United States Department of Labor
Employees' Compensation Appeals Board

DEBRA HEROD, Appellant	)	
and	)	**Docket No. 05-899**
	)	**Issued: July 22, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

Appearances:
Debra Herod, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 9, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions of December 6, 2004 and January 13 and February 4, 2005, denying her traumatic injury claim and the December 20, 2004 nonmerit decision denying appellant's claim for continuation of pay. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a traumatic injury while in the performance of duty on September 5, 2004; and (2) whether appellant is entitled to continuation of pay.

FACTUAL HISTORY

On September 22, 2004 appellant, a 45-year-old mail handler, filed a claim for traumatic injury alleging that on September 5, 2004 she suffered injuries to her back and left leg as a result of duties associated with her federal employment. Appellant alleged that she felt a pull in her

back as she was dispatching mail from overloaded wire cages. Appellant first received medical care and notified her supervisor of the alleged injury on September 20, 2004. She stopped work on September 23, 2004.

Appellant submitted a statement dated September 20, 2004 indicating that she was following the instructions of the employing establishment when the injury occurred. Appellant filed an injury and illness incident report by telephone on September 21, 2004 reiterating the allegations made in her traumatic injury claim. In a report received by the Office on September 21, 2004 and signed by Gwendolyn E. Lewis, safety captain and appellant's supervisor, the Safety Review Board found that appellant experienced a back injury when she pushed an overloaded cage to dispatch mail; that she had informed management but was nevertheless told to dispatch; and that the accident could have been prevented if the cage had not been overloaded. The report provided corrective action to eliminate similar accidents.

By letter dated November 5, 2004, the Office advised appellant that the information submitted was insufficient to establish her claim and requested additional medical evidence, including a specific diagnosis and a rationalized medical opinion on the causal relationship between the diagnosed condition and the alleged employment incident.

On November 2, 2004 appellant filed a request for continuation of pay (Form CA-7) for the period September 20 to November 3, 2004. By letter dated November 10, 2004, the Office advised appellant that the information of record was insufficient to establish her entitlement to continuation of pay and requested additional medical evidence.

In response to the Office's request, appellant submitted a variety of documents, including a report of a magnetic resonance imaging (MRI) scan dated November 23, 2004; reports from Dr. Rosemary Buckle, a Board-certified orthopedic surgeon, dated August 29 and October 10, 2003 relating to a May 2003 carpal tunnel release; and numerous physical therapy reports.

By decision dated December 6, 2004, the Office denied appellant's traumatic injury claim on the grounds that the medical evidence failed to demonstrate that her claimed medical condition was related to the established work-related event.

Appellant submitted a September 28, 2004 report from Dr. Rex A.W. Marco, a Board-certified orthopedic surgeon, who related appellant's reported history, indicating: that she was "apparently injured at work"; that she presented with lumbarized sacral vertebra and possible clavicle lesion at L4; that her back pain was worse than her left lower extremity pain, which was worse than her right lower extremity pain; that she had buttock and posterior thigh pain; and that sitting and standing exacerbated the pain. Upon examination, he found her gait to be nonantalgic; that she could toe/heel walk and squat to stand without difficulty; that forward flexion was proximal one-third of the tibias; that strength was 5/5 in the L2 to S1 distribution with intact sensation; that radial artery pulse was regular; and that she had negative Hoffman sign, no sustained clonus, no signs of hyperflexia and no clubbing, cyanosis or edema.

By decision dated December 20, 2004, the Office denied appellant's request for continuation of pay for the period September 20 through November 3, 2004.

By letter dated December 16, 2004 and received by the Office on December 27, 2004, appellant requested reconsideration of the denial of her traumatic injury claim.

In support of her request, appellant submitted a letter dated December 10, 2004 from Dr. Marco, who reported that appellant had "severe lumbago and radiculopathy," which "initially started with an injury at work." He indicated that he had recommended physical therapy and an MRI scan of the lumbar spine, which revealed L4-5 decreased signal with protrusion. He opined that "it was most certain that her vertebral body had some wearing down degeneration prior to her initial workers compensation injury that occurred on September 5, 2004 but it appears that the injury on that date exacerbated [appellant's] symptoms in her leg and increased her pain in her back most certainly aggravated her degenerative process."

Appellant submitted a letter dated December 10, 2004 from her chiropractor, Dr. Todd L. Bear, who reported that he first treated appellant on October 5, 2004 "for injuries sustained in a work-related accident on September 5, 2004." He stated that examination showed spasm of the lumbar and cervical musculature with a positive straight leg raise on the left; that there was loss of sensation of the S1 dermatome on the left that extended into the foot; and that range of motion was diminished in the cervical and lumbar areas. He opined that appellant's condition was caused by "the event of September 5, 2004." He stated that pushing a cart weighing 1,500 pounds would place stress on the lumbar muscles and that the October 23, 2004 MRI scan showed changes consistent with trauma, namely the fissuring or tearing of the disc.

