

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
J.P., Appellant)	
)	
and)	Docket No. 08-262
)	Issued: May 16, 2008
DEPARTMENT OF THE INTERIOR,)	
NATIONAL PARK SERVICE,)	
Staten Island, NY, Employer)	
_____)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Appellant, pro se</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 17, 2007 merit decision denying his claim for a recurrence of total disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of total disability on or after August 31, 1996 due to his accepted employment injuries.

FACTUAL HISTORY

The Office accepted that on August 2, 1996 appellant, then a 43-year-old seasonal maintenance worker, sustained a lumbosacral sprain due to pulling carpet up by hand.¹ He stopped work on August 3, 1996 and returned to full-time regular duty on August 16, 1996.² Appellant's temporary assignment with the employing establishment ended on August 31, 1996.

In an August 15, 1996 report, an attending chiropractor diagnosed lumbosacral sprain and cervical strain. The next report of record is a December 8, 1999 report in which Dr. Milton M. Smith, an attending Board-certified orthopedic surgeon, indicated that appellant reported that he was injured at work on August 2, 1996 using a sledgehammer. Dr. Smith stated that appellant complained of back pain on examination, that forward flexion lacked 40 degrees, and that straight leg raising lacked 40 degrees bilaterally. He indicated that magnetic resonance imaging (MRI) scan showed herniated nucleus pulposus (HNP) in both the cervical and lumbar spine and diagnosed "HNP of cervical spine and lumbosacral spine."³

In numerous brief reports dated between early 2000 and late 2001, Dr. Smith indicated that appellant continued to complain of cervical and/or back pain and noted that he had limited back motion. In a May 9, 2001 form report, he indicated that appellant reported that on August 2, 1996 he was injured while using a sledgehammer at work.⁴ Dr. Smith diagnosed "displacement of cervical/lumbosacral radiculopathy" and checked a "yes" box indicating that this condition was caused or aggravated by the reported employment activity. He indicated that appellant had been totally disabled since August 2, 1996.

On May 13, 2001 appellant filed a claim alleging that he sustained a recurrence of total disability on August 2, 1996 due to his August 2, 1996 employment injury.⁵

On June 18, 2001 Dr. Smith stated, "I have been following the patient for injuries to his neck and back which occurred at work on August 2, 1996 and shortly after his date of injury." He stated that appellant continued to show cervical and lumbar radiculopathies and noted, "[h]is current condition is related to his original injury as there are no intercurrent injuries and he has

¹ The Office had previously accepted several employment-related injuries: a lumbosacral contusion and right-sided back strain on September 21, 1987, a lumbar contusion on June 27, 1989, and a lower back strain on May 28, 1996. The May 28, 1996 injury occurred when appellant used a sledgehammer to dismantle a storage shed. He returned to his regular work shortly after May 28, 1996. The files for these injuries have been combined into the file for the August 2, 1996 injury.

² Appellant received Office compensation for this period of disability.

³ In a December 8, 1999 note, Dr. Smith prescribed physical therapy. Appellant received physical therapy treatment on a regular basis.

⁴ Dr. Smith stated that he first examined appellant on December 8, 1999.

⁵ Appellant asserted that he did not suffer a new injury on August 2, 1996 but rather sustained a recurrence of his May 28, 1996 injury on that date. He also filed a claim for compensation on February 5, 2003 alleging that he was entitled to compensation beginning "July 1997." Appellant later indicated that he felt that he was entitled to compensation for lost wages since he stopped work after August 31, 1996.

continued with these findings since the date of injury.” Dr. Smith stated that he had reviewed a description of a maintenance worker job but that appellant was unable to perform the job.

The Office referred appellant to Dr. Lester Lieberman, a Board-certified orthopedic surgeon, for an examination and opinion regarding whether he sustained a recurrence of total disability due to his August 2, 1996 employment injury. On September 20, 2001 Dr. Lieberman stated that appellant reported that he was injured at work on August 2, 1996 when he used a sledgehammer.⁶ He indicated that on examination appellant did not exhibit any tenderness of the low back and that sensation in the lower extremities was intact. There was some limitation of back motion. Dr. Lieberman stated, “Impression is that [appellant] had a lumbosacral disc problem which is related to a prior condition. There is temporary aggravation.” He indicated that appellant could perform some limited-duty work.⁷

In a February 5, 2003 form report, Dr. Smith indicated that appellant reported that on August 2, 1996 he was injured while using a sledgehammer at work. He diagnosed “displacement of cervical/lumbosacral radiculopathy” and checked a “yes” box indicating that this condition was caused or aggravated by the reported employment activity. Dr. Smith indicated that appellant had been totally disabled since August 2, 1996.

Between October 2004 and July 2005, Dr. Matthew Clarke, an attending Board-certified family practitioner, diagnosed chronic low back pain or lumbalgia with an HNP and indicated that appellant had temporary total disability.

In a February 22, 2006 decision, the Office denied appellant’s claim on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability on or after August 31, 1996 due to his accepted employment injuries.

Appellant requested a review of the written record by an Office hearing representative.⁸ He submitted several documents which were previously of the record. In an August 14, 2006 decision, the Office hearing representative affirmed the Office’s February 22, 2006 decision. The Office hearing representative determined that the medical evidence did not show that any of appellant’s work-related back injuries caused total disability after August 31, 1996.⁹

In an August 8, 2007 letter, appellant, through his attorney, requested reconsideration contending that the medical evidence of record established a recurrence of disability. Appellant submitted a July 30, 2007 report in which Dr. Tai Q. Chung, an attending Board-certified

⁶ The statement of accepted facts provided to Dr. Lieberman contained the proper history that appellant was injured on August 2, 1996 when he lifted carpet by hand.

