United States Department of Labor
Employees' Compensation Appeals Board

MARY E. HARRIS, Appellant	)	
and	)	**Docket No. 04-2048**
	)	**Issued: March 7, 2005**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, AGRICULTURE QUARANTINE INSPECTION PROGRAM, Tacoma, WA, Employer	)	

Appearances:
Mary E. Harris, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 16, 2004 appellant filed an appeal of a decision of the Office of Workers' Compensation Programs dated May 10, 2004, which denied her claim that she sustained a recurrence of disability causally related to a January 21, 1992 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a recurrence of disability causally related to her accepted cervical strain. On appeal she contends that a March 19, 1992 Office letter informed her that she would not be entitled to benefits under the Federal Employees' Compensation Act until her third-party claim was settled.

FACTUAL HISTORY

On January 21, 1992 appellant then an agriculture inspector,[1] sustained an employment-related cervical strain when her government vehicle was struck from the rear while stopped at a red light. The accident report indicates that appellant received a bump on the nose, had no complaints and received no medical care. She returned to regular duty on January 23, 1992.

In a letter dated March 19, 1992, the Office informed appellant that she was required to pursue a third-party claim, if appropriate. The Office advised that, after the third-party action was initiated and before final settlement was made, she should contact the Office regarding any disbursements made on her behalf. By letter dated March 24, 1992, appellant indicated that she still had periodic neck spasms and submitted reports dated January 27, February 3, March 9 and 29, 1992, in which Dr. Robert Bell[2] noted a history that she had been in a rear-end collision and had complaints of neck pain. He noted examination findings of full range of motion with tenderness and diagnosed cervical strain. In a March 30, 1992 report, Dr. Bell noted that appellant had pain in her neck following the employment-related motor vehicle accident and diagnosed cervical strain.

By letter dated June 7, 2000, appellant informed the Office that her third-party claim had been settled and attached a copy of the settlement agreement. On February 6, 2003 she submitted a Form CA-7 claim, requesting leave buy-back for the period January 21, 1992 to August 1, 2000. On February 28, 2003 she filed a Form CA-2a, stating that she sustained intermittent recurrences of disability and attached a leave analysis claiming 253 hours between January 22, 1992 and May 3, 2000. In a letter also dated February 28, 2003, she informed the Office that she was also claiming legal fees and past, current and future medical expenses. She stated that she had been informed that she was prohibited from filing a claim under the Act until her third-party claim was settled.

Appellant submitted an August 20, 1992 report in which Dr. Ron Slapper, a chiropractor, noted that she had first been seen on June 25, 1992. He provided x-ray diagnoses of subluxations of the cervical and upper thoracic spine with sprain/strain, which he characterized as chronic and traumatic and further diagnosed intermittent bilateral median nerve root compression. Dr. Slapper noted symptomatic improvement but advised that appellant should not work for one week.

By letter dated April 16, 2003, the Office informed appellant of the type evidence needed to support her recurrence of disability claim. In a response dated April 25, 2003, she again stated that she was seeking reimbursement for all legal and medical expenses. By letter dated May 9, 2003, the Office provided appellant with information regarding reimbursement of expenses.

[1] Appellant filed the claim on January 24, 1992 and it was accepted on April 21, 1992. Her agency was transferred from the Department of Agriculture to the Department of Homeland Security on March 1, 2003.

[2] Dr. Bell's credentials are not known.

In a statement dated May 15, 2003, appellant alleged that she was prevented from filing claims under the Act until her third-party lawsuit was fully discharged. She noted that she had had neck, back and hand problems continuously since the January 1992 employment injury, which required the use of a neck support at night. Appellant indicated that she had never regained strength in her left hand and had hand tingling, pain and numbness and would get neck and upper back spasms when driving long distances. She stated that none of these symptoms occurred prior to the January 21, 1992 automobile accident, noting that she had some improvement, especially with her right hand, following chiropractic treatment which she continued on a monthly basis. She was treated for abdominal cancer in 2000 to 2001.

