United States Department of Labor
Employees' Compensation Appeals Board

T.P., Appellant	)	
and	)	**Docket No. 08-842**
	)	**Issued: December 4, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Phoenixville, PA, Employer	)	

Appearances:
Aaron B. Aumiller, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 28, 2008 appellant, through counsel, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated August 9, 2007 denying his claim on the grounds that he failed to establish fact of injury. 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 established that he sustained a back injury in the performance of duty on June 13, 2005.

FACTUAL HISTORY

On June 13, 2005 appellant, then a 42-year-old city carrier, filed a traumatic injury claim alleging that he injured his lower back on that date while delivering a heavy parcel. No medical evidence was submitted with the claim.

On September 27, 2006 the Office received a bill from Healthcare Recoveries for chiropractic treatment provided to appellant for the period June 15, 2005 to June 30, 2006.

By letter dated September 29, 2006, the Office informed appellant that the information received was insufficient to support his claim. Appellant was advised as to the type of medical and factual evidence to submit and given 30 days to provide the requested information. He did not respond.

By decision dated October 30, 2006, the Office denied appellant's claim on the grounds that fact of injury was not established as there was no medical evidence diagnosing a condition due to the accepted June 13, 2005 incident.

Subsequent to the decision, the Office received additional medical evidence including a May 31, 2006 magnetic resonance imaging (MRI) scan; a November 30, 2006 report by Dr. Randy E. Yucha, a chiropractor; chiropractic treatment notes; and a May 30, 2006 x-ray interpretation by Dr. John Egan, an osteopath.

Dr. Egan diagnosed L3-4, L4-5 and L5-S5 central disc protrusions, lumbar spine facet degenerative change and "no significant encroachment on the exiting nerve roots" in the May 30, 2006 x-ray interpretation.

On November 30, 2006 Dr. Yucha diagnosed lumbago, lumbar strain/sprain and L4-5 subluxation. An x-ray interpretation revealed "spinous rotational deviations present and a slight concavity present in low back" with "[n]o other soft tissue or osseous pathological processes." He opined that appellant had sustained an injury on June 13, 2005 which had been aggravated by his work activities.

On November 28, 2006 appellant requested reconsideration.

In a February 20, 2007 report, Dr. Kevin F. Hanley, a second-opinion Board-certified orthopedic surgeon, diagnosed symptomatic lumbosacral degenerative disc disease. He noted the injury history and reviewed the medical records. A physical examination reveals "some low grades discomfort across the spinal axis" and no sensory loss. Dr. Hanley opined that "it is entirely possible that the June 13, 2005 work-related incident could have aggravated the underlying degenerative process," but he found that "the absence of any medical data from that time" makes it "difficult to say for sure that that is the case."

By decision dated March 2, 2007, the Office denied appellant's request for modification of the denial of his claim. However, it modified the denial to reflect the fact that, although Dr. Hanley provided a diagnosis, the evidence was insufficient to support a causal relationship between the diagnosed condition and the June 13, 2005 employment incident.

On May 7, 2007 appellant requested reconsideration and submitted a March 7, 2007 note of treatment by Dr. Imran J. Ahmed, a chiropractor; treatment notes dated November 29 and December 20, 2006 and January 16, 2007 and reports dated September 13 and October 18, 2006 and April 4, 2007 by Dr. Steven J. Valentino, an osteopath.

In reports dated September 13 and October 18, 2006, Dr. Valentino stated that a physical examination revealed significantly limited range of motion, significant facet pain at L2 to S1 on extension and significant spasm upon palpation. In the September 13, 2006 report, he related appellant had back pain complaints at L2 to S1 and that the pain is "worse with activity or

prolonged posture and also seems to be worse at the end of the workday." Dr. Valentino also noted that appellant felt a pop in his low back after lifting something in 2005. He attributed appellant's pseudoarthrosis and accelerated degenerative disc disease to his one pack a day smoking habit. In both reports, Dr. Valentino diagnosed degenerative lumbar disc disease, facet syndrome and sciatica.

On November 29, 2006 Dr. Valentino diagnosed internal disc derangement with radiculitiis and sacroiliac dysfunction. A physical examination revealed tenderness upon palpation at the sacroiliac joint and normal range of motion. In treatment notes dated December 20, 2006 and January 16, 2007, Dr. Valentino reported that appellant had leg and low back pain which "increased with activity or prolonged posture and decreased with rest and recumbency."

Dr. Valentino, in an April 4, 2007 report, noted that appellant sustained an injury on June 13, 2005 while lifting a box out of a van. He noted a May 30, 2006 MRI scan revealed L3 to S1 central disc protrusions with facet degenerative changes. Dr. Valentino opined that appellant's employment injury aggravated his preexisting degenerative disc disease as appellant had been asymptomatic prior to the injury.

On March 7, 2007 Dr. Ahmed stated that he had been treating appellant for lumbar and thoracic strains on June 15 and 17, 2005.

By decision dated August 9, 2007, the Office vacated the March 2, 2007 decision and reinstated the October 30, 2006 decision "for the reason that the evidence of file does not meet the criteria supporting fact of injury."

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of proof to establish the essential elements of his claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[1]

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 which is alleged to have occurred.[2] Second, the employee must submit evidence, in the form of medical evidence, to establish that the

[1] *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

[2] *See T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

employment incident caused a personal injury.[3] The term injury as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[4] A report is of limited probative value on the issue of the causal relationship between an employment incident and a claimed medical condition if it contains an opinion on causal relationship which is equivocal in nature.[5]

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.[6] The Office's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[7]

ANALYSIS

On June 13, 2005 appellant filed a traumatic injury claim alleging that he sustained an injury to his back at work on that date while delivering a heavy package. The Office accepted that the employment incident occurred as alleged. The issue on appeal, therefore, is whether appellant submitted sufficient medical evidence to establish that his back condition was caused or aggravated by the employment incident.

