

**United States Department of Labor  
Employees' Compensation Appeals Board**

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T.C., Appellant )

and )

DEPARTMENT OF JUSTICE, BUREAU OF )  
PRISONS, Pine Knot, KY, Employer )  
\_\_\_\_\_ )

**Docket No. 09-754  
Issued: January 15, 2010**

*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 26, 2009 appellant filed a timely appeal from a January 8, 2009 merit decision of the Office of Workers' Compensation Programs, which affirmed the denial of his claim for a recurrence of disability. 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 sustained a recurrence of disability commencing December 16, 2007 causally related to his January 18, 2007 injury.

**FACTUAL HISTORY**

On January 18, 2007 appellant, then a 39-year-old corrections officer, injured his right knee, back, neck and left arm when trying to restrain an inmate. The Office accepted his claim for cervical intervertebral disc disorder with myelopathy, right knee and leg contusion, closed dislocations of cervical and thoracic vertebrae. Appellant stopped work on January 18, 2007 and returned to a light-duty position on January 21, 2007.

Appellant was initially treated on January 19, 2007 by Dr. Dennis U. Anciro, a Board-certified emergency room physician. A January 26, 2007 x-ray of the cervical spine revealed lower cervical spondylosis and compression fracture involving C6. A magnetic resonance imaging (MRI) scan of the cervical spine dated February 9, 2007 revealed bulging and a right posterior-lateral herniation at C3-4 and C6-7 flattening the cord and bulging disc at C4-5 and C5-6 flattening the cord and producing lateral stenosis.

Appellant came under the treatment of Dr. Magdy M. El-Kalliny, a Board-certified orthopedic surgeon, from March 6 to June 18, 2007. Dr. El-Kalliny diagnosed large C5 broad-based disc herniation, left C6 radiculopathy and C4-5 disc herniation. He recommended conservative treatment of physical therapy and epidural injections. On April 24, 2007 Dr. El-Kalliny advised that appellant was not responding to conservative treatment and recommended surgical intervention. On June 18, 2007 he performed anterior cervical discectomy and fusion of C5-6 and diagnosed left C6 radiculopathy due to C5-6 disc herniation. Appellant was referred to Dr. Todd A. Bramble, a chiropractor, who treated him from March 19 to August 21, 2007 for spinal injuries incurred at work. Dr. Bramble diagnosed subluxation of the cervical region and thoracic region, intervertebral disc disorder of the cervical region and thoracic strain. His treatment consisted of spinal manipulation, electric stimulation and percussive massage therapy.

On August 1, 2007 Dr. El-Kalliny noted that appellant was progressing well postoperatively and could return to work light duty on August 6, 2007 subject to a 15-pound lifting restriction, no inmate contact and the ability to rest his head for 15 to 20 minutes as needed. In a September 26, 2007 work capacity evaluation, he advised that appellant could return to work full time with restrictions of no pushing, pulling or lifting over 15 pounds, no use of force, he is not able to participate in weapons training and rest his head as needed.

On September 28, 2007 the employing establishment offered appellant a temporary alternative-duty assignment subject to the restrictions set forth by Dr. El-Kalliny on September 26, 2007. The job duties included auditing three by five cards located in control and in the lieutenants office, assisting with auditing the detail pouches and cards, assisting with all control room functions and screening packets of incoming inmates. On September 30, 2007 appellant accepted the position but contended that he was not being treated fairly and his supervisor addressed him in a hostile and intimidating manner.

Appellant submitted a November 20, 2007 note and duty status report from Dr. El-Kalliny, who advised that appellant was status post C5-6 cervical fusion and could return to full-time work on November 20, 2007 with a 30-pound lifting restriction. On December 17, 2007 he treated appellant for neck pain and noted that appellant was off work until January 9, 2008. A January 11, 2008 MRI scan of the cervical spine revealed disc bulges at C3-4, C4-5, C6-7. Appellant was also treated by Dr. Bramble from September 21 to December 28, 2007 for upper back pain, spasm and soreness. Dr. Bramble diagnosed subluxation of the thoracic spine. In a December 23, 2007 attending physician's report, he noted that appellant was injured on January 18, 2007 when restraining an inmate. Dr. Bramble noted with a checkmark "yes" that appellant's condition was caused or aggravated by a work injury. In a December 28, 2007 report, he noted treating appellant for the January 18, 2007 work injury and advised that appellant sustained permanent damage due to the injury. Dr. Bramble noted that

appellant sustained another work injury on December 15, 2007 which aggravated his underlying condition and caused new problems. The chiropractor took appellant off work due to his inability to perform light duty.

