United States Department of Labor
Employees' Compensation Appeals Board

ISABEL B. NICHTER, Appellant	)	
and	)	**Docket No. 04-1342**
	)	**Issued: October 14, 2004**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Lancaster, CA, Employer	)	

Appearances:
Isabel B. Nichter, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 27, 2004 appellant filed a timely appeal of the a November 19, 2003 merit decision of the Office of Workers' Compensation Programs' hearing representative affirming the denial of appellant's recurrence claim beginning November 15, 2002 due to the accepted November 20, 1999 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this recurrence claim.

ISSUE

The issue is whether appellant has established that she sustained a recurrence of disability beginning November 15, 2002 due to her accepted November 20, 1999 employment injury.

FACTUAL HISTORY

On November 23, 1999 appellant, a 58-year-old distribution clerk, filed a traumatic injury claim alleging that on November 20, 1999 she injured her head and right eyebrow when a metal half door struck her above the right eyebrow. The Office accepted the claim for cervical strain and open wound of the forehead/face on the right side. Appellant did not stop work and

was released to regular work by Dr. Adrian E. De La Torre, a treating emergency room physician at Lancaster Community Hospital, Lancaster, California.[1]

Subsequent to appellant's injury she submitted status reports from Lancaster Community Hospital dated November 26 and December 8, 1999 and January 20, 2000, which released appellant to work with restrictions on lifting, pushing and pulling and no repetitive squatting, twisting or bending. These reports indicated no x-ray had been taken.

In a June 20, 2000 report, Dr. Robert E. Lawrence, a treating Board-certified orthopedic surgeon, noted that he first saw appellant on February 17, 2000. He reported that a magnetic resonance imaging (MRI) scan test revealed a disc herniation at C5 and he then placed her on "light-duty desk work, with restrictions against working over shoulder level and any type of lifting activities." A physical examination of the cervical spine revealed 60 degrees flexion, 40 degrees extension, 80 degrees right turn and 60 degrees left turn. Dr. Lawrence noted "a palpable and audible click when the head is turned from side to side rapidly." With regards to x-ray interpretations, he noted that no x-rays had been taken the day of the injury and there were "no final x-rays." Based upon the MRI scan test and a physical examination, he diagnosed chronic cervical strain, retrolisthesis C5 and "degenerative changes with spondylosis at multiple levels of the cervical spine." As to causation, the physician opined:

> "Based on the history given, available medical documentation and my physical exam[ination], this patient's neck residuals are causally related to the work injury of [November] 20, [19]99."

With regards to work restrictions, he indicated that appellant was "permanently restricted to light duty" with restrictions on standing, sitting and no pushing or lifting over 10 pounds.

On April 16, 2003 appellant filed a claim for a recurrence of disability beginning November 15, 2002 indicating that she stopped work due to her accepted November 20, 1999 employment injury.[2] The employing establishment noted that appellant had been released to full duty as her job description fit her limitations and that appellant "left on sick leave in November 15, 2002 due to "problems with circulation in her legs."

In an April 16, 2003 "Radiographic Report," Dr. David W. Howard, a chiropractor, noted that "multiple radiographs of the cervical area were exposed on November 23, 1999 and February 17, 2000." He diagnosed subluxations at C2-3, C4-5, C5-6 and T3-4. In an attached undated doctor's report of injury, Dr. Howard indicated that he first treated appellant on November 20, 1999 and indicated that she was disabled until July 16, 2003. He diagnosed cervical intersegmental dysfunction, neuralgia, fasciitis, thoracic and occipitocervical lesions, and "adhesion, adhesive nerve NEC spinal root cervical NEC." Physical findings included restricted cervical range of motion, bilateral foramina compression, bilateral shoulder depression,

[1] On June 28, 2002 appellant filed a claim for a schedule award, which the Office denied in an October 2, 2002 decision.

[2] Appellant noted that she went back to full duty with no night work and restrictions on sitting, kneeling, standing, pushing, pulling, no prolonged standing and no pushing, pulling or lifting over 15 pounds.

"Soto Hall in cervical and thoracic spine," thoracic and cervical muscle spasms and "Ely Nachlas bilaterally." He checked "yes" that his findings and diagnosis were "consistent with patient's account of injury or onset of illness."

In a June 12, 2003 letter, the Office responded to appellant's claim for a recurrence and her request for chiropractic treatment. The Office advised appellant regarding when a chiropractor can be considered a physician pursuant to 5 U.S.C. § 8101(2).

On July 8, 2003 the Office received the March 28, 2000 MRI scan. Dr. Ray M. Hashemi, a Board-certified diagnostic radiologist, diagnosed "moderately severe degenerative spondylosis with multilevel discogenic disease, hypertrophic changes."