The evidence reflects that appellant sought chiropractic treatment for the period July 15, 2005 to June 30, 2006. In a November 30, 2006 report, Dr. Yucha diagnosed lumbago, lumbar strain/sprain and L4-5 subluxation. He reported an x-ray interpretation revealed "spinous rotational deviations present and a slight concavity present in low back" with "[n]o other soft tissue or osseous pathological processes." Dr. Yucha opined that appellant's condition had sustained an injury on June 13, 2005 which had been aggravated by his work activities. The Board finds, however, that his report does not constitute probative medical evidence as he failed to indicate in his report that his findings of subluxations were demonstrated by x-rays to exist.[8]

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[3] *V.F.*, 58 ECAB ___ (Docket No. 06-1497, issued January 30, 2007); *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989); 20 C.F.R. § 10.5(a)(14).

[5] *K.W.*, 59 ECAB ___ (Docket No. 07-1669, issued December 13, 2007) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[6] 5 U.S.C. § 8101(2). *See Paul Foster*, 56 ECAB 208 (2004); *Jack B. Wood*, 40 ECAB 95, 109 (1988).

[7] 20 C.F.R. § 10.5(bb); *see also Mary A. Ceglia*, 55 ECAB 626 (2004); *Bruce Chameroy*, 42 ECAB 121 (1990).

[8] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician under section 8101(2) of the Act, which provides: (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 Paul Foste, supra* note 6.

On March 7, 2007 Dr. Ahmed stated that he had been treating appellant for lumbar and thoracic strains on June 15 and 17, 2005. As he did not diagnose a subluxation as demonstrated by x-ray, he is not considered a physician under the Act and his report is of no probative medical value.[9]

In reports dated September 13 and October 18, 2006, Dr. Valentino diagnosed degenerative lumbar disc disease, facet syndrome and sciatica. On November 29, 2006 he diagnosed internal disc derangement with radiculitiis and sacroiliac dysfunction. In treatment notes dated December 20, 2006 and January 16, 2007 and a September 13, 2006 report, Dr. Valentino reported that appellant had leg and low back pain increased with activity. In the September 13, 2006 report, he related that appellant felt a pop in his low back after lifting something in 2005. Dr. Valentino attributed appellant's pseudoarthrosis and accelerated degenerative disc disease to his one pack a day smoking habit. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[10] As Dr. Valentino provided no opinion supported by rationale as to the cause of appellant's condition, these reports are insufficient to support that appellant has a back condition caused or aggravated by the June 13, 2005 lifting injury.

Dr. Valentino, in an April 4, 2007 report, noted that appellant sustained an injury on June 13, 2005 while lifting a box out of a van. He noted that a May 30, 2006 MRI scan revealed L3 to S1 central disc protrusions with facet degenerative changes. Dr. Valentino opined that appellant's employment injury aggravated his preexisting degenerative disc disease as appellant had been asymptomatic prior to the injury. The Board has held that an opinion that a condition is causally related because the employee was asymptomatic before the injury is insufficient, without sufficient rationale, is insufficient to establish causal relationship.[11] Thus, as this report lacks the requisite rationale, the Board finds that it is insufficient to establish that appellant sustained a back condition due to the accepted June 13, 2005 employment injury.

The Office referred appellant to Dr. Hanley for a second opinion evaluation. In a February 20, 2007 report, Dr. Hanley diagnosed symptomatic lumbosacral degenerative disc disease. He noted the injury history and reviewed the medical records. A physical examination reveals "some low grades discomfort across the spinal axis" and no sensory loss. Dr. Hanley opined that "it is entirely possible that the June 13, 2005 work-related incident could have aggravated the underlying degenerative process," but that "the absence of any medical data from that time" makes it "difficult so say for sure that that is the case." The Board finds that the medical report of Dr. Hanley constitutes the weight of medical opinion. Dr. Hanley reviewed all the available and relevant medical evidence. Appellant initially sought treatment from a chiropractor for the period June 15, 2005 to June 30, 2006, as supported by a bill from Healthcare Recoveries. However, he did not submit the chiropractor report regarding his June 15 and 17, 2005 treatments to the Office. The record shows that appellant did not seek further medical treatment for his alleged injury until almost a year after June 13, 2005, the date appellant

[9] *Isabelle Mitchell*, 55 ECAB 623 (2004).

[10] *K.W.*, *supra* note 5.

[11] *Michael S. Mina*, 57 ECAB 379 (2006).

alleged he injured his back. The only medical evidence submitted by appellant begins with a May 30, 2006 x-ray interpretation which makes no mention of his employment injury. Dr. Hanley reviewed all the available medical evidence submitted by appellant and provided an opinion based on the medical reports before him. The Board finds that appellant has submitted insufficient medical evidence to establish that his back condition was caused or aggravated by factors of his federal employment.

There is no probative, rationalized medical evidence to establish that these conditions were caused or aggravated by factors of appellant's employment. Appellant has not met his burden of proof in establishing that he sustained a medical condition in the performance of duty causally related to factors of employment.

CONCLUSION

The Board finds that appellant has not established that he sustained a back injury in the performance of duty on June 13, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 9, 2007 is affirmed.

Issued: December 4, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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