

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETER C. VORUM and DEPARTMENT OF THE AIR FORCE,
WRIGHT-PATTERSON AIR FORCE BASE, OH

*Docket No. 98-117; Submitted on the Record;
Issued August 17, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant sustained an injury in the performance of duty on September 13, 1995.

On October 17, 1995 appellant, then a 45-year-old materials research engineer, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that he sustained injuries to his right knee and both hands. He indicated that his injuries occurred when he fell to the ground while participating in an employment sponsored training exercise on September 13, 1995. Appellant did not immediately cease work at the time of his injury. A coworker, Dr. Henry C. Graham, provided a November 6, 1995 statement indicating that appellant fell on his back while participating in a team building exercise called "Nitro Crossing" that required appellant to swing from a rope. Dr. Graham further stated that at the time of the incident, appellant was asked several times whether he required medical assistance and appellant "refused."

In support of his claim, appellant submitted an October 17, 1995 record of injury and treatment report. On the front of the form report, appellant provided a description of the September 13, 1995 injury consistent with the information provided on his Form CA-1. The report also noted that Dr. Sneh Patwa examined appellant that day at the employment establishment dispensary. Dr. Patwa noted right knee discomfort, possible strain and discomfort and stiffness in both middle fingers. He further noted that appellant would consult with his private physician and that he was released to return to regular duty. On the backside of the form report, appellant again described the September 13, 1995 incident and further noted that the October 17, 1995 report was being made at that time because of a flare up of his knee the prior weekend when he spent time on his feet at an outdoor festival.

Appellant's supervisor, Karl R. Mecklenburg, submitted a November 24, 1995 addendum to Form CA-1, in which he provided certain factual information regarding the filing of appellant's claim. Mr. Mecklenburg also expressed the opinion that the claim was not justified.

In a series of letters dated March 12, 1996, the Office of Workers' Compensation Programs advised appellant that he was not entitled to receive continuation of pay because of the more than 30-day delay in filing his claim. The Office also advised appellant that the evidence of record was insufficient to establish that he sustained an injury on September 13, 1995. Finally, the Office requested that appellant submit additional factual and medical evidence and advised him that he had 30 days within which to submit such evidence.

By decision dated April 10, 1996, the Office denied appellant's claim on the basis that the evidence of record failed to demonstrate that appellant sustained an injury as alleged.

In a letter dated May 7, 1996, appellant requested that his case remain open. He explained that while the Office had granted him 30 days within which to submit additional evidence, the Office issued its April 10, 1996 decision prior to the expiration of the allotted time.¹ By letter dated May 20, 1996, the Office acknowledged that it had prematurely issued its decision and further noted that appellant had yet to submit any evidence in response to its March 12, 1996 request. Additionally, the Office advised appellant of his appeal rights and suggested that he submit the factual and medical evidence previously requested of him.

On February 4, 1997 appellant filed a request for reconsideration accompanied by additional factual and medical evidence. The newly submitted factual evidence included, among other things, a detailed statement in response to the Office's March 12, 1996 request.² Additionally, appellant submitted medical evidence consisting of an August 13, 1996 magnetic resonance imaging (MRI) scan of the right knee,³ a December 18, 1996 report from Dr. Ceccarelli and a January 15, 1997 report from Dr. Donald W. Planck, a chiropractor.⁴

Dr. Planck indicated that appellant contacted him on the evening of September 13, 1995 complaining of pain in his neck, back, hands and right knee due to a fall he sustained earlier in the day while participating in a team building exercise. He reported that he examined appellant on September 15, 1995 and at that time he found evidence of strained ligaments and muscles of the right shoulder and strained collateral and patellar ligaments of the right knee, with a noted fullness on the posterior aspect of the right knee. Additionally, Dr. Planck diagnosed subluxations of the lower back area, lumbar and lower thoracic spine, with pinched nerves.⁵ He further noted that appellant complained of headaches and pain in his right shoulder and on the medial aspect of his left elbow. Dr. Planck explained that appellant's condition was consistent with a fall taken while swinging in the manner stated by appellant. He further indicated that

¹ Appellant sent a similar letter to the Office's Branch of Hearings and Review.