In a May 28, 2003 report received on July 8, 2003, Dr. Howard noted that he first saw appellant on April 9, 2003; opined that appellant was temporarily disabled for two weeks beginning February 3, 2000 and totally disabled from her job as of April 9, 2003. He reported decreased range of motion in the spine due to pain. Various tests performed by Dr. Howard noted:

> "**Shoulder depressor** test bilaterally. This is indicative of adhesions of the dural sleeves, spinal nerve roots, or the adjacent structures of the joint capsule of the shoulder.
>
> "**Soto-Hall** test C2-T5. Such localized pain suggests subluxation, exostoses, disc lesion, sprain, strain or vertebral failure.
>
> "**Kemp's** test bilaterally. This indicates a nerve root compression syndrome.
>
> "**Ely's** sign bilaterally. The elicited pain is usually indicative of hip joint lesion." (Emphasis in the original).

A physical examination also revealed "palpable muscle spasms" in the cervical, thoracic and lumbar musculature. Dr. Howard diagnosed subluxations at C2-3, C4-5, C5-6 and T3-4 based upon a review of x-ray reports dated November 23, 1999 and February 17, 2000. He diagnosed cervical intersegmental dysfunction, neuralgia, fasciitis, thoracic and occipitocervial lesions, and "Adhesion, adhesive nerve NEC spinal root cervical NEC." In concluding, Dr. Howard opined that appellant was "unable to return to her normal position at work" and that the "disability is permanent." With regards to causal relationship to the November 15, 1999 employment injury, Dr. Howard opined that "based on the history as presented by the patient and the above noted examination findings, that the above noted injuries were sustained in the injury of November 15, 1999, and that the complaints registered are clinically consistent with injuries of this nature." Lastly, he stated appellant's chiropractic "care must be continued indefinitely."

In an undated report received on July 15, 2003, Dr. Mark Greenspan, a Board-certified surgeon, noted that he first saw appellant on July 9, 2003 and diagnosed degenerative disc disease at C3-6, "sprain C, D, L, spine" and disc bulges at C3-4, C4-5 and C5-6. Physical findings include tenderness at C4-5, pain on toe to heel walking, decreased sensation at C6 and C8, lower back tenderness and spasm and pain with squatting and hopping. He checked "yes"

that his findings and diagnosis were "consistent with patient's account of injury or onset of illness." Dr. Greenspan noted appellant was retired.

By decision dated July 25, 2003, the Office denied appellant's claim for a recurrence of disability. The Office also found Dr. Howard was not a physician under the Federal Employees' Compensation Act as the x-ray interpretations as "the radiological findings of subluxation were not made until [April] 15, 2003, more than a reasonable time for a chiropractor under our program to be diagnosing subluxation."

In an undated letter mailed on August 18, 2003, appellant requested a review of the written record by an Office hearing representative and submitted a July 9, 2003 report by Dr. Greenspan in support of her claim.

Dr. Greenspan, in his July 9, 2003 report, noted the history of appellant's November 20, 1999 employment injury and that she was referred to Dr. Lawrence in December 1999, where she was examined and had x-ray interpretations taken. With regards to appellant's employment duties, Dr. Greenspan noted that the job "required prolonged standing and walking; sitting; repetitive bending at the neck," reaching, repetitive stooping, crouching and kneeling and lifting weights up to 200 pounds. He noted that appellant "continued to work through approximately November 15, 2002, but with persistent symptoms in her neck and back." Appellant related that "she began to experience radiating pain from the low back into her buttocks, down both legs to her feet, accompanied with numbness in her legs" by November 15, 2002. A physical examination revealed normal bilateral shoulder contour, normal motor testing, negative Tinel's and Phalen's tests and "Extension, right and left lateral flexion, and right and left rotation are within normal limits." An examination of the lumbar spine revealed an abnormal gait, "slight tenderness with spasm in the lumbar spine," no thoracic spine spasm, bilateral nontender sciatic notches and sacroiliac joints." Range of motion of the right lateral bending in the lumbar spine was within normal limits as was left lateral bending, extension and left and right rotations of the lumbar spine. There was "slight pain and spasm" with lumbar forward flexion." Based upon his physical examination, review of medical reports and objective evidence, Dr. Greenspan diagnosed "C4 and C5 spinous processes are tender," decreased sensation in the right C6 dermatome and left C8 dermatome, slight lumbar tenderness and spasm, "Toe walking, heel walking, hopping, and squatting increased the low back pain and spasm," lumbar spine forward flexion causes "slight pain and spasm," and right lumbar spine lateral bending causes "slight pain and spasm." Dr. Howard opined:

> "Based upon my clinical examination of this patient, my review of her history and the summarized medical reports, it is my considered opinion that the patient has not recovered from her initial injury of November 20, 1999. The patient did return to her former occupation following her injury, and was able to work, although she was never completely asymptomatic. Following her initial injury, she did report a subsequent injury on November 5, 1991,[3] but she reported that she was able to return to work without restrictions and after working for a few

[3] This appears to be a typographical error by the physician since 1999 cannot precede 1991.

months her symptoms reverted to the symptoms that she was experiencing following her initial injury of November 20, 1999."

