United States Department of Labor
Employees' Compensation Appeals Board

W.A., Appellant	)	
and	)	**Docket No. 09-309**
	)	**Issued: June 18, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Columbus, OH, Employer	)	

Appearances:
Alan J. Shapiro, 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 November 13, 2008 appellant, through his attorney, filed a timely appeal from April 2 and October 27, 2008 merit decisions of the Office of Workers' Compensation Programs denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that he sustained an injury on May 14, 2004 in the performance of duty.

FACTUAL HISTORY

This case was previously before the Board. By decision dated November 27, 2006, the Board set aside a May 2, 2006 nonmerit decision denying appellant's request for a hearing as

untimely under 5 U.S.C. § 8124.[1] The Board found that the Office properly determined that he was not entitled to a hearing as a matter of right but remanded the case for the Office to properly exercise its discretionary authority. In an order dated March 20, 2008, the Board set aside a September 11, 2007 Office merit decision denying appellant's traumatic injury claim.[2] The Board found that the hearing representative considered medical evidence associated with a prior claim that was not included as part of the record on appeal. The Board determined that it was unable to make an informed adjudication of the case and remanded the case to the Office for proper assemblage. The findings of fact and conclusions of law from the prior decision and order are hereby incorporated by reference. The relevant facts of record are set forth.

On December 30, 2004 appellant, then a 50-year-old letter box mechanic, filed a claim alleging that on May 14, 2004 he twisted his back and legs rupturing three discs and tearing cartilage in his left knee when he slipped while pulling down an overhead door on the back of his truck. He stopped work on May 17, 2004.

In a report dated July 11, 2004, Dr. John C. Kohl, a chiropractor, indicated that he was treating appellant for muscle spasm in his spine and legs. He noted that appellant had missed work beginning May 14, 2004.

In a report dated August 2, 2004, Dr. Robert A. Dixon, an osteopath, who is Board-certified in neurosurgery by the American Osteopathic Association, discussed appellant's complaints of "recurrent right leg pain causing him to slip and fall and actually injuring his left knee." He stated, "[appellant] has been unable to return to work since May 17[, 2004]. Dr. Dixon describes right-sided hip pain, radiation into his thigh and lateral calf on the right side in approximately an L5 distribution." He referred appellant for a magnetic resonance imaging (MRI) scan study.

On September 29, 2004 Dr. Dixon stated:

> "I reevaluated [appellant] who I previously operated [on] in December of 2003. [Appellant] returned to work, had some discomfort, but was completely off of medication and was not requiring ongoing treatment. He had abrupt worsening of his symptoms on May 17, 2004. [Appellant] describes pulling down on his mail truck door when he had a pop in his back, and developed acute back pain with radiation down both legs. His symptoms are now primarily right-sided although he is beginning to develop left leg pain. [Appellant] actually states that he twisted his left knee due to his abnormal gait attributable to his sciatica in his right leg. The left knee pain he has been told is the result of a meniscus tear."

[1] Docket No. 06-1452 (issued November 27, 2006). By decision dated March 22, 2005, the Office denied appellant's claim for an injury on May 14, 2004 as alleged. On March 24, 2006 appellant's attorney requested an oral hearing. In a decision dated May 2, 2006, the Office denied appellant's request for a hearing as untimely.

[2] Order Remanding Case, Docket No. 08-81 (issued March 20, 2008). In a decision dated January 4, 2007, the Office found that appellant failed to establish an injury on May 14, 2004 in the performance of duty. By decision dated September 11, 2007, a hearing representative affirmed the January 4, 2007 decision.

Dr. Dixon noted that a September 21, 2004 MRI scan study showed recurrent disc herniations at L3-4, L4-5 and L5-S1. He stated, "Since clinically [appellant's] symptoms resolved and he returned to full, gainful employment with abrupt worsening on May 17, 2004 while doing his usual duties, clearly the findings on his MRI scan study are of recurrent disc herniation." Dr. Dixon recommended possible further surgery and a change in vocation to avoid heavy or repetitive lifting.

On October 13, 2004 Dr. Kohl advised that he was treating appellant for left knee and lumbar spine complaints. He related that an MRI scan study of the left knee revealed a cartilage tear and an MRI scan study of the lumbar spine showed that the discs repaired on December 2003 had reherniated. Dr. Kohl stated, "I am treating his subluxated vertebrae in his low back with flexion distraction manipulation."

By decision dated April 2, 2008, the Office denied appellant's traumatic injury claim on the grounds that the medical evidence was insufficient to establish that he sustained an injury causally related to the May 14, 2004 work incident. It noted that he initially filed his claim for a traumatic injury on May 14, 2004 as a notice of recurrence of disability under file number xxxxxx190.

On April 7, 2008 appellant, through his attorney, requested a telephone hearing that was held on August 12, 2008. Appellant related that he injured himself shutting the back door of his truck on May 14, 2004. He initially sought medical treatment from his chiropractor. The hearing representative requested that appellant submit additional documentation showing that he sought medical treatment soon after the May 14, 2004 work incident. Appellant related that he had back surgery due to a work injury in 2003. He was back at work for a month and a half before the May 14, 2004 incident.

