United States Department of Labor
Employees' Compensation Appeals Board

RICKEY MADDEN, Appellant	)	
and	)	**Docket No. 04-1801**
	)	**Issued: December 10, 2004**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Oakland, CA, Employer	)	

Appearances:
Rickey Madden, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 12, 2003 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated June 3, 2004, which denied appellant's claim for wage-loss compensation due to his accepted lumbar strain for the period July 28, 2002 through January 12, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this claim.

ISSUE

The issue is whether appellant has established that he was totally disabled during the period July 28, 2002 through January 12, 2003, as a result of his July 18, 2002 employment-related lumbar strain.

FACTUAL HISTORY

On August 7, 2002 appellant, a 45-year-old senior tax specialist, filed a traumatic injury claim alleging that he injured his lower back and neck on July 18, 2002 when he tripped and

almost fell. Appellant stopped work on July 29, 2002 and returned to work on August 5, 2002. On August 12, 2002 appellant stopped work and has not returned to work. The Office accepted the claim for a lumbar strain and authorized physical therapy for the period November 6 through December 31, 2002.[1]

In reports dated August 23 and September 26, 2002, Dr. Small diagnosed lumbar degenerative disc disease, radiculopathy, herniated lumbar disc and spinal stenosis new injury. Dr. Small noted July 18, 2002 as the date of injury and indicated that appellant was to continue treatment and remain off work. On the second page of the August 23, 2002 report, Dr. Small noted that appellant was receiving chiropractic treatment twice a week for a four-week period.

On December 24, 2002 the Office received a December 2, 2002 prescription for chiropractic treatment by Dr. Small and a report dated December 4, 2002 from Dr. Delene Bivolcic, a chiropractor. Dr. Small diagnosed cervical and lumbar degenerative disc disease and prescribed chiropractic treatment twice a week for four weeks on December 2, 2002. Dr. Bivolcic diagnosed lumbar IVD, left leg sciatica and L5-S1 disc protrusion. He noted the history of appellant's employment injury on July 18, 2002 and a prior injury on September 13, 2001 when appellant sustained a disc injury due to tripping when he got out of an elevator. Under treatment plan, Dr. Bivolcic noted that Dr. Small prescribed treatment twice a week for a four-week period and that the treatment consisted of spinal manipulation, neuromuscular re-education, electromuscular stimulation and therapeutic exercise.

On January 13, 2003 the Office received a December 2, 2002 report by Dr. Small which diagnosed lumbar degenerative disc disease, radiculopathy, herniated lumbar disc and spinal stenosis new injury. Dr. Small noted July 18, 2002 as the date of injury and concluded that appellant was totally disabled. On the second page of the report, Dr. Small noted a new lumbar magnetic resonance imaging (MRI) scan was needed and noted "new injury."

On January 13, 2003 the Office received appellant's claims for wage-loss compensation (Form CA-7) for the periods July 28 to August 2, September 22 to October 5, October 6 to 19, October 20 to November 2 and November 3 to 16, 2002.

On January 24, 2003 the Office received appellant's claim for wage-loss compensation (Form CA-7) for the period July 28, 2002 to January 12, 2003.

On January 29, 2003 the Office received a November 16, 2002 disability slip from Dr. Small which noted that appellant was totally disabled until February 27, 2002.

On February 7, 2003 the Office received a January 28, 2003 report by Dr. Bivolcic. In this report the chiropractor diagnosed lumbar IVD, L5-S1 disc protrusion and left leg sciatica. Dr. Bivolcic reported decreased lumbar range of motion, pain in the lower back from straight leg raising at 45 degrees, lumbar spine pain while standing during Kemps test and left leg pain at 70 degrees during Lasagues test.

[1] The record contains evidence that Dr. Tolbert J. Small, an attending Board-certified internist, prescribed physical therapy twice a week for a four-week period on August 29, 2002.

In a report dated February 26, 2003, Dr. Jerrold M. Sherman, a second opinion Board-certified orthopedic surgeon, reported a normal spinal contour with no muscle spasm, forward flexion of 60 degrees, extension of 10 degrees and right and left bending of 20 degrees. Dr. Sherman diagnosed low back pain without mechanical or neurologic deficit. With regards to appellant's employment injury, the physician concluded that appellant had no back condition attributable to the employment injury. He noted appellant's "subjective complaints are not consistent with his normal examination." Regarding any period of disability, Dr. Sherman opined that appellant "had no period of total disability as the result of the July 2002" employment injury and he was capable of working with no restrictions. In concluding, the physician opined that appellant had no residuals due to his employment injury.

