United States Department of Labor
Employees' Compensation Appeals Board

J.E., Appellant	)	
and	)	**Docket No. 08-2097**
	)	**Issued: September 24, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Toledo, Oh, Employer	)	

Appearances:
Brett E. Blumstein, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 23, 2008 appellant filed a timely appeal from a May 12, 2008 decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a lower back injury and a consequential urinary incontinence condition in the performance of duty; and (2) whether the Office abused its discretion by denying his authorization for a laminectomy procedure.

FACTUAL HISTORY

This is the third appeal before the Board. Appellant, a 31-year-old clerk, filed a claim for benefits, alleging that he sustained an injury to his lower back on August 19, 1987. The Office accepted the claim for lower back strain. By decision dated March 9, 1990, it reduced appellant's compensation based on his wage-earning capacity as a personnel worker and that decision was affirmed by an Office hearing representative on January 2, 1992. In a March 23,

1994 decision, the Board reversed the Office's decisions and reinstated appellant's compensation.[1] The Office subsequently accepted the conditions of chronic pain syndrome and aggravation of degenerative disc disease at L5-S1. Appellant returned to light duty in July 1999.

On July 30, 2001 appellant filed a claim for benefits based on traumatic injury, alleging that he sustained an injury to his lower back while pushing a heavy mail cart on July 25, 2001. He submitted several reports from Dr. William D. Richardson, Board-certified in internal medicine, who stated that appellant was unable to work due to an acute flare-up of chronic back pain, which resulted from the July 25, 2001 work incident. Dr. Richardson stated that appellant was experiencing protrusion of the disc, which placed pressure on the sacral nerve roots, causing urinary incontinence because of dysfunction of the external urethral sphincter muscles. He opined that the increased pain and disability appellant experienced were due to increased inflammation of the back muscles due to acute strain and spasms of the muscles. Dr. Richardson stated that appellant would have experienced pain had the July 25, 2001 incident not occurred, but it would not have been as severe and disabling and could not have caused his urinary incontinence. The Office referred appellant for a second opinion examination with Dr. Edwin S. Carter, a Board-certified orthopedic surgeon, who opined that in a May 29, 2002 report appellant had spondylolysis but did not have a condition related to a single episode of injury. Dr. Carter stated that appellant's subjective complaints were not supported by his objective findings, which did not indicate that he sustained a back injury on July 25, 2001. He also stated that back surgery was not necessitated by the July 2001 injury, the August 1987 work injury or by any significant pathologic condition related to an injury.

By decision dated June 25, 2002, the Office denied appellant's claim for benefits based on traumatic injury, finding that he failed to submit sufficient medical evidence in support of his claim.[2] Appellant submitted additional reports from Dr. Richardson in which he expounded on his previously stated findings and noted that appellant underwent an L5-S1 laminectomy procedure in August 2002 to ameliorate his low back pain. By decision dated November 12, 2003, an Office hearing representative affirmed the June 25 and December 19, 2002 Office decisions and denied authorization for the August 2002 back surgery. By decision dated March 11, 2004, the Office denied appellant's request for reconsideration.

In a November 10, 2005 decision,[3] the Board set aside the Office's November 12, 2003 decision. The Board found that there was a conflict in the medical evidence between Dr. Richardson, the attending physician, and Dr. Carter, the referral physician, regarding whether appellant's alleged lumbar sprain was causally related to the July 25, 2001 work incident and whether his August 2002 L5-S1 laminectomy was necessitated by this alleged injury. The Board

[1] Docket No. 93-799 (issued March 23, 1994).

[2] The Office also denied the recurrence of disability claim by decision dated December 19, 2002.

[3] Docket No. 04-1268 (issued November 10, 2005).

therefore remanded the case to the Office for referral to an impartial medical examiner to resolve the existing conflict. The complete facts of this case are set forth in the Board's November 10, 2005 decision and are herein incorporated by reference.[4]

In order to resolve the conflict in the medical evidence, the Office referred the case to Dr. R. Peter Mirkin, a Board-certified orthopedic surgeon. It compiled a list of questions for Dr. Mirkin based on the Board's November 10, 2005 decision and the statement of accepted facts, including: whether surgery was necessary and if so, whether it was necessitated by the July 25, 2001 work incident and whether his condition would have progressed to its August 2002 level regardless of whether the July 25, 2001 work incident had occurred. In a February 22, 2006 report, Dr. Mirkin stated findings on examination, thoroughly reviewed the medical history and the statement of accepted facts and stated:

> "It is my impression this is a patient who has a long history of back problems dating back to at least 1987 and very likely before that. [Appellant's] documented subjective symptomatology has always been far in excess of what you would expect with a patient with a disc protrusion and especially this type of disc protrusion. The fact is that the disc protrusion is noted on the MRI [magnetic resonance imaging] scan prior to the surgery is a small right[-]sided disc protrusion that would in no way cause incontinence and he claims that he had that both in 1987 and then in July of 2001. [Appellant] eventually underwent a small procedure and tells me that he is not able to return to the work force. I would note that it is extremely unlikely that this type of a small procedure with excellent clinical results that he demonstrates objectively would preclude him from returning to any type of work, much less the light work that he was on.
>
> "The patient currently has subjective symptomatology, but certainly no subjective symptomatology that would preclude him from returning to the work force.
>
> "I also note that the pathology for which he underwent surgery was present, as per the description of the medical records, prior to the July 25, 2001 report."

