U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK H. ROSS and DEPARTMENT OF THE AIR FORCE, STRATEGIC AIR COMMAND, GRAND FORKS AIR FORCE BASE, N.D.

Docket No. 95-2648; Submitted on the Record;
Issued April 9, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration pursuant to 5 U.S.C. § 8128.

On May 13, 1992 appellant, then a 41-year-old heavy equipment repairman, filed a traumatic injury claim alleging that he sustained an injury to his back while attempting to slide freight from a truck onto a forklift.

In a Form CA-20 attending physician's report dated June 4, 1992, Dr. Rex J. Byrd, a chiropractor, stated that he first examined appellant in May 1992 for a back problem. He provided findings on examination and diagnosed intervertebral disc protrusion and lumbar subluxation and noted that the subluxation was demonstrated by x-rays taken on May 14, 1992. Dr. Byrd stated that appellant's condition was related to an injury sustained on January 11, 1984.[1]

In a report dated February 2, 1993, Dr. Byrd stated that appellant was initially examined on May 13, 1992 for an accident on that date and that appellant complained of stabbing pains in his lower and mid back. He provided findings on examination and stated that lumbar x-rays showed a pelvic tilt to the right as well as right concavity scoliosis. He diagnosed lumbar subluxation and lumbar intervertebral disc protrusion.

By decision dated February 24, 1993, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that appellant had sustained a medical condition on May 13, 1992 in the performance of duty. In its decision, the Office did not mention Dr. Byrd's June 4, 1992 report.

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[1] The record shows that appellant submitted a claim for a January 11, 1984 back injury at work which was accepted by the Office for a lumbosacral strain and subluxation at L5-S1. The Office accepted a recurrence of disability on March 16, 1990.

By letter dated March 9, 1993, appellant requested an oral hearing before an Office hearing representative and asked that the case record for his January 11, 1984 employment injury be included in the evidence of record.

On March 29, 1994 a hearing was held before an Office hearing representative at which time appellant testified.

In a report dated April 13, 1994, Dr. Byrd stated that appellant was initially seen on May 13, 1992 at which time he reported that he was moving some freight out of a truck and injured his back. Dr. Byrd stated that appellant's findings on examination and x-ray were consistent with the injury that he described. He stated that he had inadvertently failed to state in an earlier report that appellant's subluxation was demonstrated on x-ray.

By decision dated July 7, 1994, the Office hearing representative affirmed the Office's February 24, 1993 decision on the grounds that appellant had failed to establish that he had sustained an injury as a result of the lifting incident at work on May 13, 1992. In its decision the Office stated that Dr. Byrd had not supported his diagnosis of subluxation by findings noted on x-ray. The Office mentioned Dr. Byrd's February 3, 1993 and April 13, 1994 reports but did not mention his June 4, 1992 report.

By letter dated March 5, 1995, appellant requested reconsideration of the denial of his claim. He asserted that the Office had erred in its July 7, 1994 decision because, contrary to what the Office had said in its decision, Dr. Byrd's diagnosis of subluxation had been supported by x-rays. Appellant indicated that there was medical evidence contained in his 1984 employment injury file which supported the diagnosis of subluxation with x-ray findings.

By decision dated July 7, 1995, the Office denied appellant's request for further merit review of his claim on the grounds that the evidence that he submitted in support of his request for reconsideration was insufficient to warrant further merit review.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[2] As appellant filed his appeal with the Board on July 31, 1995 the only decision properly before the Board is the Office's July 7, 1995 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's July 7, 1994 decision denying appellant's claim for compensation benefits.[3]

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of his claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[4] Section 10.138(b)(2) provides that when an application for review of the merits of a

[2] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

[3] *Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

[4] 20 C.F.R. § 10.138(b)(1).

claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[5]

In this case, appellant alleged that the Office had erred in its July 7, 1994 decision by stating that Dr. Byrd, appellant's attending chiropractor, had not supported his diagnosis by reference to findings on x-rays. Appellant indicated that there was medical evidence in his 1984 employment injury file[6] which supported the diagnosis with x-ray findings and which had not been addressed by the Office. However, in its July 7, 1995 decision, the Office did not indicate that it had reviewed the consolidated 1984/1992 case file to consider appellant's allegation of error. The case record does contain a June 4, 1992 report from Dr. Byrd which contains a diagnosis of subluxation as shown on x-rays taken on May 14, 1992 but there is no indication that the Office ever reviewed this June 4, 1992 report. As appellant has shown an error in a point of law as applied by the Office in its July 7, 1994 decision, the Office improperly denied his request for reconsideration.

The July 7, 1995 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
April 9, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

[5] 20 C.F.R. § 10.138(b)(2).

[6] As noted earlier the Office had combined the case file for appellant's 1984 employment injury with his 1992 claim file.

David S. Gerson, Member, dissenting:

The majority finds that "appellant has shown an error in a point of law as applied by the Office in its July 7, 1994 decision." Presumably then, the majority is applying subsection (i) of 10.138(b)(1) of the Code of Federal Regulations which provides that a claimant may obtain review of the merits of his claim by "showing that the Office erroneously applied or interpreted a point of law." I must presume this as the language of subsection (i) most closely matches the majority's finding. Subsection (ii) allows a claimant to obtain review by "advancing a point of law or a fact not previously considered by the Office." Subsection (iii) allows for such review by "submitting relevant evidence not previously considered by the Office."

The majority states that on reconsideration appellant alleged that the Office had erred in its prior merit decision in finding that the chiropractor had not supported his diagnosis by reference to x-ray. Indeed, the chiropractor on June 4, 1992, some three weeks after the alleged injury, does indicate that "subluxation [was] demonstrated by x-ray," but he related the subluxation to a 1984 injury. This report was received by the Office on June 9, 1992. Upon a December 21, 1992 request for further factual and medical information, the Office received a February 2, 1993 letter from the chiropractor stating x-ray findings as "Pelvic Tilt to the Right, Rt., Concavity Scoliosis. The diagnosis…is…Lumbar Subluxation." The Office's first merit decision was dated February 24, 1993 and stated, "Since the x-rays taken on the first appointment do not show a subluxation of the spine, they do not support the chiropractor's diagnosis." The Office then quoted directly from the chiropractor's February 2, 1993 report. The hearing representative in her July 7, 1994 report also quotes directly from this same report which contains the diagnosis of subluxation as demonstrated by x-ray. She concludes that the quoted x-ray findings "do not meet the definition of subluxation." Both the claims examiner and the hearing representative found that the diagnosed subluxation was not supported by the x-ray findings in the narrative report.

The majority appears to accept appellant's characterization of the nature of the Office's decisions. I do not. The record appears clear to me that in December 1992 the Office requested additional factual and medical evidence and received a February 2, 1993 narrative from the chiropractor further explaining the June 4, 1992 form report. The Office twice evaluated whether the x-ray findings quoted above were sufficient to support a diagnosis of subluxation and twice concluded that they were not. This was a factual conclusion at which the Office twice arrived.

Although I am not certain on what legal basis the majority are finding that the Office abused its discretion in denying appellant's request for reconsideration, I conclude that appellant has not advanced a point of law or fact not previously considered nor has he submitted new evidence sufficient to require the Office to reopen his claim. Moreover, I do not consider that appellant has shown that the Office erroneously applied a point of law nor does the majority so cite. I would affirm the July 7, 1995 decision of the Office.

David S. Gerson
Member