In a decision dated September 5, 2003, the Office denied appellant's claim for wage-loss compensation for the period July 28, 2002 through January 12, 2003 due to his accepted July 18, 2002 employment injury. In reaching this determination, the Office found the weight of the medical opinion evidence rested with Dr. Sherman, who concluded that appellant had no period of disability due to his July 18, 2002 employment injury.

Subsequent to the September 5, 2003 decision, the Office received a January 24, 2004 MRI scan by Dr. Stuart Mansfield, an April 3, 2003 letter from the Office regarding appellant's request for another medical examination, a May 22, 2003 letter from the Office informing appellant as to when chiropractors are considered physicians under the Federal Employees' Compensation Act, a March 17, 1998 MRI scan by Dr. Richard S. Breiman, a Board-certified diagnostic radiologist, an April 28, 2003 form report by Dr. Small and a November 13, 2002 MRI by Dr. Philip J. Rich, a Board-certified diagnostic radiologist.

On October 31, 2003 the Office received an October 8, 2003 report from Dr. Small, who noted July 18, 2002 as the date of injury and diagnosed lumbar degenerative disc disease, radiculopathy, herniated lumbar disc and spinal stenosis. Physical findings included bending of 30 degrees, straight leg raising of 45 degrees for the right leg and 30 degrees for the left leg. He indicated that appellant could continue working four hours per day with restrictions including no driving, no bending and no lifting more than 10 pounds.

In an October 29, 2003 report, which the Office received on December 12, 2003, Dr. Small reiterated findings from his October 8, 2003 report.

In a January 21, 2004 report, Dr. Small diagnosed lumbar degenerative disc disease, radiculopathy, herniated lumbar disc and spinal stenosis. Physical findings included lateral bending of 30 degrees, right and left rotation of 45 degrees and flexion of 45 degrees. He increased appellant's work hours to six hours per day with restrictions on bending, lifting and no driving.

Appellant requested reconsideration on February 25, 2004 and submitted a report by Dr. Delmar C. Sanders. In a report dated January 28, 2004, Dr. Sanders diagnosed cervical stenosis and recommended that appellant avoid neck stress and requested a cervical MRI scan.

In a progress report dated February 23, 2004, Dr. Small diagnosed lumbar degenerative disc disease, lumbar herniated disc and spinal stenosis. He indicated that appellant was capable of working six hours per day with restrictions on bending, lifting and no driving.

On April 9, 2004 the Office received an August 31, 1998 report by Dr. Aubrey A. Swartz.

In a progress report dated April 5, 2004, which was received by the Office on April 21, 2004, Dr. Small diagnosed lumbar degenerative disc disease, lumbar herniated disc and spinal stenosis. He indicated that appellant was capable of working six hours per day with restrictions on bending, lifting and no driving.

By decision dated June 3, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence failed to establish any disability for the period July 28, 2002 to January 12, 2003 due to the July 18, 2002 employment injury.

LEGAL PRECEDENT

As used in the Act,[2] the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[3] Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[4] An employee who has a physical impairment causally related to her federal employment, but who nonetheless has the capacity to earn the wages she was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.[5] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wages.

ANALYSIS

The Office accepted that appellant sustained a lumbar strain on July 18, 2002. The Board finds that appellant has not established that he is entitled to wage-loss compensation for the period July 28, 2002 through January 12, 2003. The Office denied appellant's claim for wage-loss compensation because the evidence submitted did not specifically attribute his disability to his July 18, 2002 accepted injury. Moreover, the Office found the weight of the medical evidence rested with the opinion of Dr. Sherman, a second opinion Board-certified orthopedic surgeon, who concluded that appellant had no period of disability due to his employment injury.

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.5(f).

[4] *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

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

Initially, the Board notes that appellant returned to work on August 5, 2002 and stopped work on August 12, 2002. As appellant worked these days, he is not entitled to wage-loss compensation for this period.

