two weeks earlier without any of those injuries. An x-ray analysis revealed spinal scoliosis of the lumbar spine with convexity to the left; rotatory misalignments of the lumbar vertebrae to the right; retrolithesis of the 5th lumbar vertebra; posterior ilium misalignment of the right ilium; and anterior rotation of the left sacrum. A hip prosthesis was seen at the right hip. Trigger point therapy of the above muscles were provided and appellant was given a release from work until he could be evaluated by Dr. Weir.

In an April 23, 2001 report, Dr. Weir noted that appellant was placed in a different job with a chair which went out from under him as he went to sit down and he developed muscle instability to his right hip and his lower back, which he saw Dr. Flora about. Dr. Weir advised that appellant should be kept off work and attend physical therapy three times a week for two months to regain his stability. The physician agreed with appellant that he be evaluated at the Rehabilitation Institute in Chicago and that any future job changes should be discussed with both appellant and himself prior to implementation.

In May 3 and 7, 2001 reports, Dr. Weir advised that appellant's attempt to sit in a chair, which he deemed unstable, has led to the instability to his hip. He advised that the diagnosis was muscle injury to the hip due to a fall from a chair that was, in appellant's eyes, unstable. Dr. Weir stated that appellant had undergone a total hip arthroplasty and his hip, on x-ray, always looked solid. He noted that appellant is very sensitive to balances within his muscles and complains of discomfort and a feeling of imbalance to his muscles. Dr. Weir stated that this occurred every so often and had never been demonstrated with objective findings, but recommend physical therapy as appellant generally benefits from it. Appellant started physical therapy on April 27, 2001.

By decision dated June 7, 2001, the Office denied appellant's claim, finding that the evidence did not establish that a condition had been diagnosed in connection with the claimed accident.

In an undated letter, which the Office received on October 22, 2001, appellant requested reconsideration and mentioned grievances against his manager for unsafe working conditions, physical threats and management conflicts. Information unrelated to appellant's current claim was submitted along with previously submitted treatment notes from Dr. Weir, an August 27, 2001 letter from CUNA Mutual, and a duplicate copy of April 27, 2001 physical therapy notes.

In a July 10, 2001 report, Dr. Martin M. Shinedling, a psychologist, advised that appellant had reactive depression brought about by chronic pain and post-traumatic stress disorder brought about by conflict in his place of employment. He noted that appellant believed being assigned to sit in a defective chair brought on his last injury and noted that his subsequent fall from the chair created an injury from which he has not fully recovered. Dr. Shinedling noted that appellant also believed that management may have assigned him a defective chair because of their anger at his continued attempts to improve the working environment. He advised that appellant was encouraged to retrain into a less physically demanding and stressful environment.[1]

In a July 18, 2001 medical report, Dr. Weir advised that appellant should be off work for another 3 months as he was not yet 100 percent in terms of getting his strength and flexibility back with the physical therapy. Dr. Weir noted that appellant was evaluated by the psychologist and that he agreed a job change would be helpful to appellant as he thought the stress involved with the employing establishment was too much for appellant.

By decision dated January 4, 2002, the Office denied modification of its prior decision.

In an undated letter, which the Office received on May 28, 2002, appellant again requested reconsideration. Appellant submitted information relating to another case, case number A-9365466, a copy of his September 3, 1999 right total hip arthroplasty, a medical report from Dr. Flora dated October 20, 1999, an article on conditions of coverage from a postal magazine and a June 27, 2000 report from Dr. Weir with a notation that "these are the restrictions I was under by my doctor up till the fall from the chair." A physical therapy note dated May 28, 2001 noted that appellant would be discharged on June 27, 2001.

In a February 19, 2002 report, Dr. Weir noted that appellant had to have his hip replaced and revised and that his x-rays were solid, showing no signs of wear and tear. He also noted that Dr. Flora and appellant's physical therapist have demonstrated muscle instability to his hip with certain activities and he would defer to them for their expertise in demonstrating appellant's muscular instability. Dr. Weir noted that if appellant saw a physiatrist for specific muscle stability testing it might document a diagnosis for his condition.

