United States Department of Labor
Employees' Compensation Appeals Board

JAMES G. WAITS, Appellant	)	
and	)	**Docket No. 04-1692**
	)	**Issued: January 4, 2005**
DEPARTMENT OF DEFENSE, DEFENSE CONTRACT MANAGEMENT AGENCY, Carlsbad, CA, Employer	)	

Appearances:
Thomas Martin, Esq., for the appellant
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 June 23, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated March 19, 2004 which denied modification of a December 19, 2002 Office decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he sustained an injury on July 2, 2001 in the performance of duty as alleged.

FACTUAL HISTORY

On September 27, 2002 appellant, then a 55-year-old quality assurance specialist, filed a traumatic injury claim alleging that on July 2, 2001 he was required to get in and out of a government car which caused and aggravated his back condition. Appellant alleged that he sustained left arm and leg pain, numbness and low back pain. Appellant did not stop work.

By letter dated November 15, 2002, the Office informed appellant of the type of evidence needed to support his claim.

On December 11, 2002 the Office received appellant's August 13, 2002 occupational disease claim alleging that, while entering and exiting a government vehicle on July 2, 2001, he sustained pain in his left arm and leg, numbness and low back pain. Appellant first reported his condition to a supervisor on August 7, 2002. No work stoppage was noted and his assignment remained unchanged. The employing establishment noted that since August 9, 2002 appellant drove his own vehicle and had limited his field visits as a quality assurance inspector.

By decision dated December 19, 2002, the Office found that the July 2, 2001 event occurred but that there was insufficient medical evidence to establish that the incident caused an injury.

On December 18, 2003 appellant requested reconsideration. In support of his request, appellant submitted witness statements, progress notes from April 1 to December 18, 2002 from Dr. Michael J. Shack, appellant's attending physician Board-certified in psychiatry and neurology, reports dated September 4 and December 18, 2002 from Dr. Shack, a December 1, 2003 report from Dr. Roger Grifka, a chiropractor, and a December 10, 2003 report from Dr. Mark S. Stern, a Board-certified neurological surgeon.

In his September 4, 2002 report, Dr. Shack stated that he examined appellant on August 23, 2002 with respect to a work-related complaint of back and leg pain. Dr. Shack related appellant's history of injury indicating that on July 2, 2001 appellant began to use a small car at work and that he noticed low back pain while driving and when he got out of the car he "collapsed at the side of the car with a brief loss of consciousness associated with severe pain in the low back." He related that appellant indicated that, after the claimed injury, he was treated by a chiropractor. Dr. Shack noted treating appellant beginning March 1, 2002. He noted test results and appellant's course of treatment but did not advise that appellant's condition had improved over the previous three months. Dr. Shack noted that after a spinal anesthesia in early 1998 appellant developed numbness intermittently in the left thigh but in a different location from the July 2, 2001 injury. On examination, he noted limited back range of motion and a four by five weakness of left hip with flexion. Dr. Shack diagnosed left lumbar radiculopathy causing lateral numbness, slight weakness and pain as a result of the July 2, 2001 injury when appellant collapsed by his car with severe pain in the low back. He also noted an underlying lumbar strain present for over 30 years which was not aggravated by the injury as well as other nonwork-related conditions including left anterior thigh numbness, left frontal headaches, and a recent history of tingling of the left upper extremity. With respect to further treatment, Dr. Shack recommended a neurosurgical evaluation. He stated that appellant was able to function without restrictions. In the December 18, 2002 report, Dr. Shack diagnosed L4-5 lumbar radiculopathy with a date of injury of July 2, 2001.

In a report dated December 1, 2003, Dr. Grifka stated that appellant had been under his care since 1989. He reported treating appellant on July 27, 2001 for low back pain and leg numbness into the left leg which appellant stated was caused by a July 2, 2001 incident when, after squeezing in and out of a government vehicle, he dropped down in pain which persisted when treated on July 27, 2001. The diagnosis was herniated discs that required surgical

intervention. He noted that it was a reasonable certainty that the injury of July 2, 2001 caused the herniated discs and necessitated the subsequent surgery.

