United States Department of Labor
Employees' Compensation Appeals Board

MANOEL AGUIAR, Appellant	)	
and	)	**Docket No. 05-804**
	)	**Issued: July 7, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Grapevine, TX, Employer	)	

Appearances:
Manoel Aguiar, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On February 18, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 14, 2004 denying his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this claim.

ISSUE

The issue is whether appellant has established that his back condition is causally related to a July 12, 2004 employment incident.

FACTUAL HISTORY

On August 13, 2004 appellant, a 43-year-old part-time flexible (PTF) letter carrier, filed a traumatic injury claim alleging that he hurt his back on July 12, 2004 while moving a tray.

In a letter dated August 27, 2004, the Office informed appellant that the evidence of record was insufficient to support his claim. It advised him as to the medical and factual evidence required to support his claim.

On August 30, 2004 the Office received physical therapy treatment notes dated August 20 and 23, 2004 by Guillermo Molares, a physical therapist, and treatment notes dated August 17, 18 and 23, 2004 by Dr. Gordon G. McWatt, a treating physician. Dr. McWatt diagnosed a thoracic strain and indicated in his treatment notes that appellant could return to work on August 17, 2004 with restrictions.

The Office subsequently received physical therapy treatment notes dated August 25 and 27, 2004 and an August 20, 2004 progress note by Mr. Morales.

On September 20, 2004 the Office received physician activity status reports dated August 30 and 31, 2004, injury status reports dated August 31, September 9 and 14, 2004 by Dr. McWatt and physical therapy notes dated August 27, 28 and 31, September 2, 7, 9, 10, 13, 14 and 16, 2004 by Mr. Morales. In his August 30 and 31, 2004 reports, Dr. McWatt diagnosed a thoracic strain and released appellant to work on August 23, 2004 with restrictions. Dr. McWatt diagnosed a thoracic strain and released appellant to regular work in his September 9 and 14, 2004 reports.

In a September 30, 2004 report, Dr. McWatt diagnosed thoracic strain and noted that appellant related that he injured his back on July 12, 2004 while moving a tray of mail. A physical examination revealed "[m]ild tenderness of the paraspinous muscles" at T5 to T8.

On October 4, 2004 the Office received a September 20, 2004 letter from appellant, an August 17, 2004 physician activity status report by Dr. McWatt, additional physical therapy reports from Mr. Morales and a July 15, 2005 disability note by Dr. David Zhang, a chiropractor, indicating that appellant was totally disabled until July 22, 2004. In his August 17, 2004 report, Dr. McWatt diagnosed thoracic strain and indicated that appellant could return to work with restrictions.

On October 7, 2004 the Office received reports dated September 9 and 14, 2004 by Dr. McWatt and physical therapy treatment notes by Mr. Morales. Dr. McWatt noted a July 12, 2004 employment injury and diagnosed a thoracic strain in his reports. A physical examination on September 9, 2004 revealed full range of motion in the thoracic spine with pain. On September 14, 2004 a physical examination revealed "mild tenderness of the paraspinous muscles" in the thoracic spine.

By decision dated October 8, 2004, the Office denied appellant's claim on the grounds that he failed to establish fact of injury. Specifically, the Office found that appellant failed to establish that the July 12, 2004 incident occurred as alleged.

Subsequent to the Office's decision, additional physical therapy notes dated September 2, 7, 17 and 22, 2004 by Mr. Morales were received.

On October 21, 2004 the Office received a September 22, 2004 report by Dr. Norman McCall, a treating physician, who noted an injury date of July 12, 2004 and diagnosed a lumbar strain. Appellant related that the injury occurred while moving mail on a tray to the mail center from a postal vehicle.

On October 25, 2004 appellant requested reconsideration.

By decision dated December 14, 2004, the Office modified the October 8, 2004 decision to reflect that fact of injury had been accepted, but denied his claim on the grounds that he failed to establish a causal relationship between the diagnosed condition and the accepted employment injury.[1]

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained 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.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged.[4] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[5] An employee may establish that the employment incident occurred as alleged, but fail to show that his disability and/or condition relate to the employment incident.