Appellant submitted a report dated May 6, 2003 in which Dr. Jeffrey S. Clary, an attending chiropractor, stated that he had seen appellant 45 times during the period November 4, 1999 to April 18, 2003. He reported the history of a rear-end motor vehicle accident and stated that appellant informed him that she had no cervical problems and had not received chiropractic care prior to the employment injury. He noted findings on examination of November 11, 1999 and continuing and diagnosed chronic cervicothoracic sprain/strain secondary to the cervical acceleration/deceleration of the motor vehicle accident which, more probably than not, caused injuries to the facet capsules and aggravation to the disc and preexisting asymptomatic cervical spondylosis. Dr. Clary advised that he treated appellant on a monthly basis. He included brief treatment notes dating from November 4, 1999 to July 17, 2002 in which he recorded findings on examination and his treatment regimen.

By decision dated May 22, 2003, the Office denied the recurrence of disability claim. The Office noted the absence of bridging medical evidence which demonstrated the relationship of her current condition and the accepted employment injury. The Office noted that a subluxation had not been accepted as employment related and, therefore, the opinion of her chiropractor did not constitute competent medical evidence.

On June 4, 2003 appellant requested a hearing and submitted a statement titled "symptoms after accident -- add to claim" in which she addressed a sleep disturbance due to her hands going numb which required the use of a neck pillow and decreased manual dexterity and strength of the hands, especially on the left. She also submitted medical reports dated March 20 and August 20, 1992, in which Dr. Slapper provided restrictions to her physical activity.

In an unsigned report dated March 1, 1994, Dr. Joseph D. Sueno, Board-certified in physical medicine and rehabilitation, noted appellant's complaints of neck and mid-back pain and numbness of the hands and fingers. He reported the history of the January 21, 1992 employment injury and noted that she had received chiropractic care since that time. Dr. Sueno diagnosed cervical sprain, rule out cervical radiculopathy versus carpal tunnel syndrome and rule out herniated nucleus pulposus. A treatment note with an illegible signature dated March 13, 1994 provided a history of tingling to the fingers with numbness and joint aches and a diagnosis of chronic cervical strain with paresthesias. Hand x-rays done on March 16, 1994 were reported as normal.

A left upper extremity electromyography (EMG) and nerve conduction study done on April 21, 1994 was reported by Dr. Thomas Kimpel, Board-certified in neurology, as demonstrating moderately severe left carpal tunnel syndrome with no evidence of left upper

extremity radiculopathy. In an unsigned report dated May 3, 1994, Dr. W. Dale Overfield, also a Board-certified neurologist, noted the history of the January 21, 1992 rear-end collision and her report of continued symptoms with a current "predominant problem" of numbness in the left hand and neck pain. He reported a positive Phalen's test, noted the EMG findings and diagnosed cervical spine disease with a degenerative disc at T2, left carpal tunnel, probable transient right carpal tunnel, resolved and some degenerative joint disease. He opined that appellant's cervical symptomatology was due to the employment-related accident, which was superimposed on preexisting degenerative disc disease and degenerative joint disease of the neck and that the left carpal tunnel syndrome "has been precipitated primarily by the accident superimposed on her other life activities bring out the left carpal tunnel." He recommended magnetic resonance imaging (MRI) scan and physical therapy.

In an unsigned report dated October 26, 1995,[3] Dr. John A. Maxwell, Board-certified in neurosurgery, reported a history of the January 22, 1992 automobile accident and subsequent treatment, noting that appellant had been off work for one day following the accident and sporadically since that time. He noted current symptoms of neck pain with left hand numbness and advised that cervical spine x-rays were normal for her age and did not reflect any significant osteoarthritis. Following physical examination, the physician diagnosed mild cervical strain secondary to the motor vehicle accident. Dr. Maxwell opined that he disagreed that the automobile accident was an adequate explanation for her left carpal tunnel syndrome, which he felt was coincidental with sparse objective findings, noting range of motion was always pretty good. He stated that the objective findings were "simple" complaints of neck pain and "perhaps" a little neck and trapezius spasm. Dr. Maxwell opined that, although the chiropractic and palliative treatment were a bit prolonged, her medical treatment had been reasonable, advising that very few activity restrictions were caused by the employment injury. He stated that appellant still "seems" to have neck discomfort three plus years following the accident but did not think any treatment would be effective.

