United States Department of Labor
Employees' Compensation Appeals Board

I.P., Appellant	)	
and	)	**Docket No. 06-1652**
	)	**Issued: November 30, 2006**
DEPARTMENT OF THE NAVY,	)	
SAN FRANCISCO NAVAL SHIPYARD,	)	
San Francisco, CA, Employer	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 14, 2006 appellant filed a timely appeal of a September 12, 2005 merit decision of the Office of Workers' Compensation Programs, finding that his current back condition was not causally related to his September 15, 1959 employment-related injuries and a November 16, 2005 nonmerit decision, denying his request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant's current back condition and resultant disability are causally related to his accepted September 15, 1959 employment-related injuries; and (2) whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On June 12, 2005 appellant, then a 67-year-old boilermaker, filed a claim alleging that on September 15, 1959 he sustained a back injury while in the performance of duty. He stated that a sailor dropped a valve from 10 feet above onto his back and that he experienced continuing back pain. Appellant explained that the delay in filing his claim was due to a lack of knowledge.[1]

In a May 24, 2005 letter, appellant described what occurred on September 15, 1959 and the medical treatment he received from 1961 to the present. He stated that in 1961 he was in too much pain to complete a claim for compensation. Appellant related that he had no income from 1962 through March 1968. He was released to return to work as a taxicab driver by his attending physician. Appellant indicated that on February 18, 1975 he had trouble breathing and his pain medication stopped working, resulting in his total disability for work.

Appellant submitted medical evidence covering the period February 17, 1959 to July 27, 1984 which indicated, among other things, that he sustained a contusion and abrasion of the back and that he eventually returned to full-duty work.

The employing establishment controverted appellant's claim, stating that his current back condition was not causally related to the September 15, 1959 incident but due to a 1974 motor vehicle accident he was involved in while driving a taxicab after being laid off from work in either 1973 or 1974 due to a base closure.

By letter dated August 2, 2005, the Office advised appellant that it had received his claim which he failed to provide notice of a traumatic injury sustained on September 15, 1959. It further advised him that the evidence submitted was insufficient to establish his claim. The Office stated that appellant failed to provide timely notification of the alleged work injury, to explain how his current back condition was related to the September 15, 1959 incident and to submit a physician's opinion regarding the causal relationship between his current condition and the alleged work injury. It requested that he explain why he did not provide written notice of the injury to his supervisor within 30 days of the injury. The Office advised appellant about the factual evidence he needed to submit regarding the September 15, 1959 incident, the 1974 taxi accident and his receipt of state disability benefits for his back condition to establish his claim. The Office only accepted that appellant sustained a back contusion on September 15, 1959 and stated that he was not entitled to continuing benefits because the medical records indicated that this condition had resolved. It requested that he submit rationalized medical evidence establishing that his current back condition was causally related to the employment-related back contusion.

[1] The Board notes that appellant's June 12, 2005 claim was for an occupational disease. However, the Office treated his claim as a traumatic injury as opposed to an occupational disease. The primary difference between a traumatic injury and an occupational disease is that a traumatic injury must occur within a single work shift while an occupational disease occurs over more than one work shift. *See* 20 C.F.R. §§ 10.5(ee), 10.5(q).

Appellant submitted an August 17, 2005 x-ray report of Dr. Darrel A. Robbins, a Board-certified internist, which indicated that appellant, had degenerative disc disease from L3 to L5 and a sclerotic lesion in the L4-5 intervertebral space with extension over the L5 anterior vertebral body that was not well seen on the frontal view of the x-ray. Dr. Robbins stated that it could represent disc calcification extending into a Schmorl's node, sequela of prior trauma or instrumentation or an artifact. He also stated that no subluxations were found on x-ray.

An August 19, 2005 report of Dr. Brian Balbon, a chiropractor, indicated that appellant was suffering from chronic low back complaints and that he had occasional flare-ups since 1959. He diagnosed a sprain/strain and facet syndrome. Dr. Balbon provided a history of the 1959 employment injury and stated that this history along with appellant's presenting complaints and objective findings on x-ray and physical examination were consistent with the method of onset as described by appellant. He noted a December 1, 1965 statement of Dr. V.E. Kaufman, an employing establishment physician, that appellant's spine had gone through dramatic changes between 1959 and 1961. Dr. Balbon opined that appellant's current back condition was at least 70 percent due to the 1959 employment-related injury.

By letter dated August 25 2005, appellant stated that he reported his injury to his immediate supervisor who was present on the ship where the injury occurred and at the employing establishment's infirmary where he was taken by ambulance on September 15, 1959. Appellant further stated that he sustained a contusion, he was rendered unconscious by the accepted employment injury and he experienced continuing pain. Appellant self-medicated and noted that from 1961 to 1968 he had no medical insurance because he was unable to work and that he relied on neighborhood doctors and free clinics for medication for his back pain. Appellant denied that his current back pain was caused by the 1974 taxi accident. He described this incident and noted that he declined medical treatment. Appellant related that he became disabled due to stress from his back pain, continual ringing in his ears as a result of work-related noise exposure and a lung condition due to work-related asbestos exposure. He concluded that he was disabled due to back pain from 1961 until 1975 and that he had not been able to work since February 1975.

In a letter dated September 2, 2005, the employing establishment contended that the evidence of record failed to establish that appellant's current back condition was causally related to the September 15, 1959 employment injuries.