In a March 25, 2002 report, Dr. Kevin F. Brown, a Board-certified physiatrist, noted that appellant had undergone a hip replacement in 1991 or 1992, with revision surgery in 1999. He also noted that appellant returned to work as a letter carrier and had an injury with a stool when he fell on April 13, 2001. Dr. Brown reviewed appellant's medical records, noted his

[1] The record does not contain Dr. Shinedling's credentials; however, a search of the physician's credentials reveals that he is licensed or certified as a psychologist in Michigan, the state in which he practices, but there is no evidence that he is a clinical psychologist. *See Jacqueline E. Brown*, 54 ECAB ___ (Docket No. 02-284, issued May 16, 2003).

examination findings and provided an impression of possible muscular instability of the right hip following previous hip revision therapy. He advised that appellant has had appropriate treatment in terms of physical therapy. Dr. Brown further noted that Dr. Flora had diagnosed some abnormalities which included problems requiring adjustment of the ilium sacrum and fifth lumbar vertebra. He opined that with appellant's shortening of the left lower extremity and the curvature in his spine, he might have abnormal mechanical stress on the spine and that he might benefit from chiropractic treatment. Dr. Brown further noted that the problem may also be addressed with a leg length correction. He stated that he had no further recommendations with regard to appellant's right hip, providing all therapy had been done to strengthen his right hip muscles. On the basis that appellant had two hip surgeries, Dr. Brown advised that there was potential for long-term compromise and opined that it might not be possible to get him to the point of strength he was prior to the hip surgeries. The physician further opined that appellant would not be able to perform work as a walking mail carrier and needed to be limited to mostly sitting activities with occasional walking and standing.

By decision dated October 28, 2002, the Office found that the additional evidence was insufficient to warrant modification of the June 7, 2001 decision.

In an undated letter, which the Office received on June 2, 2003, appellant requested reconsideration and argued that the fall from the chair was not a new injury, but resulted from the instability from his right hip, which he had undergone surgery from which he had not fully recovered. He argued that the attachment he provided on recurrence of disability from the postal magazine applied to his situation. Appellant further stated that he was certified in corrective exercises and quoted a definition of instability from a textbook. He submitted nine pages from a textbook on exercise physiology, previously submitted medical reports from Dr. Weir and a December 17, 2002 report from Dr. Brown, which advised that appellant had objective findings of decreased strength in the hip abductors and decreased muscle bulk at the right hip area which supported his impression that appellant has muscular instability of the right hip following his recent hip surgery.

By decision dated August 6, 2003, the Office denied appellant's reconsideration request, finding that there was no new argument or evidence offered upon which to predicate a merit review of the prior denials.

LEGAL PRECEDENT -- ISSUE 1

To determine whether an employee has sustained a traumatic injury in the performance of duty, "fact of injury" must first be established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[2] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and employment, the employee must submit rationalized medical opinion evidence, based on a complete factual

[2] *Gloria J. McPherson*, 51 ECAB 441 (2000); *Elaine Pendleton,* 40 ECAB 1143 (1989).

and medical background, supporting such a causal relationship.[3] An employee may establish that an injury occurred in the performance of duty, but fail to establish that his or her disability or resulting condition was causally related to the injury.[4]

ANALYSIS -- ISSUE 1

The Office accepted that the April 13, 2001 incident occurred as alleged. The Office, however, found the medical evidence of record insufficient to establish a causal relationship between appellant's hip, lower back and leg conditions and the employment incident. In his reports, Dr. Weir diagnosed muscle instability and concluded that appellant suffered a "muscle injury" to the hip due to a fall from a chair which was, in his eyes, unstable. Dr. Weir's reports, however, are incomplete as he fails to support his conclusion with any objective evidence, medical rationale or explain the mechanism of how appellant's falling from a chair would have affected the muscle stability in his hip, which had been totally replaced and through a hip revision surgery. In his May 7, 2001 report, Dr. Weir stated that the muscle imbalance had never been demonstrated by objective findings and noted that appellant suffered from such imbalances to his muscles every so often.