Dr. Surinderjit Singh, a Board-certified physiatrist, administered a left upper extremity EMG on October 18, 1999 which was compatible with mild left median neuropathy across the wrist. A February 29, 2000 MRI scan of the cervical spine was interpreted by Dr. Drew T. Lambert, Board-certified in diagnostic radiology, as showing a small central protrusion at C6-7 with a mild osteophyte/disc bulge complex at C5-6 likely not significantly compromising the spinal cord.

In a report dated April 14, 2000, Dr. Jonathan P. Bacon, Board-certified in orthopedic surgery, noted the MRI scan findings. He opined, "based on the accident in 1992, I do consider [the MRI scan findings] related, certainly aggravated from the accident." He noted appellant's mild carpal tunnel syndrome and opined that this too was caused by the accident.

A June 19, 2003 left upper extremity EMG was reported by Dr. Edgar S. Steinitz, a Board-certified physiatrist, as abnormal with findings of moderate left carpal tunnel syndrome showing an interval change since the October 18, 1999 study. He advised that there was also a

[3] The record indicates that this report was prepared for the third-party claim.

suspicion of a subtle chronic left C6 radicular change of a rare nerve fiber and no findings for a focal ulnar neuropathy or cubital tunnel syndrome.

Appellant submitted copies of evidence previously of record, physical therapy referrals and notes dating from November 1999 to April 2000, copies of medical literature regarding whiplash, a January 9, 2000 statement by her mother for the third-party claim, appellant's answers to interrogatories for the third-party claim, several accident reports regarding the January 21, 1992 motor vehicle accident and other correspondence relating to the 1992 accident.

A jury verdict form dated May 16, 2000 indicated that appellant was awarded $100.00 for past economic damages, $2,115.00 for noneconomic damages and $0.00 for future economic damages. On November 17, 2003 appellant requested reimbursement from the Office for $32,154.51 in legal expenses.

Dr. Clary provided a February 4, 2004 report in which he noted the MRI scan findings and advised that he continued to treat appellant. He opined that, based on her "past history, mechanism of injury and diagnostic testing," she had residuals secondary to the employment-related motor vehicle accident with long-term disability due to the cervical strain/sprain and carpal tunnel syndrome, which resulted in a double crush syndrome.

At the hearing held on February 10, 2004, appellant testified regarding her medical care and continuing symptoms. She continued to work and wanted reimbursement for her chiropractic treatment. In a statement dated February 17, 2004, appellant reiterated her contention that her current neck condition and carpal tunnel syndrome were caused by the January 21, 1992 employment injury.

By decision dated May 10, 2004, an Office hearing representative affirmed the May 22, 2003 decision. The hearing representative noted that the March 19, 1992 Office letter did not absolve appellant from submitting medical bills between 1992 and 2000 and found the medical evidence insufficient to establish that her current condition was caused by the January 21, 1992 employment injury. He noted that the reports of the chiropractors were of no probative value because a spinal subluxation had not been accepted as employment related.

LEGAL PRECEDENT

Section 10.5(x) of the Office's regulation provides in part that a recurrence of disability is an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[4] Where appellant claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate

[4] 20 C.F.R. § 10.5(x).

factual and medical history, concludes that the condition is causally related to the employment injury. Moreover, sound medical reasoning must support the physician's conclusion.[5]

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.[6]

In order to meet a claimant's burden to establish that she sustained a recurrence of disability, the medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury. In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[7]

Physicians are called upon to express an opinion on the relationship between the injury claimed by the employee and specific factors of the employee's federal employment and in many instances the physician will conduct diagnostic testing to help identify the current state of the employee's condition. When the physician conducts diagnostic testing immediately after an alleged injury, the physician is better able to determine whether that testing documents the injury described by the employee's history. It must of course be acknowledged that even immediate testing carries with it a degree of uncertainty. Such testing does not, by reason of its promptness, necessarily document the injury claimed by the employee, who might well have sustained the condition before the date of the alleged injury and under circumstances not covered by the Act.[8] The greater the delay in testing, the greater the likelihood that an event not implicated by the employee has worsened the injury claimed or has, in fact, caused the condition for which the employee seeks compensation. When the delay becomes so significant that it calls into question the validity of an affirmative opinion based at least in part on that testing, such a delay diminishes the probative value of the opinion offered.[9]

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[5] *Ricky S. Storms*, 52 ECAB 349 (2001).