In order to satisfy the burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[6] An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.[7] The mere manifestation of a condition during a period of employment does not raise an inference of causal relationship between the condition and the employment.[8] Neither the fact that the condition became apparent during a

[1] Subsequent to the issuance of the Office decision, appellant submitted additional evidence. As this evidence was not previously submitted to the Office for consideration prior to its decision of March 14, 2003, it represents new evidence which cannot be considered by the Board in the current appeal. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *see Shirley Rhynes*, 55 ECAB ___ (Docket No. 04-1299, issued September 9, 2004).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) ("traumatic injury" and "occupational disease" defined).

[5] *Shirley A. Temple*, 48 ECAB 404 (1997).

[6] *Gary L. Fowler*, 45 ECAB 365 (1994).

[7] *John D. Jackson*, 55 ECAB ___ (Docket No. 03-2281, issued April 8, 2004); *William Nimitz, Jr.*, 30 ECAB 567 (1979).

[8] *Nicolette R. Kelstrom*, 54 ECAB ___ (Docket No. 03-275, issued May 14, 2003).

period of employment, nor appellant's belief that the employment caused or aggravated his condition is sufficient to establish causal relationship.[9]

ANALYSIS

As the Office, on December 14, 2004, modified its October 8, 2004 decision to find that the July 12, 2004 lifting incident occurred at the time, place and in the manner alleged and found that appellant was in the course of employment at the time of the incident, the remaining issue is whether the alleged injury was caused by the employment incident.

In support of his claim, appellant submitted treatment reports from Drs. McWatt and McCall. Dr. McWatt indicated that appellant reported suffering back pain after lifting a mail tray at work July 12, 2004. He diagnosed thoracic strain and initially released appellant to work with restrictions. Dr. McCall noted that appellant reported sustaining an injury on July 12, 2004 while moving mail and the physician diagnosed a lumbar strain. While both physicians noted the alleged July 12, 2004 employment injury and how it occurred, neither physician specifically addressed whether appellant's condition and disability were causally related to the July 12, 2004 employment incident. In order to establish causal relationship, appellant must submit a physician's report in which the physician reviews those factors of employment identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination and his medical history, explain how these employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[10] Furthermore, the Board has held medical evidence which does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[11] As Drs. McCall and McWatt did not offer an explanation, based upon their findings on examination, appellant's medical history and history of the alleged injury, as to how the claimed condition related to the employment incident, the Board finds that their reports are insufficient to establish that appellant sustained a work-related injury on July 12, 2004.

Appellant also submitted a July 15, 2004 disability certificate by Dr. Zang indicating he was totally disabled until July 22, 2004. Under section 8101(2) of the Act, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[12] However, Dr. Zang did not indicate in the disability certificate that a subluxation was demonstrated by x-ray to exist. Thus, the Board finds that this certificate does not constitute medical evidence and has no probative value regarding the relevant issue of the present case.

[9] *Phillip L. Barnes*, 55 ECAB ___ (Docket No. 02-1441, issued March 31, 2004); *Jamel A. White*, 54 ECAB ___ (Docket No. 02-1559, issued December 10, 2002).

[10] *Robert Broome*, 55 ECAB ___ (Docket No. 04-93, issued February 23, 2004).

[11] *Ellen L. Noble*, 55 ECAB ___ (Docket No. 03-1157, issued May 7, 2004).

[12] 5 U.S.C. § 8101(2). *See Isabelle Mitchell*, 55 ECAB ___ (Docket No. 04-830, issued July 8, 2004).

The numerous treatment notes from appellant's physical therapist, Mr. Morales, do not constitute competent medical evidence since a physical therapist is not considered a "physician" under the Act.[13]

As there is no rationalized medical evidence of record establishing that appellant sustained a thoracic strain on July 12, 2004 as alleged, the Board finds that he has failed to meet his burden of proof.

CONCLUSION

The Board finds that appellant failed to establish that his thoracic strain was causally related to the accepted July 12, 2004 employment incident; therefore, fact of injury in the performance of duty is not established.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 14, 2004 is affirmed.

Issued: July 7, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[13] *James Robinson, Jr.*, 53 ECAB 417 (2002).