United States Department of Labor
Employees' Compensation Appeals Board

D.D., Appellant	)	
and	)	**Docket No. 08-238**
	)	**Issued: May 14, 2008**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Tallahassee, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 31, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' March 29 and August 15, 2007 merit decisions denying her claim for a January 31, 2007 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on January 31, 2007.

FACTUAL HISTORY

On February 1, 2007 appellant, then a 46-year-old laundry supervisor, filed a traumatic injury claim alleging that she sustained an injury at work on January 31, 2007 when a vehicle backing out of a parking space struck the driver's side of the vehicle she was driving.

Appellant submitted a February 1, 2007 report in which Dr. William D.M. Atkinson, III, an attending chiropractor, stated that she reported neck, left arm, left leg and back symptoms after her vehicle was struck by another vehicle on January 31, 2007. Dr. Atkinson provided a "working diagnosis" of cervical subluxation complex with associated cervicogenic headache and spasm, lumbar joint dysfunction and pain, cervicobrachial neuralgia and lumbar radiculitis. He indicated that cervical x-rays needed to be obtained and that prior lumbar x-rays should be reviewed. On February 2, 2002 Dr. Atkinson indicated that the x-rays of appellant's cervical spine showed "mild straightening of the cervical lordosis" and well-maintained disc height and vertebral body height.[1]

On February 22, 2007 the Office requested that appellant submit additional evidence in support of her claim. Appellant submitted reports detailing her regular treatment sessions with Dr. Atkinson. None of these reports contained a diagnosis of a spinal subluxation.

In a March 29, 2007 decision, the Office denied appellant's claim that she sustained an injury in the performance of duty on January 31, 2007. The Office found that appellant established the existence of an employment incident when her vehicle was struck by another vehicle on January 31, 2007, but that she did not submit sufficient medical evidence to establish that she sustained a medical condition due to the established employment incident.[2]

Appellant requested a review of the written record by an Office hearing representative. She suggested that the January 31, 2007 incident aggravated a prior employment-related back injury.[3]

Appellant continued to submit reports of her treatment sessions with Dr. Atkinson which were similar to the previously submitted reports. On March 9, 2007 Dr. Atkinson stated that appellant did not have "a subluxation of the occipito-altanto-axial motor units" and indicated that lumbar x-rays showed well-maintained disc height and vertebral body height.

In an April 9, 2007 report, Dr. Kirk J. Mauro, an attending physician Board-certified in physical medicine and rehabilitation, stated that appellant reported that a vehicle backed into her vehicle at a high rate of speed on January 31, 2007. Appellant did not strike her head or lose consciousness, was able to exit her vehicle independently and did not go to the hospital.[4] Dr. Mauro stated that appellant had a prior medical history which was significant for prior cervical, thoracic and lumbar injuries, including an unspecified work injury in 2004 and another work injury in 2005 which led to L5-S1 dysesthesias and the need for an L5 discectomy. He indicated that on examination appellant complained of tenderness in the cervical and thoracic

[1] Dr. Atkinson indicated that palpation of the cervical spine revealed subluxation complex.

[2] The Office indicated that the reports of appellant's chiropractor did not constitute probative medical evidence.

[3] It is not clear from the record whether the Office has accepted that appellant sustained prior employment injuries. However, the subject matter of the present appeal is limited to the issue of whether appellant sustained a new employment injury on January 31, 2007.

[4] Dr. Mauro stated, "She believes she may have jammed her left hand on the steering wheel, she is somewhat uncertain."

areas as well as diffuse complaints of dysesthesia distal to the left wrist. Motor examination of the extremities yielded 4/5 results and Tinel's sign was positive. In the impression section, Dr. Mauro stated, "Motor vehicle accident, occurring January 31, 2007, with exacerbation versus aggravation to preexisting condition, involving the cervical, thoracic and lumbar spine, with associated left upper extremity dysesthesias." Dr. Mauro stated that due to the dysesthesias appellant needed electromyogram testing on the left and indicated that carpal tunnel syndrome needed to be ruled out. He stated, "The patient has multiple preexisting conditions and comorbidities. It is unclear, at this time, whether this is an exacerbation versus an aggravation, due to her preexisting conditions."

In a March 8, 2007 report, Dr. Joshua Fuhrmeister, an attending Board-certified neurologist, discussed appellant's prior medical history indicating that she reported sustaining an injury at work which caused an L5 radiculopathy. He stated that appellant reported that her vehicle was struck by another vehicle on January 31, 2007 and that she developed neck stiffness and numbness and weakness of her left foot and left hand. Dr. Fuhrmeister indicated that on examination there were no strength or reflex deficits of the extremities, that lumbar flexion and extension was slightly limited, and that numbness was reported to light touch of the left foot and left hand. He stated, "For pain most likely secondary to lumbar and cervical sprain/strain injuries, I recommended continuation of chiropractic treatment, Lidoderm for pain and Lunesta for sleep."