[6] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[7] *Ricky S. Storms, supra* note 5.

[8] 5 U.S.C. §§ 8101-8193.

[9] *Thomas R. Horsfall*, 48 ECAB 180 (1996); *Linda A. Mendenhall*, 41 ECAB 532 (1990).

ANALYSIS

In this case, the Office accepted that on January 21, 1992 appellant sustained an employment-related cervical strain when her motor vehicle was struck from the rear. She returned to work on January 23, 1992. On February 6, 2003 she filed a Form CA-7 claim for leave buy-back for intermittent disability for the period January 21, 1992 to August 1, 2000 and on February 28, 2003 filed a recurrence claim, contending that her current neck, back and hand problems were caused by the 1992 automobile accident.

Appellant's assertion that she was informed by the Office in the March 19, 1992 letter that she could not pursue a claim under the Act until her third-party action was settled is erroneous. The Office merely informed appellant that she was required to pursue a third-party claim if appropriate and that "after you have initiated a third-party action and before you make a final settlement, you should contact this [O]ffice for a statement of OWCP [the Office] disbursements made to you or on your behalf" which were to be refunded from any recovery obtained in the third-party action. The Board notes that there is nothing in the letter to indicate that appellant was not entitled to benefits under the Act while in the pursuit of her third-party claim. The Office notes that it would make disbursements on her behalf.

While appellant submitted evidence regarding physical therapy, it is well established that to constitute competent medical opinion evidence, the medical evidence submitted must be from by a qualified physician.[10] A physical therapist is not defined as a "physician" within the meaning of section 8101(2) of the Act.[11] The physical therapy evidence submitted by appellant is, therefore, not competent medical evidence under the Act and insufficient to establish that her current condition is related to the January 21, 1992 employment injury. Similarly, lay individuals are not competent to render a medical opinion.[12] The statement from appellant's mother is of no probative value regarding appellant's claim of a causal relationship between her accepted injury and her intermitted disability. Furthermore, 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.[13]

In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician under the Act.[14] Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence only to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[15] In this case, appellant

[10] *Vickey C. Randall*, 51 ECAB 357 (2000).

[11] 5 U.S.C. § 8101(2).

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

[13] *Id.*

[14] *Mary A. Ceglia*, 55 ECAB ____ (Docket No. 04-113, issued July 22, 2004).

[15] 5 U.S.C. § 8101(2); *Phyllis F. Cundiff*, 52 ECAB 439 (2001).

submitted a number of reports from her treating chiropractors, Dr. Slapper and Dr. Clary. On August 20, 1992 Dr. Slapper provided an x-ray diagnosis of spinal subluxations. He would thus be considered a "physician" under the Act. The Board, however, finds his reports insufficient to show a causal relationship between the accepted cervical strain and the diagnosed spinal subluxations, which were not accepted as employment related. Dr. Slapper did not ever discuss the relationship between the two conditions.[16] Dr. Clary, who did not diagnose subluxation by x-ray, did not begin treating appellant until 1999, almost eight years after the employment injury. A chiropractor may only qualify as a physician in the diagnosis and treatment of spinal subluxation, his or her opinion is not considered competent medical evidence in evaluation of other disorders, including those of the extremities, although these disorders may originate in the spine.[17] The reports of Dr. Slapper and Dr. Clary, therefore, do not constitute competent medical evidence in support of appellant's claim regarding her current neck condition or claim of carpal tunnel syndrome.[18] Moreover, the greater the passage of time between the date of the employment injury and the date of diagnostic testing raises a question regarding the origin of the condition documented by that testing.[19]