² Appellant explained, among other things, that he was initially treated for his injuries by a chiropractor on September 15, 1995 and that he subsequently sought treatment from an acupuncturist on September 19, 1995. He also indicated that Dr. Gary A. Dunlap, examined him on October 18, 1995 and eventually referred him to Dr. Brian J. Ceccarelli, in August 1996.

³ Dr. Yoon Chang, a Board-certified radiologist, interpreted the MRI scan as revealing a vertical tear of the posterior horn of the medial meniscus.

⁴ Although Dr. Planck's report is dated January 15, 1996, this is most likely a typographical error because the doctor refers to Dr. Ceccarelli's treatment of appellant, which did not begin until August 9, 1996.

⁵ Dr. Planck also indicated that no x-rays were taken at the time of the incident.

after numerous treatments failed to provide complete relief from pain, appellant was referred to Dr. Ceccarelli.

In his report dated December 18, 1996, Dr. Ceccarelli noted that he first examined appellant on August 9, 1996, at which time he complained of right knee and lower back pain. He reported a history of injury on September 13, 1995 and subjective complaints of medial and lateral joint line pain with fullness noted on the posterior aspect of the knee. Dr. Ceccarelli further noted that an MRI confirmed the presence of a vertical tear of the posterior horn of the medial meniscus. On September 19, 1996 he performed a diagnostic and surgical arthroscopy on appellant's right knee. Dr. Ceccarelli provided a postoperative diagnosis of "medial meniscus tear, partial tear of the anterior cruciate ligament and Grade III-IV chondromalacia of the patellofemoral joint. With respect to the cause of appellant's knee condition, Dr. Ceccarelli stated:

"There is no doubt in my mind that [appellant's] history of injury and subsequent presentation of symptoms are compatible and causal with his final diagnosis. It is my opinion he definitely sustained the injury by the direct blow described during his accident of September 1995. The trauma or insult he described to me were definitely sufficient to cause his current knee problems."

In a merit decision dated February 20, 1997, the Office modified, in part, the prior decision dated April 10, 1997, but nonetheless denied benefits based on appellant's failure to establish a causal relationship between the incident of September 13, 1995 and the claimed condition. In an accompanying memorandum, the Office explained that while appellant established the employment incident of September 13, 1995, the medical evidence of record was insufficient to establish a causal relationship between his current right knee condition and the accepted employment incident. The Office further explained that the opinion of appellant's chiropractor, Dr. Planck, was insufficient to support entitlement inasmuch as his diagnosis of a spinal subluxation was not based upon x-ray evidence and, as a chiropractor, he was not competent to offer any other diagnoses. With respect to Dr. Ceccarelli's December 18, 1996 opinion, the Office noted, among other things, that he had not examined appellant until approximately one year after the September 13, 1995 employment incident and that he did not provide adequate medical rationale as to how the incident of September 13, 1995 caused appellant's current right knee condition. Finally, the Office noted that other potentially relevant medical evidence had not been made a part of the record.⁶

On June 9, 1997 appellant filed another request for reconsideration. The medical evidence submitted with his request included an April 5, 1997 report from Dr. Ceccarelli, wherein he attributed appellant's right knee condition to the employment incident of September 13, 1995. Appellant also submitted Dr. Ceccarelli's September 19, 1996 operative report and a June 7, 1997 letter from Dr. Planck indicating that appellant's June 1961 injury had no bearing on his present condition.

⁶ The Office specifically noted the absence of Dr. Dunlap's October 18, 1995 treatment records as well as Dr. Ceccarelli's September 19, 1996 operative report. The Office also commented about the absence of other unspecified medical records pertaining to a prior back injury appellant sustained in June 1961.

In a merit decision dated September 10, 1997, the Office denied modification of the prior decision dated February 20, 1997. The Office explained that Dr. Planck's June 7, 1997 letter was not relevant and that the reports provided by Dr. Ceccarelli were of no probative value because they were based on an "inaccurate history."

