United States Department of Labor
Employees' Compensation Appeals Board

SUSAN T. SIMMONS, Appellant	)	
and	)	**Docket No. 06-42**
	)	**Issued: April 7, 2006**
FEDERAL JUDICIARY, U.S. BANKRUPTCY COURT, Las Vegas, NV, Employer	)	

Appearances:
Susan T. Simmons, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 4, 2005 appellant filed a timely appeal of a November 18, 2004 merit decision of the Office of Workers' Compensation Programs, finding that she did not sustain an injury while in the performance of duty and the April 25 and July 28, 2005 merit decisions, which denied modification. 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 has established that she sustained an injury while in the performance of duty on August 6, 2004.

FACTUAL HISTORY

On August 11, 2004 appellant, then a 56-year-old judicial assistant, filed a traumatic injury claim alleging that on August 6, 2004 she sustained muscle spasms in her back and experienced sciatic pain as a result of moving heavy articles.

In support of her claim, appellant submitted an August 10, 2004 treatment note of Dr. Joshua K. Purcell, an attending chiropractor, who recommended that she not lift or bend for one week due to muscle spasms in her lower back. In an August 27, 2004 attending physician's report, Dr. Purcell indicated that appellant sustained an injury on August 6, 2004 while moving heavy objects at work due to the employing establishment's relocation. He listed diagnostic code numbers. Dr. Purcell indicated with an affirmative mark that the diagnosed conditions were caused by the employment activity. He explained that appellant was doing well until she performed heavy lifting at work.

By letter dated September 22, 2004, the Office advised appellant that a chiropractor is considered a physician under the Federal Employees' Compensation Act if he diagnosed a subluxation as demonstrated by x-ray. The Office noted that the evidence submitted was insufficient to establish her claim and the medical evidence she needed to submit from her attending chiropractor to establish her claim.

In a September 8, 2004 report, Dr. Ammon G. Strehlow, a Board-certified radiologist, listed the findings of an x-ray examination ordered by Dr. Purcell. He found moderate discogenic spondylosis of the lower cervical spine and lower lumbar spine, mild spondylosis deformans periodically throughout the remaining cervical and lumbar spines, mild to moderate facet arthrosis with imbrications of the lower lumbar spine and atherosclerotic plaques within the abdominal aorta with no evidence of gross dilatation. The angle of the cervical curve indicated a decrease in the normally anticipated cervical lordosis. The cervical gravity line indicated anterior weight bearing of the head and cervical spine. The "Penning Method" demonstrated hypomobility of the C4-5, C5-6 and C6-7 intersegmental motor units. The Ruth Jackson's Lines revealed an irregular focus of stress during cervical intersegmental motion. There was a right lateral listing of the cervical and lumbar spines. Dr. Strehlow recommended a magnetic resonance imaging (MRI) scan of the lower cervical and/or lower lumbar spines for evaluation of the regional soft tissue structures if significant clinical signs and symptoms were warranted. He also recommended a clinical correlation with the postural/biomechanical adaptations noted above, which he stated was most likely the result of muscle spasm following a recent traumatic event.

In a September 30, 2004 letter, Dr. Purcell found that appellant sustained a vertebral subluxation. In an August 12, 2004 electromyogram (EMG) report, Dr. Purcell found no high muscle tension, which may have been caused by appellant's "bracing" due to spinal subluxation or other spinal conditions. Muscle tension was moderately high at T1, normal at C2 and C6 and below normal at C2, C4, T3, T5, T7, T9, T11, L1, L3 and L5 due to the presence of a palpable muscle spasm or appellant's complaints of problems and muscles that may have stopped firing due to fatigue, muscles that were relaxed due to a lack of problems with the spine, too much tissue between the measuring electrodes and muscles and use of muscle relaxing drugs or transcutaneous electrical nerve stimulation unit.