On January 30, 2008 appellant filed a Form CA-2a, notice of recurrence of disability, alleging that on December 16, 2007 a coworker hit him in the shoulder, pushed him into a concrete wall and punched him in the head. He experienced neck and back pain with tingling and numbness in the left arm. At the time of the recurrence he was working limited duty with restrictions.

By letter dated February 5, 2008, the Office advised appellant of the factual and medical evidence needed to establish his recurrence claim. It requested that he submit a physician's reasoned opinion addressing the relationship of his claimed recurrent condition and specific employment factors.

In February 8, 2008 report, Dr. El-Kalliny treated appellant for cervical radiculopathy. He advised that appellant was off work due to a significant delay in recovery following to a second injury on December 15, 2007. On February 12, 2008 Dr. El-Kalliny noted a history of appellant's treatment and subsequent surgery for a C5-6 disc herniation resulting from the January 18, 2007 work injury. He released appellant to work on August 6, 2007 with restrictions. On December 17, 2007 Dr. El-Kalliny treated appellant on an emergency basis as he reported being assaulted by a coworker and subsequently experiencing left arm tingling, headaches and an inability to turn his head. He indicated that appellant's condition worsened because of the new injury and appellant had a recurrence of neck and left arm pain, weakness and neck spasms and was taken off work. Dr. El-Kalliny opined that appellant had a recurrence of symptoms that were originally caused by the January 18, 2007 work injury. He advised that the December 2007 injury led to a worsening of appellant's original condition.

In a decision dated March 11, 2008, the Office denied appellant's claim for a recurrence of disability.<sup>1</sup>

On March 18, 2008 appellant requested a telephonic oral hearing, which was held on July 14, 2008. He submitted a March 26, 2008 report from Dr. El-Kalliny who noted his complaints of neck pain and pain radiating into the left shoulder and left arm. Dr. El-Kalliny noted findings of some limitation of left lateral rotation, numbness in the left shoulder, mild strength deficit measured as four out of five in the upper and lower extremities, symmetric reflexes and normal gait. He found appellant totally disabled. On May 6, 2008 Dr. El-Kalliny noted that appellant completed physical therapy and was doing well functionally with improvement in strength in the left upper extremity. He returned appellant to work with restrictions and opined that he sustained a second injury that precipitated reappearance of symptoms from the first injury. Other treatment notes from Dr. Bramble dated February 18 to May 30, 2008, diagnosed subluxation of the thoracic and cervical spine and performed spinal manipulation and electric stimulation.

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<sup>1</sup> Appellant filed a separate claim for the December 16, 2007 incident and the Office accepted cervical and thoracic strains in File No. xxxxxx127. This claim was consolidated with the current case before the Board. The Office authorized continuation of pay.

On June 19, 2008 appellant requested a telephonic oral hearing which was held on October 14, 2008.

In a decision dated January 8, 2009, the hearing representative affirmed the March 11, 2008 decision denying appellant's claim for a recurrence of disability.<sup>2</sup>

### **LEGAL PRECEDENT**

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>3</sup>

Causal relationship is a medical issue<sup>4</sup> and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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.<sup>5</sup>

### **ANALYSIS**

The Office accepted appellant's claim for cervical intervertebral disc disorder with myelopathy, right knee and leg contusion, closed dislocation of the cervical vertebrae, closed dislocation of the thoracic vertebrae, thoracic and cervical strains. Appellant returned to a full-time light-duty job on August 6, 2007. He stopped work and claimed disability compensation beginning December 16, 2007, alleging neck and back pain with tingling and numbness in the left arm after a coworker assaulted him.<sup>6</sup> The Boards finds that appellant has not established a

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<sup>2</sup> On June 11, 2008 the Office denied appellant's claim for chiropractic services and physical therapy as not being required as a result of the work injury. On January 9, 2008 a hearing representative affirmed this decision. Appellant did not appeal the January 9, 2008 decision.

