United States Department of Labor
Employees' Compensation Appeals Board

WILBERT THOMAS, JR., Appellant	)	
and	)	**Docket No. 04-1364**
	)	**Issued: November 30, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Baltimore, MD, Employer	)	

Appearances:
Wilbert Thomas, Jr., 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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 26, 2004 appellant filed a timely appeal from an April 14, 2004 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that his current medical condition is causally related to his October 29, 1990 employment injury.

FACTUAL HISTORY

This is the second appeal before the Board. In a decision issued on May 9, 1997, the Board affirmed the June 1 and August 26, 1994, and January 23, 1995 decisions of the Office on the grounds that the medical evidence of record failed to establish a causal relationship between

appellant's lumbar back condition and his employment-related incident of October 29, 1990.[1] The Board also found that the Office properly denied appellant's request for a hearing and properly denied his request for reconsideration.[2] The facts and the history of the prior appeal are incorporated by reference.[3]

On June 4, 1997 appellant filed a petition requesting that the Board reconsider its decision. By decision dated November 17, 1997, the Board denied appellant's petition for reconsideration. The Board found that appellant merely reiterated arguments previously of record.

In an October 7, 1997 report, Dr. Eli M. Lippman, a Board-certified orthopedic surgeon, advised that appellant came in for reexamination and was last seen on May 23, 1996. He noted complaints of neck pain, and related appellant's complaints that his head felt like it was "on a spindle" and that his "neck cannot support his head." The physician also noted that appellant's pectoral girdle was problematic and he had complaints of aching and pain in the upper back and shoulder as well as in the lower back, along with swelling in the middle finger of the left hand, and pain in the left elbow. Dr. Lippman also advised that appellant needed a dental referral.

In a June 14, 1996 report, which was received by the Office on September 1, 1998, Dr. Lippman diagnosed cervical strain and strain of the lumbosacral spine. He provided a rating of 10 percent permanent impairment to the cervical spine and 10 percent to the lumbar spine.

In a December 30, 1997 report, which was unsigned and received by the Office on September 1, 1998, Dr. Richard Cohen, a Board-certified surgeon, determined that the vertebral bodies were in satisfactory alignment. He noted that there was no evidence of fracture or destructive process, with minimal spondylosis, and appellant had a faintly defined density posteriorly at the level of the lower thoracic spine which was seen only in the lateral projection and which might represent a pulmonary lesion.

In a September 14, 1998 merit decision, the Office denied appellant's claim finding that he had failed to submit any new or relevant evidence which would establish that the current medical condition and resulting disability were related to the October 29, 1990 work injury.

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[1] The record reflects that appellant had a November 10, 1989 injury which was accepted for cervical, thoracic and lumbosacral strain on December 26, 1989. Appellant received compensation from December 28, 1989 through January 12, 1990. Appellant was paid two leave repurchases from January 13 to 26, 1990 and January 27 through February 16, 1990. Additionally, appellant was paid from February 3 through March 8, 1990 and returned to duty on March 9, 1990.

[2] Docket No. 95-1368 (issued May 9, 1997).

[3] On October 29, 1990 appellant, then a 41-year-old manual distribution clerk, filed a traumatic injury claim and claim for continuation of pay/compensation, Form CA-1, alleging that, on October 29, 1990, he injured his head, neck and back when he tried to sit back in a faulty chair and fell to the floor. Appellant stated that he had "back stress" from an earlier injury as well. He did not miss any work. By letter dated February 24, 1992, the Office accepted appellant's claim for a muscle strain to the neck and a contusion to the head. The Office stated it authorized compensation for wage loss through April 30, 1991.

In an October 28, 1994 report, received by the Office on January 13, 1999, Dr. Robert Franklin Draper, a Board-certified orthopedic surgeon, diagnosed: post-traumatic headaches; postcerebral concussion syndrome; myofascial pain syndrome involving the cervical and thoracic spine with cervical and thoracic strain; and myofascial pain syndrome involving the right shoulder, with right shoulder strain.

In a November 27, 1998 letter, appellant inquired into the status of his case. In a letter dated December 17, 1998, he was advised to follow the appeal rights that accompanied the September 14, 1998 merit decision.

By decision dated April 8, 1999, the Office determined that the report of Dr. Draper, dated October 28, 1994 was received prior to the September 14, 1998 decision and reopened the claim. The Office reviewed the additional evidence and determined that appellant failed to submit any evidence which would establish that the current medical condition and resulting disability were causally related to the October 29, 1990 work injury. The Office found that the evidence was insufficient to warrant modification of the decision issued on May 9, 1997.