By decision dated September 12, 2005, the Office stated that appellant's claim had been accepted for medical treatment of a lumbar contusion and abrasion only for the period September 15 through 17, 1959. The Office, however, denied his claim for medical and wage-loss compensation for a degenerative low back condition as the medical evidence of record was insufficient to establish that this condition was causally related to his September 15, 1959 employment injuries.

By letter dated October 9, 2005, appellant requested a "hearing based on a review of the written evidence" by an Office hearing representative.

In a decision dated November 16, 2005, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing. It explained that he was not entitled to a hearing or review of the written record as a matter of right because his injury occurred prior to July 4, 1966. The Branch of Hearings and Review considered the request, nonetheless and denied a discretionary hearing on the grounds that appellant could equally well address the issue in the case by requesting reconsideration and submitting additional evidence establishing that the claimed back condition occurring after September 17, 1959 was causally related to his September 15, 1959 employment injuries.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his or her claim, including the fact that an injury was sustained 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.[3] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.[4]

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,[5] must be one of reasonable medical certainty[6] 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.[7] The mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the condition became apparent during a period of employment, nor the belief of appellant that the condition was caused or aggravated by employment conditions is sufficient to establish causal relation.[8]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a back contusion and abrasion on September 15, 1959, which resolved when he returned to full-duty work on September 17, 1959.

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Jerry D. Osterman*, 46 ECAB 500 (1995); *see also Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[4] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[5] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[6] *See Morris Scanlon*, 11 ECAB 384-85 (1960).

[7] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[8] *Manuel Garcia*, 37 ECAB 767, 773 (1986); *Juanita C. Rogers*, 34 ECAB 544, 546 (1983).

Appellant alleged that he continued to suffer from his September 15, 1959 employment-related back injuries after September 17, 1959. However, the Board finds that he has not presented any rationalized medical evidence establishing that his current back condition is causally related to his September 15, 1959 employment injuries.

Dr. Robbins' August 17, 2005 x-ray report stated that appellant developed degenerative disc disease from L3 to L5 and a sclerotic lesion in the L4-5 intervertebral space with extension over the L5 anterior vertebral body. He noted that no subluxations were found on x-ray. Dr. Robbins did not provide an opinion on whether appellant's current back conditions were causally related to the September 15, 1959 employment-related injuries. 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.[9]

Dr. Balbon, a chiropractor, diagnosed a back sprain/strain and facet syndrome. He opined that, based on the history of the September 15, 1959 employment-related injuries, appellant's complaints of chronic low back pain and objective findings on x-ray and physical examination, at least 70 percent of appellant's current back condition was due to the accepted employment injuries. Section 8101(2) of the Act provides that chiropractors are considered physicians 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.[10] Section 10.311 of the implementing federal regulations provides:

> "(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. [The Office] will not necessarily require submittal of the x-ray or a report of the x-ray, but the report must be available for submittal on request."[11]

Thus, where x-rays do not demonstrate a subluxation, a chiropractor is not considered a physician and his or her reports cannot be considered as competent medical evidence under the Act.[12] Dr. Balbon did not diagnose a subluxation as demonstrated by x-ray to exist. Therefore, he is not a physician under the Act and his opinion on causal relationship is, accordingly, of no probative value.

Appellant failed to submit rationalized medical evidence establishing that his current back condition is causally related to his September 15, 1959 employment-related back contusion and abrasion. The Board finds that he has not met his burden of proof.

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[9] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[10] 5 U.S.C. § 8101(2).

[11] 20 C.F.R. § 10.311.

[12] *See Susan M. Herman*, 35 ECAB 669 (1984).

LEGAL PRECEDENT -- ISSUE 2

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings or review the written record in certain circumstances where no legal provision was made for such hearings or review and that the Office must exercise this discretionary authority in deciding whether to grant a hearing or review.[13] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request or review of the written record on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing or review.[14]

ANALYSIS -- ISSUE 2

In this case, appellant's claim involves an injury sustained prior to the enactment of the 1966 amendments to the Act that provided the right to a hearing and a review of the written record. He is, therefore, not entitled to a hearing as a matter of right under the Act.[15] The Office, nonetheless, has discretionary authority to grant a hearing. The Board finds that the Office properly exercised its discretionary authority in this case. In its November 16, 2005 decision, the Office's Branch of Hearings and Review considered appellant's request and denied a discretionary hearing on the grounds that appellant could equally well address the issue in his case by requesting reconsideration. As appellant can address the issue in this case by submitting to the Office relevant medical evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretionary authority in denying appellant's request for a review of the written record and properly advised him of the reasons for its decision.[16]

CONCLUSION

The Board finds that appellant has failed to establish that his current back condition and disability are causally related to his accepted September 15, 1959 employment-related injuries. The Board further finds that the Office properly denied appellant's request for an oral hearing.

[13] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[14] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[15] *See* Act of July 4, 1966, 80 Stat. 252 (conferring the right to an Office hearing to claimants who sustained their employment injuries on or after the date of enactment, July 4, 1966).

[16] The Board has held that a denial of a claimant's request for hearing on the grounds that the claim could be considered further upon the submission of evidence with a request for reconsideration is a proper exercise of the Office's discretionary authority. *Jeff Micono*, 39 ECAB 617 (1988); *Henry Moreno*, 39 ECAB 475 (1988).

ORDER

IT IS HEREBY ORDERED THAT the November 16 and September 12, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 30, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board