<sup>3</sup> *Terry R. Hedman*, 38 ECAB 222 (1986). See 20 C.F.R. § 10.5(x) for the definition of a recurrence of disability.

<sup>4</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

<sup>5</sup> *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>6</sup> As noted, appellant filed a separate claim for a work injury occurring on December 16, 2007 which was accepted by the Office. He was authorized continuation of pay for a period of up to 45 days after this injury which overlaps with the recurrent period claimed by appellant in the present appeal. Board notes that, pursuant to 5 U.S.C. § 8118(c) and 20 C.F.R. § 10.401(a), appellant is not entitled to continuation of pay and wage-loss compensation for the same period of time.

change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.

In a December 17, 2007 note, Dr. El-Kalliny indicated that he treated appellant for neck pain and took him off work until January 9, 2008. On February 8, 2008 he treated appellant for cervical radiculopathy and advised that he would be off work due to a second injury on December 15, 2007. On February 12, 2008 Dr. El-Kalliny noted that on December 17, 2007 appellant was seen on an emergency basis and reported being assaulted by a coworker and experienced tingling in his left arm, headaches and he was unable to turn his head. Dr. El-Kalliny indicated that appellant's condition worsened because of the new injury and he had a recurrence of neck and left arm pain, weakness and neck spasms that were originally caused by the January 18, 2007 injury. He opined that the December 2007 injury led to a worsening of appellant's original condition.

Dr. El-Kalliny did not provide a rationalized opinion explaining the reasons why appellant's recurrent condition and disability on or after December 16, 2007 was due to the accepted January 18, 2007 work injury.<sup>7</sup> He did not note a particular change in the nature of appellant's physical condition, arising from the employment injury, which prevented appellant from performing his light-duty position. Instead, Dr. El-Kalliny attributed appellant's disability to a new injury on December 16, 2007 that was developed separately.<sup>8</sup> Therefore, the evidence was insufficient to establish his disability commencing December 16, 2007 was due to residuals of the January 18, 2007 work injury.

In a March 26, 2008 report, Dr. El-Kalliny noted appellant's complaints of neck pain radiating into the left shoulder and left arm and advised that appellant would be off work until after he completed physical therapy. On May 6, 2008 he noted that appellant was progressing well and showed improvement in strength in the left upper extremity and returned to work with restrictions. Dr. El-Kalliny reiterated that appellant sustained a second injury on December 16, 2007 that precipitated the reappearance of symptoms from the first injury. As noted he again attributed appellant's disability on December 16, 2007 to a new work injury that was accepted under a separate claim.

Appellant submitted reports from Dr. Bramble, a chiropractor, who treated him for pain, spasm and soreness of the upper back and diagnosed subluxation of the thoracic spine. Section 8101(2) of the Federal Employees' Compensation Act provides that chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting

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<sup>7</sup> *Supra* note 5.

<sup>8</sup> The Board notes that a recurrence of disability is defined as the inability to work after an employee has returned to work caused by a spontaneous change in the accepted medical condition without any intervening injury. *See* 20 C.F.R. § 10.5(x).

of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.”<sup>9</sup>

Where x-rays do not establish a subluxation spinal a chiropractor is not a “physician,” as defined under the Act. His or her reports cannot be considered as competent medical evidence.<sup>10</sup> Dr. Bramble did not state that he based his subluxation diagnosis on a review of x-rays. He is not a physician as he did not diagnose a spinal subluxation as demonstrated by x-ray. Therefore, Dr. Bramble’s opinion is not considered competent medical evidence under the Act.

The Board finds that the evidence does not substantiate that appellant experienced a change in the nature and extent of the light-duty requirements or was required to perform duties which exceeded his medical restrictions. Rather, the medical evidence of record attributed his disability commencing December 16, 2007 to a new injury sustained on that date.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability on December 16, 2007 causally related to his January 18, 2007 injury.

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<sup>9</sup> 5 U.S.C. § 8101(2); *see also* section 10.311 of the implementing federal regulations provides: “(c) 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.”

<sup>10</sup> *See Susan M. Herman*, 35 ECAB 669 (1984).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 8, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 15, 2010  
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