By letters dated November 10, 1999 and March 21, 2000, appellant requested reconsideration and enclosed additional evidence. Subsequent to the April 8, 1999 decision, the Office received additional medical evidence.

An August 7, 1992 x-ray of the lumbar spine, read by Dr. William W. Scott Jr., a Board-certified diagnostic radiologist, revealed that appellant had degenerative disc disease at L5-S1 and disc space narrowing, sclerosis, vacuum cleft and a radiolucent line across the inferior facet on the left side of L5. He noted that this could represent old trauma or a congenital defect. Additionally, a December 30, 1997 x-ray of the lumbar spine read by Dr. John N. Diaconis, a Board-certified radiologist, revealed narrowing of the lumbosacral joint with marginal osteophytes and subchondral sclerosis compatible with degenerative disease. In a subsequent x-ray dated January 1, 1998, Dr. Diaconis determined that appellant had chronic strain of the cervical, thoracic and lumbosacral spine.

By decision dated June 21, 2000, the Office determined that the evidence was insufficient to warrant modification of the prior decision. The Office noted that the medical evidence of record indicated that appellant's condition might be due to a work injury sustained on November 10, 1989.

On July 7, 2000 appellant requested reconsideration and included additional evidence.

In an August 11, 2000 report, Dr. Lippman indicated that appellant came in for pain pills and there did not appear to be any acute orthopedic issues. He noted that appellant was primarily concerned with pain management.

By decision dated August 22, 2001, the Office denied merit review of appellant's claim. The Office determined that appellant had not raised substantive legal questions nor included new and relevant evidence.

By letter dated February 14, 2003, appellant requested reconsideration and enclosed additional evidence. In a January 2, 2002 report, Dr. Lippman indicated that it was difficult to

review all of the claims appellant had as they went back many years. He noted that he had multiple charts for appellant and referred to an injury on August 4, 1988 to his little finger, a November 10, 1989 injury to his mid back, an injury around January 18, 1990 to appellant's back, and an October 29, 1990 injury with injuries to the head, neck and right shoulder. He advised that particular attention should be noted to the fact that appellant's injury to his back occurred on November 10, 1989. Additionally, he advised that he examined appellant on May 23, 1996 and combined the reports of the neck and back, and dated the accident back to October 29, 1990, although he opined that it probably should have been said that the back was injured in 1989, however, he noted that appellant had a permanent disability in his back as well as his neck. Dr. Lippman repeated that he erred when he dated the accident to the October 29, 1990 injury, and noted that the initial treating physician and the employing establishment dated the back injury to November 10, 1989.[4]

By decision dated May 23, 2003, the Office determined that appellant's request was not timely filed and did not present clear evidence of error.

On June 5, 2003 appellant indicated that he was dissatisfied with the May 23, 2003 decision and requested a hearing.

By letters dated June 16 and July 15, 2003, the Office advised appellant that his only right of appeal was to the Board.

On July 22, 2003 the Office received duplicates of reports previously received.

On July 30, 2003 appellant appealed the May 23, 2003 decision to the Board and enclosed duplicates of materials previously received.[5]

In a letter dated October 2, 2003, the Branch of Hearings and Review returned the case to the Office noting that it was not in posture for a hearing as it lacked any formal final decision.

In an order remanding case dated October 29, 2003, the Board found that the record was incomplete and did not contain the May 23, 2003 decision of the Office. The case was remanded for reconstruction and proper assemblage of the record followed by an appropriate decision.

In a memorandum dated March 18, 2004, the Office determined that appellant requested reconsideration of the decision issued August 22, 2001 under claim No. 250372457 and his request was denied by decision dated May 23, 2003 as untimely. The Office also noted that appellant appealed the decision and the Board remanded case number 250351956. The Office subsequently recommended that 250351956 be doubled into 250372457, and that the original reconsideration request should be revisited with a new decision issued to protect appellant's appeal rights.

By merit decision dated April 14, 2004, the Office determined that the evidence was insufficient to warrant modification of the previous decision dated August 22, 2001.

[4] Duplicates of previous reports dated March 8, 1990, October 7, 1997 and June 14, 1996 were also included.

[5] Appellant made numerous requests on October 14, 2002, January 21, April 2 and June 24, 2003.

LEGAL PRECEDENT

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been 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.[6] 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 the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[7] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[8]

ANALYSIS

The Office doubled appellant's two claims and accepted that appellant sustained a muscle strain to the neck and a contusion to the head with respect to his October 29, 1990 injury which resolved when he was discharged on April 25, 1991 and further the Office previously accepted that appellant sustained a cervical, thoracic and lumbosacral strain on November 10, 1989 which resolved when he returned to duty on March 9, 1990.