The physician concluded that appellant "is currently temporarily totally disabled" and that "Given the very nature of work assignment, it is highly probable that if she were to return to this type of work, she would only aggravate her condition further." Lastly, Dr. Greenspan noted that appellant was retired, but attributed her total disability to her November 15, 1999 employment injury.

In a June 16, 2003 cervical spine x-ray interpretation, Dr. Suppiah Balachandran, a Board-certified diagnostic radiologist and nuclear medicine specialist, diagnosed a C7 subluxation, "posterior subluxation of C5 on C6," narrowed disc spaces at C3 to C6, "marginal osteophytes are seen at the endplates from C3 through C5" and "normal cervical lordosis is lost."

In an August 19, 2003 progress report, Dr. Howard noted restricted cervical range of motion, "[f]oramina [c]ompression bilaterally" and cervical and thoracic Soto Hall. Dr. Howard diagnosed cervical intersegmental dysfunction, occipitocervical lesions, "nonallopathic head," and "lesions, nonallopathic back (thoracic)."

By decision dated November 19, 2003, an Office hearing representative affirmed the denial of appellant's claim for a recurrence of disability on and after November 15, 2002 due to her accepted November 20, 1999 employment injury. He also found that Dr. Howard could not be considered a physician under the Act as he had not diagnosed a subluxation to exist by x-ray.

LEGAL PRECEDENT

An employee 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 he claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basic 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 reasoning.[4] A recurrence of disability is defined by the Office regulations as an inability to work, caused by a spontaneous change in a medical condition that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[5]

ANALYSIS

In support of her claim for a recurrence of disability beginning November 15, 2002, appellant submitted reports from Dr. Howard, a chiropractor, and Dr. Greenspan, a July 16, 2003 x-ray interpretation and a March 28, 2000 MRI scan.

[4] *Ronald A. Eldridge*, 53 ECAB ___ (Docket No. 01-67, issued November 14, 2001); *Ricky S. Storms*, 52 ECAB 349 (2001).

[5] 20 C.F.R. § 10.5(x); *see also Bernitta L. Wright*, 53 ECAB ___ (Docket No. 01-1858, issued May 1, 2002).

In a report dated April 16, 2003, Dr. Howard, a chiropractor, indicated that he had treated appellant since November 20, 1999 for the November 20, 1999 employment injury. However, in his May 28, 2003 report, he indicated that he first treated appellant on April 9, 2003 for a November 20, 1999 employment injury. In both reports, he diagnosed subluxations at C2-3, C4-5, C5-6 and T3-4. Dr. Howard, in his May 28, 2003 report, attributed appellant's injuries and permanent disability to her November 20, 1999 employment injury. In both reports, he indicates that he based his diagnosis of subluxation on x-ray reports dated November 23, 1999 and February 17, 2000. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under 5 U.S.C. § 8101(2). A chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray to exist.[6] Section 10.311(c) provides a chiropractor may interpret his or her x-rays to the same extent as any other physician.[7] While Dr. Howard diagnosed subluxations based upon x-ray, he did not identify who took these films.[8] Moreover x-ray interpretation for these dates did not accompany his report nor did he identify who took the x-rays. As the record is unclear whether Dr. Howard actually interpreted his x-rays and no copies of x-ray interpretations were submitted to the record he cannot be considered a physician under the Act.

Dr. Greenspan, in an undated report, noted that he initially saw appellant on July 9, 2003 and a physical examination revealed tenderness at C4-5, pain on toe to heel walking, decreased sensation at C6 and C8, lower back tenderness and spasm and pain with squatting and hopping. He diagnosed degenerative disc disease at C3-6, "sprain C, D, L, spine" and disc bulges at C3-4, C4-5 and C5-6 which he checked "yes" that his findings and diagnosis were "consistent with patient's account of injury or onset of illness." 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 appellant's disability was related to the history, is of diminished probative value. Without any explanation or rationale for the conclusion reached, such a report is insufficient to establish causal relationship.[9] Dr. Greenspan's undated report did not provide any medical rationale explaining how or why appellant's diagnosed condition was caused by the November 20, 1999 employment injury. Thus, this report is insufficient to establish appellant's burden.