The competent medical evidence consists of a March 30, 1992 report, in which Dr. Bell diagnosed cervical strain following the January 21, 1992 automobile accident. This was the condition accepted by the Office. The next report is that dated March 1, 1994, two years after the employment injury, in which Dr. Sueno diagnosed cervical sprain, rule out cervical radiculopathy versus carpal tunnel syndrome and rule out herniated nucleus pulposus. He, however, did not provide an opinion regarding the cause of these diagnosed conditions. 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.[20]

The first EMG contained in the medical record was performed on April 21, 1994. Although Dr. Kimpel diagnosed moderately severe left carpal tunnel syndrome, he did not provide an opinion regarding the cause of this condition.[21] As noted when diagnostic testing is delayed as in this case, the greater the delay in testing, the greater the likelihood that an event not related to employment has caused or worsened the condition for which the employee seeks compensation.[22] Dr. Kimpel did not provide sufficient rationale to support the causal relationship between the diagnosis of left carpal tunnel syndrome and the accepted motor vehicle accident of 1992.

[16] *See Mary A. Ceglia, supra* note 14.

[17] *Pamela K. Guesford*, 53 ECAB 726 (2002).

[18] *Id.*

[19] *See Linda A. Mendenhall, supra* note 9.

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

[21] *Id.*

[22] *Linda A. Mendenhall, supra* note 9.

While Dr. Overfield diagnosed degenerative disc disease and left carpal tunnel syndrome in a 1994 report and opined that these were caused by the 1992 motor vehicle accident, he did not provide any explanation other than that the accident was superimposed over appellant's underlying degenerative condition. For conditions not accepted by the Office as being employment related, it is appellant's burden to provide rationalized medical evidence sufficient to establish causal relationship.[23] A medical report is of limited probative value on the issue of causal relationship if it merely contains a conclusion that the condition was caused by the employment injury that is unsupported by medical rationale.[24] Dr. Overfield's opinion is insufficient to establish appellant's claim.

In an October 26, 1999 report, Dr. Maxwell opined that appellant's carpal tunnel syndrome was not related to the January 21, 1992 automobile accident and further advised that, while she seemed to have continued neck discomfort, there were few objective findings, noting normal range of motion. He further noted that she had been able to return to work two days following the employment injury. His report, therefore, does not establish that there had been an objective worsening of appellant's accepted condition,[25] and is insufficient to establish that she sustained a recurrence of disability.

Dr. Singh reported on October 18, 1999 that EMG findings showed mild left median neuropathy, but he did not provide an opinion regarding the cause of this condition.[26] In his April 14, 2000 report, Dr. Bacon noted the February 29, 2000 MRI scan findings of a small central protrusion at C6-7 with a mild osteophyte/disc bulge complex at C5-6 likely not significantly compromising the spinal cord and opined that he considered these findings related to and "certainly" aggravated by the 1992 accident. He, however, provided no further explanation as to why findings of an MRI scan done in 2000 and appellant's symptomatology were caused by an accident that had occurred more than eight years previously. As discussed medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relationship.[27] Moreover, the eight-year delay in obtaining the MRI scan diminishes its probative value. Therefore, Dr. Bacon's report is of reduced probative value in establishing that the cervical findings demonstrated on the MRI scan were caused by the January 21, 1992 motor vehicle accident.[28] There follows a three-year absence between Dr. Bacon's April 14, 2000 report and the June 19, 2003 EMG administered by Dr. Steinitz, who diagnosed worsening left carpal tunnel syndrome. He, too, did not provide an opinion regarding the cause of appellant's condition.[29] The record in this case does not contain a medical report

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

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

[25] *See Laurie S. Swanson*, 53 ECAB 517 (2002).

[26] *Michael E. Smith, supra* note 20.

[27] *Albert C. Brown, supra* note 24.

[28] *Linda A. Mendenhall, supra* note 9.

[29] *Michael E. Smith, supra* note 20.

providing a reasoned medical opinion that appellant's claimed conditions were caused by the January 21, 1992 motor vehicle accident.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a recurrence of disability.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 10, 2004 be affirmed.

Issued: March 7, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member