Dr. Mirkin stated that appellant had sustained a relatively small disc protrusion at L5-S1, which had intermittently caused symptomatology. He advised that this symptomatology would have been the same whether or not he had pushed the cart on July 25, 2001, as it could have been aggravated by bending, stooping, coughing or lifting. Dr. Mirkin asserted that appellant was capable of performing his duty as a modified general clerk and could return to much more vigorous work if he were to give a full effort and not display symptom magnification. He opined that appellant's August 2002 back surgery was performed for a condition, which existed prior to the July 25, 2001 incident and that he would probably have or the procedure regardless of whether the incident had occurred.

[4] The Board noted that appellant had filed a separate claim for recurrence of disability stemming from the July 25, 2001 work incident, which it considered separately in its decision. The Board denied a claim based on a recurrence of disability as of July 25, 2001.

Dr. Mirkin also noted that he had reviewed a videotape depicting a person pushing a cart in the manner appellant claimed to have sustained his injury. He stated that it was extremely unlikely for the pushing of a cart as shown in the tape to have caused a significant back injury. In a March 8, 2006 supplemental report, Dr. Mirkin stated:

> "It would be my opinion that the objective evidence does not support an injury resulting from pushing a cart, as depicted in the videotape. Certainly, [appellant] does have a lumbar condition that preexists that date. Certainly, I think he has subjective symptoms that are out of proportion to his objective findings and do not support his contention that he is disabled from work activities."

By decision dated March 17, 2006, the Office determined that appellant's low back and urological conditions were not causally related to the July 25, 2001 work incident and denied authorization for his August 2002 surgery. It found that Dr. Mirkin's referee opinion represented the weight of the medical evidence.

By letter dated January 21, 2007, appellant requested reconsideration.

Dr. Richardson in a report dated March 27, 2007, noted appellant's complaints of back pain, reviewed the medical evidence and diagnostic tests and reiterated that his injuries and resulting conditions and disability were causally related to the July 25, 2001 work incident. He stated that appellant was currently disabled from performing his usual work.

By decision dated May 2, 2007, the Office denied modification of the March 17, 2006 decision.

By letter dated May 2, 2008, appellant, through his attorney, requested reconsideration. Counsel stated that Dr. Mirkin did not address whether appellant's need for surgery was work related because he did not consider the effects of his original injury from 1987. He noted that the Office has accepted three conditions: low back strain, chronic pain syndrome and aggravation of degenerative disc disease at L5-Sl and has acknowledged that appellant continued to have residuals of his 1987 injury. Counsel also stated that appellant did not address the issue of whether he was currently affected by chronic pain syndrome. In addition, he argues that Dr. Mirkin's opinion had a flawed factual foundation because he based it on a video of someone pushing a cart. Counsel noted that the video did not depict appellant nor did it depict the actual cart he pushed.[5] He stated that he was submitting an April 8, 2008 report from Dr. Richardson.

By decision dated May 12, 2008, the Office denied modification of the March 17, 2006 decision.

[5] Counsel also argued that the Office erred in finding that appellant did not sustain a recurrence of disability because it applied the wrong standard. This argument is moot and without merit. The Board previously found in its November 10, 2005 decision that appellant failed to establish that he sustained a recurrence of disability as of June 25, 2001.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[6] has the burden of establishing that the essential elements of his or 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.[7] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[8]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[9] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[10] The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician 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 specific employment factors identified by the claimant.[11]

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.[12]

An award of compensation may not be based on surmise, conjecture or speculation. Neither, the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[13]

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[6] 5 U.S.C. §§ 8101-8193.

[7] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[9] *John J. Carlone*, 41 ECAB 354 (1989).

[10] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(a)(14).

[11] *Id.*

[12] *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

[13] *Id.*

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision.