In an August 15, 2007 decision, the Office hearing representative affirmed the Office's March 29, 2007 decision.[5]

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[6] has the burden of establishing the essential elements of 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 disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[7] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[8]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the

[5] Appellant submitted additional evidence after the Office's decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[6] 5 U.S.C. §§ 8101-8193.

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

[8] *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990).

employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[9] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[10] 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.[11] A report is of limited probative 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.[12]

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.[13] 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.[14]

ANALYSIS

On February 1, 2007 appellant filed a traumatic injury claim alleging that she sustained an injury at work on January 31, 2007 when a vehicle backing out of a parking space struck the driver's side of the vehicle she was driving. The Board finds that appellant established the existence of an employment incident when her vehicle was struck by another vehicle on January 31, 2007, but that she did not submit sufficient medical evidence to establish that she sustained a medical condition due to the established employment incident.

Appellant submitted an April 9, 2007 report in which Dr. Mauro, an attending physician Board-certified in physical medicine and rehabilitation, stated that she reported that a vehicle backed into her vehicle on January 31, 2007. Dr. Mauro noted that appellant had a prior medical history which was significant for prior cervical, thoracic and lumbar injuries and indicated that on examination she complained of tenderness in the cervical and thoracic areas as well as diffuse complaints of dysesthesia distal to the left wrist.[15]

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[9] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[10] *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).

[11] *Elaine Pendleton*, *supra* note 7; 20 C.F.R. § 10.5(a)(14).

[12] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956) (finding that an opinion which is equivocal or speculative is of limited probative value regarding the issue of causal relationship).

[13] 5 U.S.C. § 8101(2). *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

[14] 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

[15] Motor examination of the extremities yielded 4/5 results and Tinel's sign was positive.

Dr. Mauro's report is of limited probative value on the main issue of the present case because he did not provide a clear opinion that appellant sustained an injury in the performance of duty on January 31, 2007. He provided an equivocal opinion on this matter because he explicitly indicated that he was unclear whether the events of January 31, 2007 contributed to the medical condition observed in April 2007 or whether the condition was solely due to a preexisting condition.[16] For example, in the impression section, Dr. Mauro stated, "Motor vehicle accident, occurring January 31, 2007, with exacerbation versus aggravation to preexisting condition, involving the cervical, thoracic and lumbar spine, with associated left upper extremity dysesthesias." In addition, he stated, "The patient has multiple preexisting conditions and comorbidities. It is unclear at this time, whether this is an exacerbation versus an aggravation, due to her preexisting conditions."[17]

On March 8, 2007 Dr. Fuhrmeister, an attending Board-certified neurologist, stated that appellant reported that her vehicle was struck by another vehicle on January 31, 2007 and complained of developing neck stiffness and numbness and weakness of her left foot and left hand. This report, however, is of limited probative value on the relevant issue of the present case in that it does not contain an opinion on causal relationship.[18] Dr. Fuhrmeister did not provide any indication that appellant sustained an injury on January 31, 2007.[19]

Appellant submitted numerous reports dated beginning in February 2007 of Dr. Atkinson, an attending chiropractor. However, these reports do not constitute probative medical evidence as Dr. Akinson did not indicate in any of his reports that his findings of subluxations were demonstrated by x-rays to exist.[20] On February 1, 2007 Dr. Atkinson provided a "working diagnosis" of cervical subluxation complex, but this diagnosis was made before x-rays were taken. He obtained x-rays the next day but these tests showed "mild straightening of the cervical lordosis" and well-maintained disc height and vertebral body height, findings which would not constitute subluxations under the Act.[21]

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[16] *See supra* note 12 and accompanying text regarding the limited probative value of equivocal opinions. It is not clear from the record whether the Office has accepted that appellant sustained prior employment injuries. The subject matter of the present appeal is limited to the issue of whether appellant sustained a new employment injury on January 31, 2007

[17] Moreover, Dr. Mauro also appeared unclear about the nature of appellant's diagnosed condition. He stated that due to the dysesthesias appellant needed electromyogram testing on the left and indicated that carpal tunnel syndrome needed to be ruled out.

[18] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[19] Dr. Fuhrmeister stated, "For pain most likely secondary to lumbar and cervical sprain/strain injuries, I recommended continuation of chiropractic treatment, Lidoderm for pain and Lunesta for sleep." He did not, however, specify the injuries to which he referred.

[20] *See supra* note 13 and accompanying text. Dr. Atkinson indicated that palpation of the cervical spine revealed subluxation complex, but as indicated above spinal subluxations must be demonstrated by x-rays.

[21] *See supra* note 14 and accompanying text.

Appellant did not submit sufficient medical evidence to establish that she sustained an injury in the performance of duty on January 31, 2007 and the Office properly denied her claim.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained an injury in the performance of duty on January 31, 2007.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 15 and March 29, 2007 decisions are affirmed.

Issued: May 14, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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