United States Department of Labor
Employees' Compensation Appeals Board

W.K., Appellant	)	
and	)	**Docket No. 07-2350**
	)	**Issued: March 14, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Lindenhurst, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 17, 2007 appellant filed a timely appeal from a July 9, 2007 merit decision of the Office of Workers' Compensation Programs that denied his occupational disease claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he developed an occupational disease in the performance of duty.

FACTUAL HISTORY

This case has previously been before the Board. On November 22, 2005 appellant, then a 53-year-old mail carrier, filed an occupational disease claim alleging that he developed "work-related aches and pains" in the performance of duty. By decision dated March 1, 2006, the Office denied appellant's claim, finding that he submitted no medical evidence establishing that he sustained medical condition causally related to his employment. Appellant requested

reconsideration and submitted a February 17, 2006 report from Dr. Lawrence A. Opisso, a chiropractor, who diagnosed vertebral subluxation complex at C5-6, cervical disc displacement, shoulder joint stiffness and lumbago based on an August 27, 2005 magnetic resonance imaging (MRI) scan. By decision dated July 5, 2006, the Office denied modification of its March 1, 2006 decision. On December 22, 2006 the Board affirmed the Office's decisions, finding that Dr. Opisso's February 17, 2006 report was not competent medical evidence as the chiropractor based his cervical subluxation diagnosis on an MRI scan rather than x-ray testing as required by the Act.[1] The facts and history of the claim, as set forth in the Board's prior decision, are incorporated by reference.

On February 1, 2007 Dr. Opisso provided an addendum to his February 17, 2006 report. He noted that appellant's "primary diagnosis of vertebral subluxation complex at C5-6 was confirmed by cervical spine x-rays taken on September 6, 2006." Dr. Opisso explained that the x-ray results as well as his physical examination of appellant confirmed the diagnosis of cervical subluxation. He conducted a physical examination on January 30, 2007 and found that appellant exhibited continuing symptoms of palpatory tenderness and fixation at C5-6 as well as altered posture with increased dorsal kyphosis and cervical lordosis. Dr. Opisso found that appellant was totally disabled and opined that his condition was causally related to his employment as a mail carrier.

On May 21, 2007 appellant requested reconsideration of the Office's July 5, 2006 decision.

In a July 9, 2007 decision, the Office denied modification of its July 5, 2006 decision. The Office found that Dr. Opisso's February 1, 2007 report was not considered medical evidence from a physician because Dr. Opisso did not submit the x-ray film or x-ray report establishing a spinal subluxation.

LEGAL PRECEDENT

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 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 disabilities and/or specific conditions for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

[1] Docket No. 06-2057 (issued December 22, 2006).

[2] 5 U.S.C. §§ 8101-8193.

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

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

An occupational disease or injury is one caused by specified employment factors occurring over a longer period than a single shift or workday.[5] The test for determining whether appellant sustained a compensable occupational disease or injury is three-pronged. To establish the factual elements of the claim, appellant must submit: "(1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the factors identified by the claimant."[6]

The medical evidence required to establish causal relationship generally is rationalized medical opinion evidence. 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.[7] The physician's opinion must be based on a complete factual and medical background[8] and must be one of reasonable medical certainty[9] explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[10]

Section 8101(2) of the Act provides that the term "physician," as used therein, "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."[11] Office regulations provide that 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.[12]

ANALYSIS

The Board previously found that appellant engaged in the employment activities alleged. However, he has not presented sufficient medical evidence to establish that his diagnosed condition was causally related to his employment factors.

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[5] *D.D.*, 57 ECAB ___ (Docket No. 06-1315, issued September 14, 2006).

[6] *Michael R. Shaffer*, 55 ECAB 386, 389 (2004), *citing Lourdes Harris*, 45 ECAB 545 (1994); *Victor J. Woodhams*, *supra* note 4.

[7] *Conard Hightower*, 54 ECAB 796 (2003); *Leslie C. Moore*, 52 ECAB 132 (2000).

[8] *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

[9] *John W. Montoya*, 54 ECAB 306 (2003).

[10] *Judy C. Rogers*, 54 ECAB 693 (2003).

[11] 5 U.S.C. § 8101(2).

[12] 20 C.F.R. § 10.311(c).

On reconsideration appellant submitted a February 1, 2007 report from Dr. Opisso who noted conducting x-ray testing on September 6, 2006, which he advised confirmed a diagnosis of cervical subluxation. The February 1, 2007 report constitutes competent medical evidence pursuant to the Act.[13] Although the Office found that the February 1, 2007 report was not from a physician because Dr. Opisso did not submit the x-ray film or an x-ray report, this was error. The Office's regulations provide that a chiropractor may interpret his own x-rays to the same extent as any other physician and do not require that an x-ray film or x-ray report be submitted. Instead, the regulations provide that the x-ray or a report of the x-ray be made available for submittal upon request.[14] The record before the Board does not indicate that the Office ever requested an x-ray or x-ray report from Dr. Opisso.

Although Dr. Opisso's February 1, 2007 report is competent medical evidence, it is not sufficiently rationalized to establish a causal relationship between appellant's diagnosed cervical subluxation and his employment duties. The chiropractor did not identify any employment factors or explain how they caused or contributed to appellant's diagnosed subluxation. Moreover, as Dr. Opisso did not take x-rays for more than nine months after appellant filed his claim, this delay in testing also diminishes the probative value of the opinion offered.[15] As Dr. Opisso has not fully explained the processes by which appellant's work as a letter carrier would have caused or aggravated the diagnosed condition. His February 1, 2007 report is insufficient to establish appellant's claim. The Board finds that appellant has not established that his cervical subluxation was causally related to his employment.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he developed an occupational disease in the performance of duty.

[13] *See Linda L. Mendenhall*, 41 ECAB 532 (1990).

[14] 20 C.F.R. § 10.311(c).

[15] *See Mendenhall*, *supra* note 13.

ORDER

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

Issued: March 14, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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