Although, in his April 19, 2001 report, Dr. Flora advised that appellant had a reexasperation of his hip condition, noted objective findings of muscle splinting which were not present two weeks earlier and diagnosed spinal and hip conditions on x-ray, as a chiropractor, Dr. Flora is not considered a "physician" under the Federal Employees' Compensation Act and, therefore, his opinion lacks probative value.[5]

In his March 25, 2002 report, Dr. Brown provided an impression of possible muscular instability of the right hip. This report is insufficient to establish appellant's claim as there is no discussion as to whether the employment incident of April 13, 2001 either caused or contributed to appellant's right hip condition. Dr. Brown noted the April 13, 2001 incident when noting appellant's history but he offered no specific opinion regarding how that incident may have caused or aggravated a hip condition.[6]

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[3] *See* 20 C.F.R. § 10.115(e); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Gary Fowler*, 45 ECAB 365 (1994).

[4] *Earl David Seal*, 49 ECAB 152 (1997).

[5] In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under the Act. 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…." 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986). Therefore, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence. *Kathryn Haggerty*, 45 ECAB 383 (1994). Dr. Flora's April 19, 2001 report did not include a diagnosis of subluxation. Accordingly, Dr. Flora's opinion is of no probative value as he is not considered a physician under the Act.

[6] *See Conard Hightower*, 54 ECAB __ (Docket No. 02-1568, issued September 9, 2003) (medical evidence that does not offer an opinion on the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

Although Dr. Shinedling, appellant's psychologist, noted that appellant has reactive depression brought about by chronic pain and a post-traumatic stress disorder brought about by conflict at his place of employment, he is not considered a physician as defined under the Act.[7] The Act does not include psychologists as physicians unless they are clinical psychologists.[8] Thus, his opinion is of no probative medical value.

As appellant has not provided rationalized medical evidence identifying the specific factor of employment implicated in causing his hip, lower back and leg conditions, he has not established that he sustained an injury in the performance of duty.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulation provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[9] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[10] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[11]

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration, which the Office received on June 2, 2003, failed to demonstrate that the Office erroneously applied or interpreted a specific point of law. Although appellant argued that the incident with the chair on April 13, 2001 was not a new injury, this argument is contrary to the original allegations set forth on the Form CA-1 filed April 17, 2001, the accident report of April 13, 2001 and appellant's history of the injury to his physicians. Appellant further argued that he had not recovered from his previous disability and, thus, he sustained a recurrence on April 13, 2001 or a consequential injury. This is not a relevant argument as appellant clearly identified a causative incident to which he attributed his current disability and the medical evidence of record does not support that such incident caused or contributed to appellant's weakened hip condition. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

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[7] 5 U.S.C. § 8101(2).

[8] *Id.*

[9] 20 C.F.R. § 10.606(b)(2) (1999).

[10] 20 C.F.R. § 10.608(b) (1999).

[11] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the additional evidence appellant submitted, although new, is neither relevant nor pertinent to the issue in this case. In his December 17, 2002 report, Dr. Brown noted his objective findings which support his impression of muscular instability of appellant's right hip. Dr. Brown, however, does not address the employment incident of April 13, 2001 nor provide any discussion linking the employment incident of April 13, 2001 to the muscular instability of the right hip. Thus, his report is irrelevant to the issue at hand.

Appellant also submitted copies of publications with his request for reconsideration. The Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and a claimant's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to particular employment factors or incidents.[12]

As appellant is not entitled to a review of the merits pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant has not established that his hip, lower back and leg condition are causally related to his federal employment. The Board further finds that the Office properly denied merit review of his claim on August 6, 2003.

[12] *Dominic E. Coppo*, 44 ECAB 484 (1993).

ORDER

IT IS HEREBY ORDERED THAT the August 6, 2003 and October 28, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 13, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member