In the December 10, 2003 report, Dr. Stern stated that he initially examined appellant on January 15, 2003 and related history of appellant's July 2, 2001 work-related injury. He related that appellant was driving a government car which he thought was too small, he then blacked out due to back pain as he got out of the car. Dr. Stern noted a February 13, 2002 magnetic resonance imaging (MRI) scan which revealed degenerative disc disease with moderate stenosis at L4-5 and L5-S1 with normal flexion and extension. He noted that appellant underwent a discography and neuroplasty on May 7, 2003. On July 22, 2003 Dr. Stern provided an essentially normal physical evaluation. He diagnosed appellant with degenerative lumbar disease and lumbar disc herniation, noting that the traumatic event of July 2, 2001 aggravated appellant's condition. Dr. Stern further noted that appellant's nonindustrial preexisting disability of degenerative disc disease at multiple lumbar levels were unrelated to the July 2, 2001 event and indicated that appellant continued to suffer residuals of the work-related injury based on his persistent discomfort which reduces his ability to function in a manner consistent with his age and position. He added that appellant's injury of blacking out and hitting his head while operating a vehicle exacerbated a previous degenerative disc disease at multiple lumbar levels which accelerated and exacerbated the process of degeneration.

By decision dated March 19, 2004, the Office denied appellant's request for modification based on a merit review of the claim. The Office found the evidence submitted by appellant insufficient to establish that he sustained a work-related injury on July 2, 2001.

LEGAL PRECEDENT

In order to determine whether an employee actually sustained a traumatic injury in the performance of duty, the Office begins with an analysis of whether "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.[1]

Second, the employee must submit sufficient evidence, generally in the form of medical evidence, to establish that the employment incident caused the personal injury.[2] The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence.[3] 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. Such an opinion of the physician must be one of reasonable medical certainty and must be supported by medical

[1] *Caroline Thomas*, 51 ECAB 451 (2000).

[2] *Gloria J. McPherson*, 51 ECAB 441 (2000).

[3] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[4]

ANALYSIS

It is not disputed that appellant was required to get in and out of an automobile while working on July 2, 2001. However, appellant has not submitted sufficient medical evidence to establish that this incident caused an injury or aggravated a preexisting condition.

The December 1, 2003 report from Dr. Grifka, a chiropractor, is of no probative value on the issue of whether appellant sustained a work-related injury on July 2, 2001 because his report does not constitute medical evidence within the meaning of the Federal Employees' Compensation Act. Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[5] Dr. Grifka did not diagnose findings of subluxations as demonstrated by x-rays to exist. The Office's regulations at 20 C.F.R. § 10.5(bb)[6] have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays. Dr. Grifka is therefore not considered a physician under the Act.

While both Drs. Shack and Stern provided some support for causal relationship, their reports are insufficient to establish appellant's claim. In the September 4, 2002 report, Dr. Shack reported that appellant related that he fell beside his car on July 2, 2001, with a brief loss of consciousness which he associated with pain in the low back. Likewise, Dr. Stern stated that appellant related that his injury occurred on July 2, 2001 when he was operating a compact government vehicle, determined that it was too small, and "blacked out," hitting his head, and awakening on the ground outside his office. However, it appears that these reports are based on an inaccurate history of injury as appellant indicated in his initial claim that he sustained a back injury and injuries to his left leg and arm as a result of getting in and out of the government vehicle. Appellant did not mention any falls or loss of consciousness.[7]

Further, the medical report provides insufficient medical reasoning in support of the claim and is somewhat contradictory. Dr. Shack stated that appellant's underlying lumbar strain was not aggravated by the July 2, 2001 incident while Dr. Stern stated that the incident exacerbated the previous degenerative disc disease. More importantly, neither Dr. Shack nor Dr. Stern explained how the process of appellant getting in and out of the government vehicle caused a back injury or aggravated a preexisting back condition. In other words, there is no

[4] *Id*.

[5] 5 U.S.C. § 8101(2).

[6] 20 C.F.R. § 10.5(bb).

[7] *See Beverly R. Jones*, 55 ECAB ___ (Docket No. 03-1210, issued March 26, 2004) (medical conclusions based on inaccurate or incomplete histories are of little probative value).

rationalized medical opinion explaining why there is a causal relationship between appellant's back condition and the incident of July 2, 2001. For example, neither doctor explained the medical reasons by which appellant's back condition would not be the sole result of a 30-year history of lumbar problems but would instead have resulted, in whole or in part, by getting in and out of a car on July 2, 2001.

Consequently, the medical evidence is insufficient to establish that the July 2, 2001 incident caused or aggravated a preexisting back condition.

CONCLUSION

Appellant has not met his burden of proof.

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member