In order to resolve the conflict in the medical evidence between appellant's treating physician, Dr. Richardson, and Dr. Carter, the second opinion physician, the Office referred the case to a referee medical specialist, Dr. Mirkin, who stated in his February 2006 report that the small degree of low back symptomatology appellant experienced would have been the same whether or not he had pushed the cart on July 25, 2001 and could have been aggravated by bending, stooping, coughing or lifting. Dr. Mirkin advised that appellant had a long history of back problems dating back to at least 1987, but that his documented subjective symptomatology had always exceeded the objective findings normally associated with the type of disc protrusion appellant sustained. He stated that this disc protrusion noted on the MRI scan prior to the 2002 surgery was a small right-sided disc protrusion which would in no way cause incontinence. Dr. Mirkin stated that it was extremely unlikely that this type of small procedure with excellent, objective clinical results would preclude him from returning to any type of work, much less the light work that he was doing. He asserted that appellant could return to much more vigorous work if he gave a full effort and did not display symptom magnification. Dr. Mirkin advised that appellant had subjective symptomatology but not the type which would preclude him from returning to the workforce. The Office relied on his opinion in its March 17, 2006 decision, finding that appellant had no condition or disability causally related to the July 25, 2001 work incident and was therefore not entitled to compensation or medical benefits. By decision dated May 12, 2008, it denied modification and found that Dr. Mirkin's opinion continued to represent the weight of the medical evidence.

The Board finds that Dr. Mirkin's referee opinion on causal relationship is of limited probative value because he did not provide adequate medical rationale in support of his conclusions.[14] Dr. Mirkin did not describe appellant's accident in any detail or explain his opinion that the July 25, 2001 cart-pushing incident could not have caused the claimed low back and urinary incontinence conditions. He noted in his February 22, 2006 report that appellant had a long history of low back symptomatology, which "could have" been aggravated by bending, stooping, coughing or lifting, as opposed to pushing a cart on June 25, 2001, but did not provide adequate support for this assertion. Dr. Mirkin's opinion is therefore of limited probative value also because it is generalized in nature and equivocal in that he only noted summarily that appellant's conditions were not causally related to the June 25, 2001 work incident. The Board therefore finds that Dr. Mirkin failed to provide a thorough, well-rationalized medical opinion sufficient to meet the standard for an impartial medical specialist.

Because the Office relied on Dr. Mirkin's opinion, the Board will set aside the May 12, 2008 Office decision and remand for further development regarding this issue. The case is remanded to the Office for referral to a new medical specialist, to resolve the outstanding conflict in the medical evidence regarding whether appellant's low back and urinary incontinence conditions were causally related to the June 2001 work incident.

[14] *William C. Thomas*, 45 ECAB 591 (1994).

LEGAL PRECEDENT -- ISSUE 2

Section 8103 of the Act[15] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.[16] In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[17]

ANALYSIS -- ISSUE 2

The Board finds that Dr. Mirkin's referee opinion regarding the necessity of appellant's August 2002 surgery is not based upon an adequate factual foundation and requires clarification. The Office had accepted that appellant sustained the conditions of lower back strain, chronic pain syndrome and aggravation of degenerative disc disease at L5-S1 as a result of his 1987 employment injury. The Board in its November 10, 2005 decision instructed the Office to obtain an opinion from an impartial medical examiner regarding whether his 2002 surgery was necessitated by the alleged June 25, 2001 injury or an employment-related injury. The Office failed to ask Dr. Mirkin, in its January 9, 2006 list of questions, whether appellant's surgery was necessitated by an employment-related injury other than that alleged to have resulted from the July 25, 2001 work incident. Given that Dr. Mirkin has indicated that appellant's 2002 L5-S1 laminectomy was performed due to pathology documented in the medical records prior to the July 25, 2001 work incident, including a degenerative disc condition at L5-S1 and that the surgery was performed for a condition, which preexisted this nonwork-related incident, the Board will set aside the May 12, 2008 Office decision and remand for further development regarding the issue of whether the Office properly denied authorization for appellant's August 2002 L5-S1 laminectomy.

Accordingly, the Office's May 12, 2008 decision is set aside and the case remanded for referral to a new impartial medical examiner, to resolve the outstanding conflict in the medical evidence regarding whether the Office properly denied authorization for appellant's August 2002 L5-S1 laminectomy. On remand, it shall ask the new medical specialist whether appellant's

[15] 5 U.S.C. §§ 8101-8193.

[16] 5 U.S.C. § 8103.

[17] *Daniel J. Perea*, 42 ECAB 214 (1990).

2002 surgery was necessitated by an employment-related injury or condition. After such development as it deems necessary, the Office shall issue a *de novo* decision.[18]

CONCLUSION

The Board finds that the case is not in posture for decision with regard to the issue of whether appellant's low back and urinary incontinence conditions were causally related to the July 2001 work incident. The Board finds that the case is not in posture for decision regarding the issue of whether the Office properly denied appellant authorization for his August 2002 laminectomy procedure.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2008 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development consistent with this decision.

Issued: September 24, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[18] The Board notes that the Office stated in its May 12, 2008 decision, that appellant had not submitted new, relevant evidence and that therefore it was not considering the merits of the claim. However, it appears from the decision that the Office engaged in a thorough review of the evidence of record. The Board will therefore consider the May 12, 2008 decision as a merit review; appellant's appeal rights are preserved. The Board further notes that, although appellant's attorney stated that he submitted Dr. Richardson's April 8, 2008 report with his request for reconsideration, such a report is not contained in the instant record and was apparently not among the evidence reviewed by the Office in its May 12, 2008 decision.