U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDRES FLORES and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Corpus Christi, TX

Docket No. 02-1037; Submitted on the Record;
Issued September 24, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant sustained a recurrence of disability on July 31, 2000 causally related to his September 15, 1999 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied his request for reconsideration.

On September 15, 1999 appellant, then a 38-year-old forklift operator, sustained a back contusion when a forklift struck his back and leg. The Office accepted the claim for contusion to the back.

On August 25, 2000 appellant filed a claim for a recurrence of disability on July 31, 2000.

In a report dated September 14, 2000, Dr. Joel Joselevitz, appellant's attending Board-certified physiatrist, provided a history of appellant's condition and findings on examination and diagnosed pain in the sacroiliac joint.

In a report dated November 8, 2000, Dr. Joselevitz provided findings on examination and diagnosed low back pain and right sacroiliac joint pain.

In a report dated November 7, 2000, Dr. Lawrence H. Wilk, a Board-certified orthopedic surgeon and an Office referral physician, provided a history of appellant's condition and findings on examination and stated his opinion that appellant had no residual disability or medical condition causally related to his September 15, 1999 employment-related back contusion.

In reports dated December 7, 2000 and January 15, 2001, Dr. Joselevitz stated that appellant continued to have severe pain. He diagnosed myofascial pain syndrome, rule out radiculopathy.

Due to the conflict in the medical opinion evidence between Dr. Joselevitz, appellant's attending physician, and Dr. Wilk, the Office referral physician, as to whether appellant had

sustained a recurrence of disability causally related to his September 15, 1999 employment injury, the Office referred appellant, together with a statement of accepted facts and the case file, to Dr. Theodore W. Parsons, III, a Board-certified orthopedic surgeon, for resolution of the conflict.

In a report dated April 7, 2001, Dr. Parsons provided a history of appellant's condition, course of treatment and findings on examination and stated:

> "1. The current diagnosis is that of right low back pain in the S1 joint area, of uncertain etiology. I presume it is myofascial in nature, although there seems to be some overlying anxiety associated with this pain.
>
> "2. While the current situation seems to be medically connected to his work-related injury, *i.e.*, [appellant] took a blow to the back, the persistence of symptoms and lack of significant objective findings are worrisome.
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> "3. I do not have the results of the MRI [magnetic resonance imaging scan]. If indeed an MRI was obtained in November 2000, and there were no objective findings, then I would not pursue any additional workup.
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> "4. There are no specific objective findings, and I do not believe that the blow [appellant] sustained to his back would have been significant enough to cause serious S1 joint injury. I believe that much of the pain is myofascial, with some emotional overlay.
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> "5. I do not believe there are any disabling residuals. Only as they are associated with his anxiety and emotional overlay.
>
> "6. The back contusion, per se, should have long since resolved, essentially within some six or eight weeks following an accident. Whatever pain is left, real or perceived, has no etiology other than the modest contusion, which may have left [appellant] with some myofascial pain. Unfortunately, we may never have a better diagnosis than this.
>
> "7. In terms of why the condition is prolonged, this is basically, in my opinion, because of his emotional overlay and 'pain syndrome' associated with the injury. Physiologically, it is very unlikely he sustained a significant injury, although the cause of myofascial pain, which is essentially uncertain pain that persists despite a good etiology, is unknown.
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> "8. There is no reason [appellant] cannot go back to his position as a forklift operator….
>
> "9. [Appellant] is capable of working for an 8-hour day.
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> "10. I would suggest that reassurance that there is no significant abnormality by virtue of normal tests mentioned above, and inviting [appellant] back to the workplace are the best ways to get him back to full duty. However, he may never

fully recover from his 'back condition,' depending upon the nature of the pain and whatever emotional overlay may be present."

By decision dated April 26, 2001, the Office denied appellant's claim for a recurrence of disability on July 31, 2000 on the grounds that the weight of the medical evidence, as represented by the report of Dr. Parsons, established that appellant did not sustain a recurrence of disability causally related to his September 15, 1999 employment-related back contusion.

By letter dated July 31, 2001, appellant requested reconsideration and stated his belief that he had sustained a recurrence of disability causally related to his September 15, 1999 employment injury. He submitted no new evidence or argument.

By decision dated January 11, 2002, the Office denied appellant's request for reconsideration.

The Board finds that appellant failed to establish that he sustained a recurrence of disability on July 31, 2000 causally related to his September 15, 1999 employment injury.

When an employee claims a recurrence of disability due to an accepted employment injury, he has the burden of establishing by the weight of the reliable, probative, and substantial medical evidence that the recurrence claimed is causally related to an accepted employment injury.[1] 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.[2]

In reports dated September 14, November 8 and December 7, 2000 and January 15, 2001, Dr. Joselevitz, appellant's attending Board-certified physiatrist, provided a history of appellant's condition and findings on examination and diagnosed low back pain, myofascial pain and pain in the sacroiliac joint.

In a report dated November 7, 2000, Dr. Wilk, a Board-certified orthopedic surgeon and an Office referral physician, provided a history of appellant's condition and findings on examination and stated his opinion that appellant had no residual disability or medical condition causally related to his September 15, 1999 employment-related back contusion.

Section 8123(a) of the Federal Employees' Compensation Act provides, in pertinent part, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[3]

[1] *See Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988).

[2] *See Mary S. Brock*, 40 ECAB 461, 471 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[3] 5 U.S.C. § 8123(a); *see Talmadge Miller*, 47 ECAB 673, 680 (1996); *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770, 773 (1996).

A conflict in the medical evidence was found between Dr. Joselevitz, appellant's attending physician, and Dr. Wilk, the Office referral physician, as to whether appellant sustained a recurrence of disability causally related to his September 15, 1999 employment injury. The Office then properly referred appellant, together with a statement of accepted facts and the case file, to Dr. Parsons, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation in order to resolve the conflict.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[4]

In a report dated April 7, 2001, Dr. Parsons provided a history of appellant's condition, course of treatment and findings on examination and stated his opinion that appellant had no residual disability or medical condition causally related to his September 15, 1999 employment-related back contusion. He stated:

> "The back contusion, per se, should have long since resolved, essentially within some six or eight weeks following an accident. Whatever pain is left, real or perceived, has no etiology other than the modest contusion, which may have left [appellant] with some myofascial pain….
>
> "In terms of why the condition is prolonged, this is basically, in my opinion, because of [appellant's] emotional overlay and 'pain syndrome' associated with the injury. Physiologically, it is very unlikely he sustained a significant injury, although the cause of myofascial pain, which is essentially uncertain pain that persists despite a good etiology, is unknown.
>
> "There is no reason [appellant] cannot go back to his position as a forklift operator … for an eight-hour day.
>
> "[Appellant] is capable of working for an eight-hour day."

Dr. Parsons' opinion that appellant's September 15, 1999 employment injury had resolved was based upon a complete and accurate factual background, and he supported his opinion with sound medical rationale. Therefore, the Office properly based its April 26, 2001 decision denying appellant's recurrence claim on Dr. Parson's April 7, 2001 report.

The Board further finds that the Office properly denied appellant's request for reconsideration.

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5]

[4] *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

[5] 20 C.F.R. § 10.606(b)(2).

When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[6]

In his request for reconsideration dated July 31, 2001, appellant submitted no new evidence or argument and did not show that the Office erroneously applied or interpreted a specific point of law. Therefore, the Office properly denied his request for further merit review.

The decisions of the Office of Workers' Compensation Programs dated January 11, 2002 and April 26, 2001 are affirmed.

Dated, Washington, DC
September 24, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[6] 20 C.F.R. § 10.608(b).