⁷ Dr. Smith continued to produce reports in 2002 and 2003 indicating that appellant complained of back pain and had limited back motion. He periodically diagnosed lumbar radiculopathy.

⁸ In a March 20, 2006 statement, appellant again argued that he did not suffer a new injury on August 2, 1996 but rather sustained a recurrence of his May 28, 1996 injury on that date.

⁹ The Office hearing representative determined that it was appropriate to find that appellant sustained a new injury on August 2, 1996, rather than a recurrence of his May 28, 1996 injury, because he engaged in the distinct activity of pulling up carpet by hand.

orthopedic surgeon, stated that he first saw appellant in 2006 at which time diagnostic testing showed degenerative disc disease at several levels. Dr. Chung stated that appellant continued to complain of back pain and noted, “He asked me whether his present problem is reasonably related to his low back injury in 1996. I think it certainly is a strong possibility that his present symptoms are a result of his injury in 1996.” In a September 17, 2007 decision, the Office affirmed its August 16, 2006 decision.

LEGAL PRECEDENT

An individual 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 compensation is claimed is causally related to the accepted injury.¹⁰ 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.¹¹ Where no such rationale is present, medical evidence is of diminished probative value.¹²

ANALYSIS

The Office accepted that appellant sustained a lower back strain on May 28, 1996 when he used a sledgehammer to dismantle a storage shed. Appellant returned to his regular work shortly after May 28, 1996. The Office also accepted that he sustained a lumbosacral sprain on August 2, 1996 due to pulling carpet up by hand. Appellant stopped work on August 3, 1996 and returned to full-time regular duty on August 16, 1996.¹³ His temporary assignment with the employing establishment ended on August 31, 1996. Appellant alleged that he sustained a recurrence of total disability after August 31, 1996 due to his accepted employment injuries.

The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained a recurrence of total disability on or after August 31, 1996 due to his accepted employment injuries.

In a May 9, 2001 form report, Dr. Smith, an attending Board-certified orthopedic surgeon, indicated that appellant reported that on August 2, 1996 he was injured while using a sledgehammer at work.¹⁴ He diagnosed “displacement of cervical/lumbosacral radiculopathy” and checked a “yes” box indicating that this condition was caused or aggravated by the reported

¹⁰ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

¹¹ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

¹² *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

¹³ Appellant received appropriate disability compensation from the Office. The Office also accepted two prior employment injuries: a lumbosacral contusion and right-sided back strain sustained on September 21, 1987 and a lumbar contusion sustained on June 27, 1989.

¹⁴ Dr. Smith stated that he first examined appellant on December 8, 1999.

employment activity. Dr. Smith indicated that appellant had been totally disabled since August 2, 1996.

This report, however, is of limited probative value regarding appellant's claim that he sustained an employment-related recurrence of disability on or after August 31, 1996 because Dr. Smith did not provide adequate medical rationale in support of his conclusion on causal relationship.¹⁵ Dr. Smith did not provide any notable description of the August 2, 1996 employment injury and in fact he appears to have partially described appellant's May 28, 1996 injury (which involved using a sledgehammer) rather than the August 2, 1996 injury (which involved pulling up carpet). He did not provide a complete and accurate factual and medical history.¹⁶ Dr. Smith did not describe the medical process through which appellant's medical process would have worsened such that he was no longer able to work after August 31, 1996, when his temporary assignment ended. He diagnosed cervical and lumbar radiculopathies but appellant's case has not been accepted for such conditions. The medical evidence does not otherwise establish the existence of an employment-related herniated cervical or lumbar disc or consequent radicular condition.¹⁷

The necessity for medical rationale is particularly necessary in the present case as Dr. Smith did not first see appellant until December 1999 and there is no medical evidence in the record between August 1996 and December 1999. On June 18, 2001 Dr. Smith stated that appellant continued to show cervical and lumbar radiculopathies and noted, "His current condition is related to his original injury as there are no intercurrent injuries and he has continued with these findings since the date of injury." However, he did not provide any discussion of why nonwork factors would not be solely responsible for appellant's observed condition. As noted, Dr. Smith did not provide a complete factual and medical history.

Appellant submitted a July 30, 2007 report in which Dr. Chung, an attending Board-certified orthopedic surgeon, stated that he continued to complain of back pain and noted, "He asked me whether his present problem is reasonably related to his low back injury in 1996. I think it certainly is a strong possibility that his present symptoms are a result of his injury in 1996." This report is of limited probative value regarding appellant's recurrence of disability claim because Dr. Chung did not provide a clear opinion that he sustained a recurrence of disability on or after August 31, 1996 due to an accepted employment injury. Dr. Chung did not

¹⁵ See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

¹⁶ See *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).

¹⁷ Dr. Smith produced a similar report on February 5, 2003 but this report is deficient for the same reasons. He also produced numerous brief notes between 2001 and 2003 in which he diagnosed lumbar radiculopathy but these notes contain limited findings on examination and do not establish an employment-related cause for this condition.

identify a specific employment injury or indicate that appellant sustained disability during a specific period due to that injury.¹⁸

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.¹⁹ He failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied his claim for compensation.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of total disability on or after August 31, 1996 due to his accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 17, 2007 decision is affirmed.

Issued: May 16, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ Between October 2004 and July 2005, Dr. Clarke, an attending Board-certified family practitioner, diagnosed chronic low back pain or lumbalgia with an HNP and indicated that appellant had temporary total disability. However, Dr. Clarke provided no opinion on the cause of appellant's back condition. On September 20, 2001 Dr. Lieberman, a Board-certified orthopedic surgeon who served as an Office referral physician, indicated that appellant had "a lumbosacral disc problem which is related to a prior condition." He did not identify an employment-related cause for this condition.

¹⁹ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).