Appellant alleged that he continued to suffer a back injury after April 25, 1991 causally related to factors of his federal employment. As part of appellant's burden of proof, he must submit rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, showing a causal relationship between the injury claimed and his federal employment.[9] The mere fact that a condition manifests itself or is worsened during a period of employment does not raise an inference of causal relationship between the two.[10]

In the present case, appellant has not presented any rationalized medical evidence establishing that his current back condition is causally related to his October 29, 1990

[6] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[8] *James Mack*, 43 ECAB 321 (1991).

[9] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Steven R. Piper*, 39 ECAB 312, 314 (1987).

[10] *Kathryn Haggerty, supra* note 9 at 389.

employment injury. The record reflects that appellant's treating physician, Dr. Lippman, discharged appellant in his April 25, 1991 report. Appellant submitted several reports in support of his claim, including a June 14, 1996 report, in which Dr. Lippman diagnosed cervical strain and strain of the lumbar spine and provided an impairment rating of 10 percent to the cervical spine and 10 percent to the lumbar spine. Although the report lends support for an impairment rating, he offered no opinion regarding whether appellant had a current back condition causally related to his federal employment in light of the fact that he had discharged appellant in 1991. In an October 7, 1997 report, Dr. Lippman related that appellant came in for complaints of neck pain and a problematic girdle, but he offered no diagnosis or opinion. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[11] In an August 11, 2000 report, Dr. Lippman indicated that appellant came in for pain pills and pain management; however, he did not offer any diagnosis or opinion on the issue of whether appellant had a current lumbar condition causally related to factors of his employment.[12] In his January 2, 2002 report, Dr. Lippman indicated that appellant had a complicated history with many claims and opined that he may have erred when he combined the reports of the back and neck and related them to the October 29, 1990 injury as it should have related to the November 1989 injury. This report did not offer any opinion which addressed the specific factual and medical evidence of record or provide any medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or employment.[13] For example, the physician failed to offer an opinion as to why appellant continued to suffer from residuals of his employment-related injury after he discharged appellant on April 25, 1991.

In an August 7, 1992 x-ray report, Dr. Scott, a Board-certified diagnostic radiologist noted that appellant had degenerative disc disease at L5-S1 and could represent an old trauma or congenital defect. However, appellant's 1990 injury was accepted for a muscle strain to the neck and contusion to the head, the physician offered no opinion with respect to how this degenerative condition was related to his accepted employment injury. The Board has held that medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.[14] Furthermore, his report was speculative and inconclusive. The Board has held that speculative opinions are of limited probative value.[15]

In an October 28, 1994 report, Dr. Draper, a Board-certified orthopedic surgeon, diagnosed several conditions including some which were not accepted by the Office including,

[11] *Jaja K. Asaramo,* 55 ECAB ____ (Docket No. 03-1327, issued January 5, 2004).

[12] *Id.*

[13] *See Robert Broome,* 55 ECAB ___ (Docket No. 04-93, issued February 23, 2004).

[14] *Albert C. Brown,* 52 ECAB 152 (2000).

[15] *Jennifer L. Sharp,* 48 ECAB 1996.

post-traumatic headaches, postcerebral concussion syndrome, myofascial pain syndrome, and thoracic strain and strains of the shoulders. However, he offered no opinion on causal relation.[16]

Additionally, in a December 30, 1997 report, Dr. Cohen, a Board-certified surgeon, indicated that there was no evidence of fracture or destructive process and minimal spondylosis, and a possible pulmonary lesion. However, spondylosis was not accepted by the Office and he offered no opinion on causal relation.[17] Further, his report was speculative.[18]

In x-rays dated December 30, 1997 and January 1, 1998, Dr. John Diaconis, a Board-certified radiologist, indicated that appellant had degenerative disease and diagnosed chronic strain of the cervical, thoracic and lumbosacral spine. However, he offered no opinion on causal relationship. Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.[19]

Appellant, however, did not submit any rationalized medical evidence of record establishing a causal relationship between his back condition and his October 29, 1990 employment injury. He therefore has failed to meet his burden of proof.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof in establishing that his current back condition was causally related to his October 29, 1990 employment injury.

[16] *See* footnote 11.

[17] *Id.*

[18] *See* footnote 16.

[19] *Steve S. Saleh*, 55 ECAB ___ (Docket No. 03-2232, issued December 12, 2003); *Jennifer Atkerson*, 55 ECAB ___ (Docket No. 04-158, issued February 13, 2004).

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 30, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member