By decision dated January 13, 2005, the Office denied modification of its December 6, 2004 decision, on the grounds that the medical evidence failed to establish a causal relationship between the accepted work-related incident and a diagnosed condition.[1]

By letter dated January 27, 2005, appellant requested reconsideration of the January 13, 2005 decision. In support of her request, appellant submitted a statement dated January 20, 2005 detailing the events related to the September 5, 2004 work-related incident and restating her belief that her current condition was work related.

Appellant submitted reports from Dr. Marco dated October 12 and 26, 2004 and January 21, 2005. His October 12, 2004 report reflected a diagnosis of lumbarized sacral vertebra and possible lesion at L4. In his October 26, 2004 report, Dr. Marco stated that appellant's MRI scan revealed L4-5 decreased signal with protrusion.[2] In a January 25, 2005 letter, he reported that following the September 5, 2004 work injury, appellant had "significant pain" in her back and leg and that she had a subsequent MRI scan that showed a protrusion at L4-5 and some decreased disc signal and a protrusion at L3-4. He opined that "with all medical probability it does appear that the event of September 5, 2004 is the cause of her current complaints." He stated that, though appellant did have "a condition that was there prior to this injury at work," her current pain is "most certainly" from the work-related injury.

[1] The Board notes that the Office issued an amended decision dated January 13, 2005, to correct an apparent typographical error in the conclusion of the original decision.

[2] Dr. Marco indicated that the L4-5 decreased signal with protrusion was described as L3-4 on the MRI scan report.

Appellant submitted a letter dated September 22, 2004 from Dr. R.O. Maidenberg, a treating physician, reflecting that he treated appellant on September 20, 2004 for severe low back pain. Dr. Maidenberg indicated that he referred appellant to an orthopedic surgeon, instructing her to remain off work until such time as she was able to obtain treatment from a specialist.

By decision dated February 4, 2005, the Office denied modification of the January 13, 2005 decision.[3]

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[4] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[5]

An employee seeking benefits under the Act has the burden of proof to establish the essential elements of 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 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.[6] When an employee claims that she sustained a traumatic injury in the performance of duty, she must establish the "fact of injury," consisting of two components, which must be considered in conjunction with one another. The first is whether the employee actually experienced the incident that is alleged to have occurred at the time, place and in the manner alleged. The second is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[7]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[8] An award of

[3] The Board notes that appellant submitted additional evidence after the Office rendered its December 9, 2004 decision. 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); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Therefore, the newly submitted evidence cannot be considered by the Board.

[4] 5 U.S.C. § 8102(a).

[5] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB ___ (Docket No. 04-1257, issued September 10, 2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

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

[7] *Deborah L. Beatty*, 54 ECAB ___ (Docket No. 02-2294, issued January 15, 2003). *See also Tracey P. Spillane*, 54 ECAB ___ (Docket No. 02-2190, issued June 12, 2003); *Betty J. Smith*, 54 ECAB ___ (Docket No. 02-149, issued October 29, 2002). The term "injury" as defined by the Act, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101(5). *See* 20 C.F.R. § 10.5(q), (ee).

[8] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

compensation may not be based on appellant's belief of causal relationship.[9] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[10] Simple exposure to a workplace hazard does not constitute a work-related injury entitling an employee to medical treatment under the Act.[11]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[12]

ANALYSIS -- ISSUE 1

The Office accepted that appellant was a federal employee, that she timely filed her claim for compensation benefits and that the workplace incident occurred as alleged. The issue, therefore, is whether she has submitted sufficient medical evidence to establish that the employment incident caused an injury. The Board finds that the medical evidence presented does not contain a rationalized medical opinion establishing that the work-related incident caused or aggravated any particular medical condition or disability. Therefore, appellant has failed to satisfy her burden of proof.

Dr. Maidenberg's September 22, 2004 letter reflecting that he treated appellant for severe low back pain fails to provide an opinion as to causal relationship and therefore lacks probative value. The Board has long held that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[13]

In a December 10, 2004 report, appellant's chiropractor, Dr. Bear, stated that examination showed spasm of the lumbar and cervical musculature with a positive straight leg raise on the left; that there was loss of sensation of the S1 dermatome on the left that extended into the foot; and that range of motion was diminished in the cervical and lumbar areas. He opined that appellant's condition was caused by "the event of September 5, 2004," explaining that pushing a cart weighing 1,500 pounds would place stress on the lumbar muscles and that the October 23, 2004 MRI scan showed changes consistent with trauma, namely the fissuring or

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[9] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[10] *Florencio D. Flores*, 55 ECAB ___ (Docket No. 04-942, issued July 12, 2004).

