United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 06-1810**
	)	**Issued: August 10, 2007**
DEPARTMENT OF THE ARMY, CORPUS CHRISTI ARMY DEPOT, Corpus Christi, TX, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 2, 2006 appellant filed a timely appeal from a December 22, 2005 decision of the Office of Workers' Compensation Programs that denied his claim for a low back condition and a July 13, 2006 decision that denied his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a low back condition causally related to factors of his federal employment; and (2) whether the Office properly denied his request to reopen his case for further merit review.

FACTUAL HISTORY

On November 4, 2005 appellant, then a 51-year-old instrument mechanic, filed an occupational disease claim alleging a low back condition which he attributed to his federal employment. He listed the sitting, stooping, lifting and bending required in his position.

Appellant stopped work from February 17 to April 2, 2004. He noted that he first became aware of his condition and its relationship to his employment on February 14, 2004.

By letter dated November 10, 2005, the Office advised appellant to submit additional information in support of his claim. It requested that he provide a medical report from an attending physician that provided a diagnosis of his condition and a statement as to the causal relationship with his federal employment.

Appellant submitted a May 14, 2004 report from Dr. Anthony R. Kunce, a chiropractor, who noted that appellant was initially evaluated on February 17, 2004 for treatment of injuries sustained in a motor vehicle accident on February 13, 2004. Dr. Kunce diagnosed sprains and strains of the cervical, thoracic and lumbar spine with post-traumatic cephalgia. He stated that appellant was treated until April 2, 2004, when he lost contact with him. A March 23, 2004 dispensary note reflected that appellant was under medical care due to an automobile accident of February 13, 2004. Lumbar x-rays were obtained by Dr. Kenneth D. Matejka, a Board-certified radiologist, on April 12, 2004, who noted degenerative facet changes with small osteophytes at all lumbar disc spaces without evidence of fracture or alignment abnormality. A magnetic resonance imaging (MRI) scan of the lumbar spine, obtained by a Dr. Karl T. Fan on April 20, 2004 diagnosed a central annulus tear at L5-S1 with narrowing of the anterior epidural space. Foraminal narrowing was also identified at this level. On May 14 and June 11, 2004 Dr. John M. Borkowski, an orthopedic surgeon, performed right L5 epidural injections for neuropathic pain.

The employing establishment controverted the claim. Appellant's supervisor noted that appellant did not describe any back problem until he submitted the occupational disease claim. He stated that appellant was off work from February 17 through April 2, 2004 following a February 13, 2004 automobile accident.

In a December 22, 2005 decision, the Office denied appellant's claim. It found that the medical evidence of record was insufficient to establish that his low back condition was employment related.

On June 12, 2006 appellant requested reconsideration. He submitted additional MRI scans obtained by Dr. Stephen Pomeranz, a Board-certified radiologist, on January 18 and May 18, 2006. Dr. Pomeranz noted multilevel lumbar disc displacement and an L5-S1 central protrusion. In treatment notes dated May 8 through 26, 2006, Dr. Borkowski addressed the diagnostic tests and noted that appellant still experienced low back pain. He noted that surgery was an option for treatment of the annular tear. Dr. Borkowski also noted that appellant was seeking a medical retirement.

By decision dated July 13, 2006, the Office denied reconsideration on the grounds that appellant did not submit new and relevant medical evidence in support of his claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his claim, including the fact that the individual is an employee of the United States, that an injury was sustained in the performance of duty as

alleged, and that any disability or specific conditions for which compensation is claimed is causally related to his federal employment.[1] An award of compensation may not be based on surmise, conjecture, speculation or upon a claimant's own belief that there is a causal relationship between his claimed injury and his employment.[2] Although work activities may produce symptoms revelatory of an underlying condition, to establish entitlement to compensation, a claimant must submit probative medical evidence based on an accurate medical history which attributes the conditions claimed to his employment duties.[3] Medical opinions which are based on an incomplete or inaccurate factual background are of diminished probative value.[4]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that his low back condition is causally related to his federal employment as a mechanic. He has not submitted medical evidence sufficient to establish that his low back condition, diagnosed as an L5-S1 disc, was caused or aggravated by his federal employment.

The record reflects that appellant filed his claim on November 4, 2005, claiming disability due to his low back condition as of February 17, 2004. The medical evidence reflects, however, that appellant was involved in a nonemployment-related automobile accident and first sought medical treatment from a chiropractor on February 17, 2004. The reports of Dr. Kunce recorded a history of a February 13, 2004 automobile accident and listed sprains and strains of the cervical, thoracic and lumbar spine. It is noted that the Act includes chiropractors as a "physician" as defined at section 8101(2) 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.[5] As the evidence does not reflect that Dr. Kunce obtained x-rays of the spine or diagnosed spinal subluxations, his reports do not constitute probative medical evidence. However, they may still be considered as they pertain to the history of injury provided by the claimant of an automobile accident on February 13, 2004, immediately preceding the period of claimed disability.

The medical evidence reflects that diagnostic studies, including x-rays and MRIs, were obtained of appellant's lumbar spine. However, as diagnostic studies, the radiologists of record did not provide any opinion on the causal relationship of the diagnosed conditions to appellant's federal employment. Therefore, these reports are of limited probative value on the issue of causal relationship. Dr. Borkowski, an orthopedic surgeon, performed epidural injections of the right L5 for neuropathic pain but did not address the issue of causal relationship. The medical evidence submitted by appellant failed to provide any history of his work activities as a

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

[2] *See Donald W. Long*, 41 ECAB 142 (1989).

[3] *See Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

[4] *See Daniel J. Overfield*, 42 ECAB 718 (1991).

[5] 5 U.S.C. § 8101(2). *See Bruce Chameroy*, 42 ECAB 121 (1990).

mechanic or relate his low back symptoms to his federal employment. Rather, the medical evidence records a nonemployment-related automobile accident of February 13, 2004, following which appellant sought medical treatment for his low back.

LEGAL PRECEDENT -- ISSUE 2

Under the implementing federal regulations at section 10.606(b)(2), a claimant may obtain review of the merits of a case by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.[6] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[7] When reviewing a decision of the Office denying further merit review, it is the function of the Board to determine whether the Office properly applied the standards set forth in the federal regulations to the claimant's application and any evidence submitted in support thereof.[8]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly refused to reopen appellant's claim for further review of the merits. In support of his request for reconsideration, appellant submitted additional diagnostic studies pertaining to his low back. However, as noted, these reports do not constitute relevant new medical evidence as they do not address the underlying issue in this case, *i.e.*, whether appellant's federal employment caused or contributed to his condition. As Dr. Pomeranz did not address causal relationship, the diagnostic studies of January 18 and May 18, 2006 were not sufficient to require further merit review. Similarly, the 2006 treatment notes from Dr. Borkowski reviewed the diagnostic studies and indicated that appellant experienced chronic low back pain. His comment that appellant was seeking a medical retirement from his employer is not relevant to the underlying issue of causal relationship. The noted surgical option as a treatment recommendation was not a relevant explanation of the issue of causal relationship. The evidence submitted by appellant was not sufficient to require the Office to reopen his case for further merit review.

CONCLUSION

The Board finds that appellant did not establish that his low back condition was caused or contributed to by his federal employment. The Office properly denied his request for further merit review.

[6] 20 C.F.R. § 10.606(b).

[7] 20 C.F.R. § 10.608(b).

[8] *See Annette Louise*, 54 ECAB 783 (2003).

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2006 and December 22, 2005 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: August 10, 2007
Washington, DC

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

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

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