Dr. Strehlow annotated the September 8, 2004 x-ray report to reflect that all signs of subluxation were present. In an October 15, 2004 report, Dr. Raji Venkat, a Board-certified internist, provided a history of the August 6, 2004 incident and appellant's medical treatment. Dr. Venkat reported findings on physical examination and diagnosed unspecified backache, depressive disorder which was not elsewhere classified and esophageal reflux.

In an October 11, 2004 MRI scan report, Dr. George D. Momii, a Board-certified radiologist, found degenerative spondylosis and disc disease changes at C5-6 and C6-7 and a small disc protrusion posteriorly, but no spinal stenosis or neural impingement. In another MRI scan report of the same, Dr. Momii found degenerative disc disease changes from L3 through S1 with associated disc bulges. He also found a small disc protrusion at L4-5 with minor thecal sac effacement and slight proximal lateral recess narrowing on the left. No neural impingement was detected.

Dr. Purcell's August 23, 2004 treatment note recommended that appellant have one massage per week for two to four weeks to help the muscles in her spine. He stated that this was from a work-related lifting injury she sustained.

An unsigned report dated November 3, 2004 from Dr. Derek A. Duke, a Board-certified neurosurgeon, provided a history of the August 6, 2004 incident and appellant's symptoms, medical treatment and family and social background. He also provided his findings on MRI scan testing and physical examination. Appellant was diagnosed as having lumbar and cervical degenerative disc disease and a positive Patrick's maneuver on the left, which was indicative of probable hip pathology. He recommended physical therapy for the neck and back and an EMG.

By decision dated November 18, 2004, the Office found the medical evidence of record insufficient to establish that appellant sustained a back condition causally related to the August 6, 2004 incident.

In a January 18, 2005 letter, appellant requested reconsideration. She submitted letters from coworkers who addressed the August 6, 2004 incident.

In a February 16, 2005 report, Lori Skophammer, a physical therapist, found that appellant presented with left hip bursitis and muscular pain which caused functional deficits and weakness. Ms. Skophammer's February 17, 18, 22, 23 and 28 2005 treatment notes indicated that appellant was doing well, but that she still experienced pain.

In an April 25, 2005 decision, the Office denied modification of the November 18, 2004 decision, findings that the medical evidence submitted was insufficient to establish that she sustained a back condition causally related to the August 6, 2004 incident.

Appellant submitted a June 29, 2005 unsigned operative report from Dr. Duke, who noted that she underwent a bilateral laminectomy at L4 and L5. Her postoperative diagnosis was lumbar spinal stenosis and neurogenic claudication.

By letter dated July 19, 2005, appellant requested reconsideration of the Office's April 25, 2005 decision. She submitted Dr. Venkat's May 23, 2005 prescription note, which found that she had back problems that were aggravated by moving heaving objects at work. Dr. Venkat indicated that she had difficulty moving around and performing her job secondary to this activity.

In a February 22, 2005 unsigned treatment note, Dr. Duke found that appellant had lateral recess stenosis at L4-5 bilaterally, which affected the L5 nerve root. Appellant consented to undergo a cortisone injection at L4 and L5. Dr. Duke recommended an L4-5 laminectomy with

an L5 foraminotomy if the injection did not help her pain. An unsigned May 24, 2005 treatment note from Dr. Duke indicated that appellant's films demonstrated lateral recess stenosis at L4-5 and that she had consented to a L4-5 bilateral laminectomy with a L5 foraminotomy. Dr. Duke's July 5, 2005 unsigned treatment note revealed that appellant was doing well after her surgery, that she was neurologically intact and that her incision was healing well.

By decision dated July 28, 2005, the Office denied modification of the April 25, 2005 decision. The Office found that appellant failed to submit sufficient evidence establishing that she sustained an injury causally related to the August 6, 2004 incident.

LEGAL PRECEDENT

An employee seeking benefits under the Act[1] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act; that the claim was filed within applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[3]

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 or exposure, which is alleged to have occurred.[4] In order to meet her burden of proof to establish the fact that she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that she actually experienced the employment injury or exposure at the time, place and in the manner alleged.

