

FACTUAL HISTORY

The Office accepted that on October 24, 2004 appellant, then a 47-year-old mail handler, sustained a lumbar sprain/strain due to moving an all-purpose container filled with mail.¹ Appellant stopped work on October 24, 2004 and returned to his regular work the next day. He stopped work on October 27 to 29, November 10 to 14, December 12 to 13 and December 22 to 25, 2004, January 25 to 30, February 2 to 6 and 14 to 20 and March 19 to April 15, 2005 and claimed that these work stoppages constituted recurrences of total disability due to his October 24, 2004 employment injury.²

Appellant submitted several reports in which Dr. Shannon T. Herr, an attending chiropractor, diagnosed low back strain and indicated that he was disabled for various dates between January and February 2005. On February 24, 2005 the Office requested that appellant submit probative medical evidence in support of his claim. It advised appellant that Dr. Herr was not a physician as defined under the Federal Employees' Compensation Act because he did not diagnose a spinal subluxation as demonstrated by x-ray testing to exist.

Appellant submitted additional reports in which Dr. Herr diagnosed an acute exacerbation of low back pain and indicated that he was disabled for various dates between November 2004 and February 2005. In a March 28, 2005 form report, Dr. Gerald L. Peer, an attending Board-certified anesthesiologist, diagnosed lumbar spondylosis and indicated that appellant was partially disabled from March 18 to April 1, 2005.³ Appellant also submitted numerous medical reports detailing his medical condition after April 15, 2005.

In a February 3, 2006 decision, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained recurrences of total disability as claimed between April 15, 2005 and October 27, 2007 due to his October 24, 2004 employment injury. The Office found that Dr. Herr's reports did not constitute probative medical evidence because he did not diagnose a spinal subluxation as demonstrated by x-ray testing.

Appellant requested a hearing before an Office hearing representative. At the January 29, 2008 hearing, he discussed his history of employment-related back injuries. Appellant testified that Dr. David Hartman, an attending Board-certified internist, directed him to seek chiropractic care after his October 24, 2004 employment injury.⁴

¹ Appellant filed a recurrence of disability claim for this condition but the Office properly treated it as a claim for a new injury rather than a recurrence of disability because he implicated new employment factors. He suffered prior work-related back injuries, including injuries on May 8, 2002 and October 16, 2003.

² Appellant returned to his regular work after each of his work stoppages.

³ Dr. Peer restricted appellant from lifting more than 20 pounds, standing more than two hours and stooping or engaging in repetitive bending for more than one hour.

⁴ Appellant also submitted additional medical reports detailing his medical condition after April 15, 2005.

In a May 15, 2008 decision, the Office hearing representative affirmed the February 3, 2006 decision.

LEGAL PRECEDENT

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.⁵ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.⁶ Where no such rationale is present, medical evidence is of diminished probative value.⁷

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 testing to exist.⁸ 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.⁹

ANALYSIS

The Office accepted that appellant sustained a lumbar sprain on October 24, 2004 and he claimed that he sustained recurrences of total disability on October 27 to 29, November 10 to 14, December 12 to 13 and December 22 to 25, 2004, January 25 to 30, February 2 to 6 and 14 to 20 and March 19 to April 15, 2005 due to this injury.

Appellant submitted several reports in which Dr. Herr, an attending chiropractor, diagnosed low back strain or acute exacerbation of low back pain and indicated that he was disabled for various dates between November 2004 and February 2005. However, Dr. Herr did not diagnose in any of his reports that appellant had spinal subluxations as demonstrated by x-ray testing to exist. Therefore, he is not a physician under the Act and his reports do not constitute probative medical evidence.¹⁰ Appellant asserted Dr. Hartman, an attending Board-certified internist, directed him to seek chiropractic care after his October 24, 2004 employment injury, but there is no evidence in the record to support this contention. He also submitted a March 28,

⁵ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

⁶ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

⁷ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

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

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

¹⁰ See *supra* note 8 and accompanying text.

2005 report in which Dr. Peer, an attending Board-certified anesthesiologist, diagnosed lumbar spondylosis and indicated that he was disabled from March 18 to April 1, 2005. However, Dr. Peer did not provide any indication that this disability was related to the October 24, 2004 employment injury or any other employment-related cause.¹¹

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.¹² Appellant failed to submit rationalized medical evidence establishing that his claimed recurrences of disability were causally related to the accepted employment injury and, therefore, the Office properly denied his claims for compensation.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained recurrences of total disability for various dates between April 15, 2005 and October 27, 2007 due to his October 24, 2004 employment injury.

¹¹ It has not been accepted that appellant sustained employment-related lumbar spondylosis. Moreover, although Dr. Peer recommended work restrictions, it is unclear whether these restrictions would have prevented appellant from performing his regular work.

¹² See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 15, 2008 decision is affirmed.

Issued: January 15, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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