United States Department of Labor
Employees' Compensation Appeals Board

S.C., Appellant	)	
	)	**Docket No. 08-1965**
and	)	**Issued: May 19, 2009**
	)	
DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Quantico, VA, 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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 7, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs merit decision dated May 5, 2008 which affirmed the denial of her traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a back injury on March 10, 2006.

FACTUAL HISTORY

On March 16, 2006 appellant, then a 35-year-old criminal investigator, filed a CA-1 form traumatic injury claim alleging that on March 10, 2006 he sustained a low back injury due to wearing body armor and lifting combat load equipment during a drug interdiction operation. He did not stop work. In support of his claim, appellant submitted physical therapy notes from

March 29 to June 25, 2006, in which he sought treatment for discogenic low back pain with radicular symptoms.

By letter dated June 21, 2006, the Office requested additional information from appellant stating that the initial information submitted was insufficient to establish an injury on March 10, 2006. It asked appellant to submit a medical report from his treating physician containing a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to his claimed back injury. He did not respond.

In a decision dated August 4, 2006, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that his condition was caused by his employment duties.

On August 21, 2006 appellant requested an oral hearing, which was changed to a request for review of the written record. He submitted additional physical therapy notes. In reports dated August 10 and 17, 2006, Dr. Barrie J. Pilgrim, a chiropractor, noted treating appellant for injuries sustained at work on March 10, 2006. Appellant reported working for several hours wearing heavy gear and moving heavy objects when he experienced back pain extending to his thigh. Dr. Pilgrim diagnosed radiculopathy secondary to lumbar disc injury and recommended conservative care and further diagnostic evaluation.

In a decision dated February 2, 2007, the hearing representative affirmed the August 4, 2006 Office decision.

On January 24, 2008 appellant requested reconsideration. He submitted a magnetic resonance imaging (MRI) scan of the lumbar spine dated September 12, 2006, which revealed a large left sided L5-S1 focal disc herniation with extruded fragment. A September 26, 2006 report from Dr. Marc B. Danziger, a Board-certified orthopedic surgeon, addressed appellant's low back pain. Appellant reported working in Afghanistan where he picked up a piece of heavy equipment and injured his back. Dr. Danziger noted normal range of motion of the back. He recommended conservative treatment including therapeutic and strengthening exercises. On January 24, 2008 Dr. Danziger diagnosed lumbar herniated disc and noted with a checkmark "yes" that appellant's condition was caused or aggravated by his employment. Appellant submitted treatment notes from Dr. Jay C. Tyroler, a Board-certified internist, dated March 13, 2007 to January 23, 2008. He noted a history of injury and diagnosed L5-S1 herniated disc with extruded fragment. On January 23, 2008 Dr. Tyroler diagnosed L5-S1 herniated disc with sciatica. He noted with a checkmark "yes" that appellant's condition was caused by an employment activity, specifically, lifting heavy objects.

In a decision dated April 28, 2008, the Office denied modification of the February 2, 2007 decision. The decision was reissued on May 5, 2008.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 filed within the applicable time limitation 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 is causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[2]

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.[3] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[4]

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. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[5] The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[6]

ANALYSIS

Appellant alleged that he sustained a low back injury as a result of wearing body armor and lifting combat load equipment while performing his duties on March 10, 2006. The Board

[1] 5 U.S.C. §§ 8101-8193.

[2] *Gary J. Watling*, 52 ECAB 357 (2001).

[3] *Michael E. Smith*, 50 ECAB 313 (1999).

[4] *Id*.

[5] *Leslie C. Moore*, 52 ECAB 132 (2000).

[6] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

notes that the evidence of record supports that the March 10, 2006 incident occurred as alleged. The Board finds however, that the medical evidence is insufficient to establish that appellant sustained a low back injury or herniated disc causally related to the March 10, 2006 work incident. Appellant did not submit a rationalized medical report from an attending physician addressing how the March 10, 2006 lifting incident may have caused or aggravated his claimed condition.

Appellant submitted physical therapy notes from March 29 to June 25, 2006; however, the Board has held that physical therapy notes are not considered medical evidence as a physical therapist is not a physician as defined under the Act.[7] Therefore, these reports are insufficient to meet appellant's burden of proof.

Appellant submitted reports from Dr. Pilgrim, a chiropractor dated August 10 and 17, 2006. However, section 8101(2) of the Act provides that chiropractors are considered physicians "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."[8] Where x-rays do not demonstrate a subluxation (a diagnosis of a subluxation based on x-rays has not been made), a chiropractor is not considered a "physician" and his or her reports cannot be considered as competent medical evidence under the Act.[9] Dr. Pilgrim is not considered a physician as he did not diagnose a spinal subluxation demonstrated by x-ray.

On September 26, 2006 Dr. Danziger, noted that appellant was working in Afghanistan when he picked up a piece of heavy equipment and strained his back. Dr. Danziger noted an essentially normal physical examination and diagnosed disc herniation of the low back and recommended conservative treatment. However, he appears merely to be repeating the history of injury as reported by appellant without providing his own opinion regarding whether appellant's condition was work related.[10] To the extent that Dr. Danziger is providing his own opinion, he failed to provide a rationalized opinion regarding the causal relationship between appellant's condition and the factors of employment believed to have caused or contributed to such condition.[11] He did not explain the reasons how the March 10, 2006 incident caused or aggravated appellant's lower back condition. On January 24, 2008 Dr. Danziger diagnosed lumbar herniated disc and noted with a checkmark "yes" that appellant's condition was caused or aggravated by his employment. The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the

[7] *See* 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[8] 5 U.S.C. § 8101(2); *see also* 20 C.F.R. § 10.311.

[9] *See Susan M. Herman*, 35 ECAB 669 (1984).

[10] *See Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

[11] *See Jimmie H. Duckett*, *supra* note 6.

claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[12]

Other notes from Dr. Tyroler dated March 13, 2007 to January 23, 2008, noted a history of injury and diagnosed L5-S1 herniated disc with extruded fragment. However, as noted above, he appears merely to be repeating the history of injury as reported by appellant without providing his own opinion regarding whether appellant's condition was work related. Dr. Tyroler also did not note any specific history of heavy lifting at work on March 10, 2006. In an attending physician's report dated January 23, 2008, he noted a history of injury and diagnosed L5-S1 herniated disc with sciatica. Dr. Tyroler noted with a checkmark "yes" that appellant's condition was caused by an employment activity, specifically, lifting heavy objects. As noted above, the Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[13]

The remainder of the medical evidence, including an MRI scan of the lumbar spine dated September 12, 2006, fails to provide an opinion on the causal relationship between the March 10, 2006 incident and appellant's diagnosed conditions. For this reason, this evidence is not sufficient to meet appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor his belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[14] Causal relationships must be established by rationalized medical opinion evidence. Appellant failed to submit such evidence and the Office therefore properly denied appellant's claim for compensation.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a low back injury in the performance of duty.

[12] *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

[13] *Id.*

[14] *See Dennis M. Mascarenas*, 49 ECAB 215 (1997).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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