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[5] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *See Irene St. John*, 50 ECAB 521 (1999); *Michael I. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 2.

[4] *See also*, Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803(2)(a) (June 1995).

[5] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

identified factors.[6] The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.[7]

ANALYSIS

The Office accepted that on August 6, 2004 appellant was moving heavy articles while in the performance of duty. The Board finds, however, that the medical evidence of record is insufficient to establish that the accepted incident caused a back injury.

Dr. Purcell, a chiropractor, diagnosed appellant as having a subluxation as demonstrated by x-ray. As Dr. Purcell diagnosed subluxation as demonstrated by x-ray, the Board finds that he is a physician under the Act.[8] However, neither he nor Dr. Strehlow identified the level at which the diagnosed condition existed. Further, they did not address the issue of whether the diagnosed subluxation was caused by the August 6, 2004 employment incident. The Board finds therefore that Dr. Purcell's opinion is of diminished probative value and insufficient to establish appellant's claim. In an August 10, 2004 treatment note, Dr. Purcell restricted lifting due to muscles spasms in appellant's lower back region, but failed to address whether her spinal subluxation caused by the accepted employment incident. On August 23, 2004 Dr. Purcell recommended a weekly massage for the muscles in appellant's spine and stated that this was due to her work-related lifting injury. He failed to provide any rationale explaining how appellant's diagnosed spinal subluxation was caused by the accepted August 6, 2004 employment incident. Dr. Purcell's August 27, 2004 report which indicated with an affirmative mark that the diagnosed conditions of "739.1, 739.2, 739.3, 723.1, 724.2, 729.1, 846.0 and 724.3" were caused by the August 6, 2004 employment incident. This report did not identify or otherwise translates the codes to explain the conditions being addressed. Moreover Dr. Purcell did not provide any medical rationale explaining how or why appellant's diagnosed conditions were caused by the accepted employment incident. These reports are insufficient to establish her claim. A report which only addresses causal relationship with a check mark without more by way of medical rationale explaining how the incident caused the injury, is insufficient to establish causal relationship and is of diminished probative value.[9]

Dr. Venkat found that appellant had unspecified backache, depressive disorder which was not elsewhere classified and esophageal reflux. He did not address whether the diagnosed conditions were caused by the August 6, 2004 employment incident. The Board finds that Dr. Venkat's opinion is of diminished probative value.

---

[6] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[7] *Charles E. Evans*, 48 ECAB 692 (1997).

[8] 5 U.S.C. § 8101(2); section 8101(2) of the Act provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 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 and subject to regulation by the Secretary. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[9] *See Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

In a May 23, 2005 prescription note, Dr. Venkat opined that appellant's back problems were caused by a work-related lifting injury. However, he failed to provide a well-rationalized statement on the issue of causal relationship. The note did not specify the August 6, 2004 lifting incident or provide an opinion as to why appellant's back condition was caused or aggravated by the accepted employment incident.

Dr. Duke's reports and treatment notes which addressed appellant's back problems and surgery have no probative value because they are not signed by the physician.[10] As the reports and treatment notes lack proper identification, the Board finds that they do not constitute probative medical evidence sufficient to establish appellant's burden of proof.[11]

The report and treatment notes of Ms. Skophammer, a physical therapist, do not constitute probative medical evidence as a physical therapist is not considered a "physician" under the Act.[12]

The Board finds there is insufficient rationalized medical evidence of record to establish that appellant sustained a back injury in the performance of duty on August 6, 2004. The Board finds that she has failed to meet her burden of proof.

CONCLUSION

As appellant did not provide the necessary medical evidence to establish that she sustained an injury caused by the August 6, 2004 employment incident, the Board finds that she has failed to satisfy her burden of proof in this case.

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

[11] *Merton J. Sills, supra* note 8.

[12] 5 U.S.C. §§ 8101-8193; 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).

ORDER

IT IS HEREBY ORDERED THAT the July 28 and April 25, 2005 and November 18, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 7, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board