With respect to appellant's claimed disability for the period July 28 to August 4, 2002 and August 13, 2002 to January 12, 2003, the Office denied wage-loss compensation because the evidence did not establish that his disability was due to his July 18, 2002 employment injury. The evidence relevant to appellant's disability for this period includes reports dated December 4, 2002 and January 28, 2003 by Dr. Bivolcic, a chiropractor, a November 26, 2002 disability slip and reports dated December 2, 2002, April 28 and October 29, 2003, January 21, February 23 and April 5, 2004 by Dr. Small, a February 26, 2003 report by Dr. Sherman, and a January 28, 2004 report by Dr. Sanders. None of the medical reports submitted specifically relate appellant's disability for the period in question to his July 18, 2002 employment injury.

In his December 4, 2002 and January 28, 2003 reports, Dr. Bivolcic diagnosed lumbar IVD, left leg sciatica and L5-S1. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician as defined under section 8101(2) of the Act.[6] A chiropractor cannot be considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.[7] A chiropractor's report is considered medical evidence only to the extent that spinal subluxations as demonstrated by x-rays to exist are treated.[8] In the instant case, as Dr. Bivolcic was not treating a spinal subluxation as diagnosed by x-ray, he is not considered a physician and his report is of no probative value. In addition, his reports do not address whether appellant was totally disabled for the period July 28, 2002 through January 12, 2003, which further diminishes the probative value of his opinion.

Dr. Small, in his November 26, 2002 disability slip and reports dated December 2, 2002, April 28 and October 29, 2003, January 21, February 23 and April 5, 2004, indicated that appellant was totally disabled. While Dr. Small opined that appellant was totally disabled from performing his work, the physician did not provide any rationale explaining how this disability was causally related to his July 18, 2002 employment injury. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[9] Thus, Dr. Small's opinion on whether appellant's disability was related to his July 28, 2002 employment injury is insufficient to meet appellant's burden of proof.

In his January 28, 2004 report, Dr. Sanders diagnosed cervical stenosis. However, the Office never accepted that appellant sustained cervical stenosis as a result of his July 18, 2002

[6] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8101(2).

[7] *See Carmen Gould*, 50 ECAB 504 (1999).

[8] *Phyllis F. Cundiff*, *supra* note 4.

[9] *See Michael E. Smith*, 50 ECAB 313 (1999).

work injury and there is no medical rationalized evidence to support such a conclusion.[10] Furthermore, Dr. Sanders makes no mention of appellant's July 18, 2002 employment injury or offers any opinion as to whether appellant was totally disabled for the period July 28, 2002 to January 12, 2003 due to this injury. As noted previously, the Board has held that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[11] For these reasons, the opinion of Dr. Sanders is insufficient to meet appellant's burden to establish his entitlement to wage-loss compensation for the period July 28, 2002 to January 12, 2003.

The Board finds that the weight of the medical evidence is represented by the second opinion physician, Dr. Sherman, who provided a complete comprehensive report based on a review of the medical records, a statement of accepted facts and a complete examination. Appellant did not submit any reports from his treating physician containing any rationale that would establish a causal relationship between his accepted July 18, 2002 employment-related lumbar strain and disability for the period July 28, 2002 through January 12, 2003. Since no rationale was provided describing or explaining a causal relationship between his accepted lumbar strain and disability for the period July 28, 2002 through January 12, 2003, appellant has not met his burden to overcome the weight of Dr. Sherman's report. Thus, Dr. Sherman's opinion constitutes the weight of the medical evidence regarding the question of whether appellant had any disability for the period July 28, 2002 through January 12, 2003 due to his July 18, 2002 employment injury. Accordingly, the Office properly denied wage-loss compensation for the period July 28, 2002 to January 12, 2003 under the present claim.[12]

CONCLUSION

The Board finds that appellant has failed to establish that he was disabled due to his July 18, 2002 employment injury during the period July 28, 2002 through January 12, 2003.

[10] *Alice J. Tysinger*, 51 ECAB 638 (2000).

[11] *See Michael E. Smith*, *supra* note 9.

[12] The Board notes that the Office authorized physical therapy for the period November 6 through December 31, 2002. The record contains no evidence showing the dates or amount of time for appellant's physical therapy treatments during this period.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2004 is affirmed.

Issued: December 10, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member