By decision dated October 27, 2008, the hearing representative affirmed the April 2, 2008 decision. He found that there was no medical evidence prior to Dr. Dixon's September 29, 2004 report containing a history of the May 14, 2004 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[3] (the Act) 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; that an injury was sustained while 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

[3] 5 U.S.C. §§ 8101-8193.

[4] *Paul Foster*, 56 ECAB 208 (2004); *Anthony P. Silva*, 55 ECAB 179 (2003).

[5] *See Ellen L. Noble*, 55 ECAB 530 (2004).

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.[7] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[8]

ANALYSIS

Appellant filed a traumatic injury claim alleging that on May 14, 2004 he sustained ruptured discs in his back and a torn cartilage in his left knee when he slipped while closing an overhead door on the back of his truck. The Office accepted the occurrence of the May 14, 2004 employment incident and there are no inconsistencies in the evidence sufficient to cast doubt that it occurred at the time, place and in the manner alleged.[9] The issue is whether the medical evidence establishes that he sustained an injury as a result of the May 14, 2004 employment incident.

The Board finds that appellant has not established that the May 14, 2004 employment incident resulted in an injury. The determination of whether a work incident caused an injury is generally established through probative medical evidence.[10]

In a report dated July 11, 2004, Dr. Kohl described his treatment of appellant for a muscle spasm in his spine and legs and indicated that he was off work commencing May 14, 2004. On October 13, 2004 he related that diagnostic studies showed a cartilage tear of the left knee and a reherniation of lumbar discs. Dr. Kohl asserted that he was treating appellant's "subluxated vertebrae in his low back with flexion distraction manipulation." Section 8101(2) of the Act provides that the "term 'physician' 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…."[11] A chiropractor is not considered a physician under the Act unless it is established that there is a

[6] *Deborah S. Stein*, 56 ECAB 494 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

[7] *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[8] *Id.*

[9] *See Betty J. Smith*, 54 ECAB 174 (2002) (an employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim).

[10] *Lois E. Culver (Clair L. Culver)*, 53 ECAB 412 (2002).

[11] 5 U.S.C. § 8101(2); *see also Michelle Salazar*, 54 ECAB 523 (2003).

subluxation as demonstrated by x-ray evidence.[12] Dr. Kohl did not establish that he obtained an x-ray in diagnosing a subluxation. He is not considered a "physician" under the Act and his reports are of no probative medical value.[13]

On August 2, 2004 Dr. Dixon evaluated appellant for complaints of right leg pain that resulted in a slip and fall and left knee injury. He noted that appellant had been unable to work since May 17, 2004 and currently complained of right hip pain radiating into the thigh and calf. Dr. Dixon did not address the cause of appellant's right leg pain or provide a history of the May 14, 2004 employment incident. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[14]

On September 29, 2004 Dr. Dixon indicated that he had operated on appellant in December 2003 and that he had subsequently returned to work with some continued symptoms but no need of further medical treatment. On May 17, 2004 appellant's back symptoms worsened after he pulled the door of his truck. He experienced radiating back pain into his right leg and injured his left knee due to his abnormal gait. Dr. Dixon diagnosed recurrent disc herniations at L3-4, L4-5 and L5-S1. He related that, as appellant's symptoms had resolved and he had resumed work prior to May 17, 2004, the sudden worsening performing his job duties was due to the recurrent disc herniations. Dr. Dixon did not, however, provide sufficient rationale for his opinion that the recurrent disc herniations resulted from the May 2004 work incident.[15] A physician must provide a narrative description of the identified employment incident and a reasoned opinion on whether the employment incident described caused or contributed to appellant's diagnosed medical condition.[16] A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet a claimant's burden of proof.[17] Dr. Dixon's only reason for supporting causal relationship was that appellant's symptoms substantially increased after the incident. The Board has held, however, that the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference of causal relationship between the condition and the employment.[18]

An award of compensation may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between his claimed condition and his

[12] The Office's regulations, at 20 C.F.R. § 10.5(bb), defines subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See Mary A. Ceglia*, 55 ECAB 626 (2004).

[13] *Isabelle Mitchell*, 55 ECAB 623 (2004).

[14] *A.D.*, 58 ECAB 149 (2006); *Conrad Hightower*, 54 ECAB 796 (2003).

[15] Dr. Dixon further indicated that the incident occurred on May 17, 2004 rather than May 14, 2004.

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

[17] *See Beverly A. Spencer*, 55 ECAB 501 (2004).

[18] *D.E.*, 58 ECAB 448 (2007); *Roy L. Humphrey*, 57 ECAB 238 (2005).

employment.[19] Appellant must submit a physician's report in which the physician reviews those factors of employment identified by him as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his opinion.[20] He failed to submit such evidence. Appellant further did not provide any medical evidence contemporaneous with the May 14, 2004 work incident providing an accurate history of injury or a reasoned opinion explaining the lack of such evidence. Consequently, he failed to discharge his burden of proof.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury on May 14, 2004 in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 27 and April 2, 2008 are affirmed.

Issued: June 18, 2010
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

[19] *D.E.*, *supra* note 18; *Patricia J. Glenn*, 53 ECAB 159 (2001).

[20] *Robert Broome*, 55 ECAB 339 (2004).