The Board has duly reviewed the case record on appeal and finds that the case is not in posture for a decision.

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 that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.⁷ In the instant case, the Office accepted the fact that the employment incident of September 13, 1995 occurred as alleged. The second component in a fact of injury analysis is whether the employment incident caused a personal injury. This latter component generally can be established only by rationalized medical opinion evidence.⁸ Here, the Office denied appellant's claim based on his failure to satisfy this second component.

As previously noted, appellant submitted medical evidence from his chiropractor and his orthopedic surgeon, Dr. Ceccarelli, both of whom related his knee condition to the accepted employment incident of September 13, 1995. As a chiropractor, Dr. Planck was not deemed a "physician" under the Act with respect to the diagnoses offered and Dr. Ceccarelli's reports were found to have no probative value because they were allegedly based on an "inaccurate history." While the evidence submitted by appellant's chiropractor is not probative with respect to the diagnosis of appellant's knee condition,⁹ as discussed *infra*, Dr. Planck's January 15, 1997 report, nonetheless, provides certain factual information regarding the onset of appellant's symptoms that is relevant to the issue of causal relationship.

In discrediting Dr. Ceccarelli's opinion regarding causal relationship, the Office specifically noted that appellant failed to mention "the 33 days ... without complaint" between the training incident on September 13, 1995 and the onset of symptoms on October 17, 1995. Additionally, the Office noted that appellant failed to mention "the day of nonwork walking immediately before the onset of pain." The Office concluded that his reliance on an inaccurate

⁷ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

⁹ In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under the Act. 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." 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986). Therefore, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence. *Kathryn Haggerty*, 45 ECAB 383 (1994). By letter dated March 12, 1996, the Office properly advised appellant of the limitations imposed by the Act with respect to the use of chiropractic evidence. In the instant case, Dr. Planck is not considered a physician with respect to his treatment of appellant's knee condition. Furthermore, he did not rely upon an x-ray in diagnosing appellant's spinal subluxations. Consequently, Dr. Planck's diagnosis and opinion regarding causal relationship is of no probative value as he is not considered a physician under the Act.

history of injury undermined the probative value of his reports dated December 18, 1996 and April 5, 1997.

The factual information the Office relied upon to discredit Dr. Ceccarelli's reports was apparently obtained from the November 24, 1995 addendum to Form CA-1 submitted by appellant's supervisor, Mr. Mecklenburg. In his statement, appellant's supervisor indicated, among other things, that appellant stated some 30 days after his alleged injury that "he experienced trouble in his knee after spending *all day walking* around at a regional display, a weekend carnival-type personal experience." (Emphasis added.) He further indicated that "[t]here were no complaints of injury from the rope swinging experience and no statements regarding any other injuries or lack of injuries during the time between the rope swinging and the extended carnival walking period." In essence, Mr. Mecklenburg expressed his skepticism regarding the true cause of appellant's knee injury.

When asked by the Office to respond to Mr. Mecklenburg's statement, appellant indicated that his supervisor came to him some time after November 3, 1995 to interview him about the accident. Appellant further noted that Mr. Mecklenburg did not take notes at the time of the interview and, as a result, he made several errors of fact in recalling what appellant had told him. The "weekend carnival type personal experience" Mr. Mecklenburg referred to occurred on October 14, 1995. With respect to the events of this day, appellant explained that he advised his supervisor that he "played with the Kettering Civic Band at the ... Sauerkraut Festival." Appellant further indicated that he described the so called "extended carnival walking period" to Mr. Mecklenburg as a *45 minute stroll*," and not an "all day" event.¹⁰ (Emphasis added.) He also explained that while he experienced pain immediately after his injury on September 13, 1995, the pain did not become severe until approximately 31 days later.