In a report dated July 9, 2003, Dr. Greenspan diagnosed "C4 and C5 spinous processes are tender," decreased sensation in the right C6 dermatome and left C8 dermatome, slight lumbar tenderness and spasm, "Toe walking, heel walking hopping, and squatting increased the low back pain and spasm," lumbar spine forward flexion causes "slight pain and spasm," and right

[6] *See Kathryn Haggerty*, 45 ECAB 383 (1994).

[7] 20 C.F.R. § 10.311(c).

[8] *See Ronald Q. Pierce*, 53 ECAB ___ (Docket No. 01-1007, issued February 7, 2002) (Office regulations provide that 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 on request).

[9] *Lucrecia M. Nielson,* 42 ECAB 583 (1991).

lumbar spine lateral bending causes "slight pain and spasm." He concluded that appellant's condition was due to her employment injury and stated:

> "Based upon my clinical examination of this patient, my review of her history and the summarized medical reports, it is my considered opinion that the patient has not recovered from her initial injury of November 20, 1999. The patient did return to her former occupation following her injury, she did report a subsequent injury on November 5, 1991, but she reported that she was able to return to work without restrictions and after working for a few months her symptoms reverted to the symptoms that she was experiencing following her initial injury of November 20, 1999."

However, Dr. Greenspan did not mention the date of recurrent disability claimed by appellant, November 15, 2002. While he did describe appellant's November 20, 1999 work injury, he did not explain the medical process through which it would have been competent to cause the conditions he diagnosed in 2003 or the disability that was claimed to have occurred a few years after the work injury.[10] Moreover, the record contains no evidence of a November 5, 1991 employment injury, which is mentioned by Dr. Greenspan.[11] In addition, appellant provided Dr. Greenspan with an inaccurate description of the physical requirements of her job, *i.e.*, lifting 200 pounds from the knee level to the waist and carrying up to 200 pounds for a distance of a couple of feet without assistance. The record establishes that appellant's job required her to lift at most 70 pounds. For these reasons, this report is not sufficiently well rationalized to establish that appellant sustained a recurrence of disability on November 15, 2002 causally related to her November 20, 1999 employment injury.

A June 16, 2003 cervical spine x-ray report by Dr. Balachandran, diagnosed a C7 subluxation, "posterior subluxation of C5 on C6," narrowed disc spaces at C3 to C6, "marginal osteophytes are seen at the endplates from C3 through C5" and "normal cervical lordosis is lost." Dr. Balachandran, however, did not specifically relate the subluxation and narrowed disc spaces at C3 to C6, "marginal osteophytes are seen at the endplates from C3 through C5" to appellant's November 20, 1999 employment injury, provide any rationale for his findings or discuss the

[10] *See Robert Broome*, 55 ECAB ___ (Docket No. 04-93, issued February 23, 2004) (a medical opinion supporting causal relationship must be based on a complete factual and medical background, supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion on causal relationship must be based on a complete and accurate factual and medical history).

[11] A new employment injury would break the legal chain of causation between the accepted cervical strain and open wound of the forehead/face on the right side and appellant's medical condition on and after the intervening events. *See Carlos A. Marrero*, 50 ECAB 117, 119-20 (1998) (the Board found that the claimant's use of an exercise machine constituted an intervening cause of appellant's disability and thus the Office properly denied appellant's claim for recurrence of disability); *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994) (the Board found that the claimant's knee injury sustained while playing basketball broke the legal chain of causation from an accepted knee injury sustained in the performance of his duties as a firefighter). In addition, the November 5, 1991 employment injury is not the subject of this appeal as no final decision was issued. *See* 20 C.F.R. § 501.2(c).

relevant issue of whether appellant sustained a recurrence of disability beginning November 15, 2002. Thus, his opinion is of little probative value.[12]

Similarly, a March 28, 2000 MRI scan by Dr. Hashemi is also of little probative value. Dr. Hashemi diagnosed "moderately severe degenerative spondylosis with multilevel discogenic disease, hypertrophic changes." Dr. Hashemi, however, did not specifically relate the diagnosed condition to appellant's November 20, 1999 employment injury, provide any rationale for his findings or discuss the relevant issue of whether appellant sustained a recurrence of disability beginning November 15, 2002. Moreover, this report predates appellant's claim for a recurrence of disability. Thus, his opinion is of little probative value.[13]

CONCLUSION

The Board finds that appellant has failed to establish that she sustained a recurrence of disability on and after November 15, 2002 causally related to her accepted November 20, 1999 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated November 19, 2003 is affirmed.

Issued: October 14, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *See Bonnie Goodman*, 50 ECAB 139 (1998).

[13] *Id.*