[11] 20 C.F.R. § 10.303(a).

[12] *John W. Montoya*, 54 ECAB ___ (Docket No. 02-2249, issued January 3, 2003).

[13] *Michael E. Smith*, 50 ECAB 313 (1999).

tearing of the disc. However, a chiropractor is considered a physician for purposes of the Act only where he diagnoses subluxation by x-ray.[14] Dr. Bear did not take appellant's x-rays, nor did he diagnose subluxation. Therefore, because he does not meet the statutory definition of "physician," his report lacks probative value.

Dr. Marco's reports are also insufficient to establish appellant's claim. In a September 28, 2004 report, Dr. Marco, related appellant's reported history, indicating that she was "apparently injured at work;" that she presented with lumbarized sacral vertebra and possible clavicle lesion at L4; that her back pain was worse than her left lower extremity pain, which was worse than her right lower extremity pain; that she had buttock and posterior thigh pain; and that sitting and standing exacerbated the pain. Upon examination, he found her gait to be nonantalgic; that she could toe/heel walk and squat to stand without difficulty; that forward flexion was proximal one-third of the tibias; that strength was 5/5 in the L2 to S1 distribution with intact sensation; that radial artery pulse was regular; that she had negative Hoffman sign, no sustained clonus, no signs of hyperflexia and no clubbing, cyanosis or edema. However, although Dr. Marco provided detailed results of his examination, he did not provide a complete factual background of the work-related incident or explain how the incident caused appellant's current condition. In a December 10, 2004 report, Dr. Marco opined that "it was most certain that [appellant's] vertebral body had some wearing down degeneration prior to her initial workers compensation injury that occurred on September 5, 2005, but it appears that the injury on that date exacerbated her symptoms in her leg and increased her pain in her back most certainly aggravated her degenerative process." However, Dr. Marco failed to discuss the nature of the relationship between appellant's condition and the work-related incident and, specifically, how the incident exacerbated her symptoms. He did not specify the nature of the prior condition or explain why appellant's current condition is not merely a natural progression of the original condition, rather than a result of the alleged work-related injury. Therefore, his opinion lacks probative value. In a January 25, 2005 letter, Dr. Marco stated that following a September 5, 2004 work injury, appellant had "significant pain" in her back and leg and that she had a subsequent MRI scan that showed a protrusion at L4-5 and some decreased disc signal and a protrusion at L3-4. He opined that "with all medical probability it does appear that the event of September 5, 2004 is the cause of her current complaints" and that though appellant did have "a condition that was there prior to this injury at work," her current pain is "most certainly" from the work-related injury. Without explanation, Dr. Marco's blanket assertion that appellant's condition was related to the employment injury is not sufficient to establish a causal relationship. Dr. Marco is required to explain how appellant's condition is physiologically related to the September 5, 2004 employment injury.

In this case, there is insufficient medical evidence of record establishing a causal relationship between a diagnosed condition and the accepted September 5, 2004 work-related incident. The Office advised appellant of the type of medical evidence required to establish her claim; however, she failed to submit such evidence. An award of compensation may not be

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[14] Section 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 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 and subject to regulation by the secretary." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

based on surmise, conjecture, speculation or upon appellant's own belief that there is a causal relationship between her claimed condition and her employment.[15] 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 her condition and, taking these factors into consideration as well as findings upon examination and appellant's medical history, explain how these employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.[16] Appellant failed to submit such evidence and, therefore, failed to satisfy her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Time limitations for making a claim for continuation of pay are provided by section 10.205 of the Code of Federal Regulations.[17] This regulation provides that in order to be eligible for continuation of pay, a person must file a notice of traumatic injury (Form CA-1) within 30 days of the date of the injury.[18] The Act authorizes continuation of pay of an employee who has filed a valid claim for traumatic injury.[19] However, if that claim is denied, the employee will be deemed ineligible for the payments and at his or her discretion, any payments previously made will be charged to sick or annual leave or deemed overpayments within the meaning of 5 U.S.C. § 5584.[20]

ANALYSIS -- ISSUE 2

The Board finds that appellant is not entitled to receive continuation of pay. Appellant filed her claim for a traumatic injury within 30 days of the alleged employment-related incident. However, since her traumatic injury claim has been denied, appellant is not entitled to receive continuation of pay.[21]

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a traumatic injury in the performance of duty or that she is entitled to continuation of pay.

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[15] *Patricia J. Glenn*, 53 ECAB, 159 (2001).

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

[17] 20 C.F.R. § 10.205.

[18] *Id.*

[19] 5 U.S.C. § 8118(a).

[20] 5 U.S.C. § 8118(d).

[21] 5 U.S.C. § 8118(d).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions of February 4 and January 13, 2005 and December 20 and 6, 2004 are affirmed.

Issued: July 22, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board