It appears that in discrediting Dr. Ceccarelli's opinion, the Office did not attempt to resolve the discrepancy regarding the events of October 14, 1995, but merely accepted Mr. Mecklenburg's version that appellant said he spent "all day walking around." In view of this unresolved factual dispute, appellant's alleged failure to relate the events of October 14, 1995 to Dr. Ceccarelli does not provide a sufficient basis for discrediting the doctor's opinion regarding causal relationship. Moreover, regardless of the amount of time appellant may have spent walking while in attendance at the Sauerkraut Festival, there is no medical evidence of record to suggest that appellant's knee condition was caused by the events of October 14, 1995.¹¹

The Office also erred in discrediting Dr. Ceccarelli's opinion on the basis that appellant failed to mention to him that he experienced "33 days ... without complaint" between the

¹⁰ As previously noted, the record also includes an October 17, 1995 record of injury and treatment report in which appellant explained that the injury report was being "made at this time because of [a] flare up of [my] knee last weekend, when [I] spent time on [my] feet at [an] outdoor festival." While appellant did not specifically describe the amount of time he spent on his feet, he did not indicate that it was "all day." It is noted that the October 17, 1995 injury report not only predates Mr. Mecklenburg's November 24, 1995 statement, but it also bears his signature.

¹¹ In his April 5, 1997 report, Dr. Ceccarelli explained that meniscal pathology is frequently present, but intermittently and does not have to be continuously symptomatic post injury. He further explained that "[o]ftentimes symptoms will quiet down and the complaints resolve for a time only to recur again with little or minimal aggravation of the area. Dr. Ceccarelli continued his explanation by noting that "[t]his does not mean that there is a new injury; only that the original problem is reasserting itself to cause pain and difficulty for a patient."

training incident on September 13, 1995 and the onset of symptoms on October 17, 1995. The record indicates that appellant did, in fact, complain of symptoms associated with his right knee prior to October 17, 1995. As noted by Dr. Planck in his January 15, 1996 report, appellant contacted him on the evening of September 13, 1995 complaining of pain in his neck, back, hands and right knee due to a fall he had taken earlier in the day. He further noted that appellant stated that “the pain was evident immediately after he arose from the fall” and that “it was difficult to climb stairs or do other activities that required much effort with his right knee.” Dr. Planck initially examined appellant two days after his injury, at which time appellant related complaints of continued pain. In light of the history reported by Dr. Planck, the Office erred in concluding that appellant did not experience any symptoms associated with his right knee for a period of 33 days after the incident of September 13, 1995.¹² As such, Dr. Ceccarelli’s failure to consider erroneous information clearly does not undermine the credibility of his opinion.

Although Dr. Ceccarelli attributed appellant’s knee condition to the employment incident of September 13, 1995, he did not begin treating appellant until August 9, 1996; some 11 months after the incident. Appellant indicated that he began treatment with Dr. Gary A. Dunlap, an osteopath, approximately one month after the incident and that it was Dr. Dunlap who referred him to Dr. Ceccarelli.¹³ However, Dr. Dunlap’s treatment records are not a part of the record, and Dr. Ceccarelli explained that he did not have the opportunity to review these records. The probative value of Dr. Ceccarelli’s opinion is somewhat diminished by the lack of specific information regarding appellant’s treatment during the 11-month period prior to August 9, 1996.

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.¹⁴ Although the reports from Dr. Ceccarelli do not contain sufficient rationale to discharge appellant’s burden of proving by the weight of the reliable, substantial and probative evidence that his knee condition is causally related to his September 13, 1995 employment incident, they raise an uncontroverted inference of causal relationship sufficient to require further development of the case record by the Office.¹⁵

On remand, the Office should make an effort to obtain Dr. Dunlap’s treatment records and then refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an evaluation and a rationalized medical opinion on whether appellant’s knee condition is causally related to the accepted employment incident of September 13, 1995. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

¹² As noted above, while Dr. Planck’s diagnosis and opinion regarding causal relationship lack probative value, there is no legal or factual basis in the record to suggest that his ability to accurately relate appellant’s subjective complaints is somehow compromised by his status as a chiropractor.

¹³ In his February 4, 1997 statement, appellant advised the Office of his treatment with Dr. Dunlap and provided the doctor’s address.

¹⁴ *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁵ *See John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

The decisions of the Office of Workers' Compensation Programs dated September 10 and February 20, 1997 are hereby set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
August 17, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member