U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ETHEL D. OTEY and DEPARTMENT OF AGRICULTURE, FOOD & NUTRITION SERVICE, St. Louis, Mo.

Docket No. 96-2639; Submitted on the Record;
Issued December 18, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury in the performance of duty on October 4, 1994, as alleged; and (2) whether the Office of Workers' Compensation Programs, by its July 23, 1996 decision, abused its discretion by refusing to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128.

On October 6, 1994 appellant, then a 37-year-old secretary, filed a traumatic injury claim (Form CA-1), alleging that on October 4, 1994, she was rotating files and while bending over to reach a lower drawer with files in her hand, she injured her lower back.

Accompanying the claim form, was a disability certificate dated October 19, 1994 by Dr. Nathaniel Watlington, a chiropractor, who diagnosed low back pain syndrome and strain/sprain lumbar and indicated that appellant was partially incapacitated from October 4, 1994 "to undetermined at this time."

In November 1994[1] the record was updated to include a request for examination and/or treatment (Form CA-16) dated October 19, 1994 and completed by Dr. Watlington.[2] Dr. Watlington diagnosed low back pain syndrome, strain/sprain lumbar spine and indicated a subluxation at L1 through L5.

By letter dated November 17, 1994, the Office requested detailed factual and medical information from appellant to support her claim.

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[1] The complete date that the form was stamped in by the Office was not legible.

[2] Part A of the form was not completed, signed or dated.

On December 7, 1994 the record was updated to include a return to work certificate dated November 18, 1994 from Dr. Watlington who diagnosed low back pain syndrome and indicated that appellant was able to return to work on light duty on a temporary basis beginning November 21, 1994.

By decision dated May 18, 1995, the Office denied appellant's claim for failure to establish that she sustained an injury in the performance of duty as alleged and, therefore, fact of injury was not established.[3]

By letter dated May 22, 1995, appellant requested an oral hearing before an Office hearing representative. An informal hearing was held on March 7, 1996 at which time appellant elected not to proceed with an oral hearing but to have the case reviewed on the written record. By letter dated March 20, 1996 from the hearing representative to appellant, the discussion of May 7, 1996 was laid out and it was stated that the record would be held open for 65 days for the submission of additional evidence after which a review of the written record would be conducted.

On May 29, 1996 after receiving no additional evidence, the hearing representative found that appellant failed to establish that she sustained an injury as a result of the October 4, 1994 incident and affirmed the Office's May 18, 1995 decision.[4] The Board notes that the hearing representative also found that the request for examination and/or treatment (Form CA-16) dated October 19, 1994 from Dr. Watlington was not a binding contract.

On June 20, 1996 the record was updated to include a May 29, 1996 letter from appellant accompanied by a summary of events relating to the October 4, 1994 incident, duplicates of the November 18, 1994 return to work certificate already of record; a doctor's bill; and the employing establishment nursing notes with an October 4, 1994 entry providing a history of injury and noting complaints of tenderness to touch.

The record was updated to include a July 16, 1996 letter from a personnel officer of the employing establishment and a Form CA-16 dated October 18, 1994. The personnel officer indicated that "I confirm that I, the authorizing official, gave [appellant] authorization to seek medical care retroactive to her date of injury, October 4, 1994."

By an undated letter received on June 20, 1996, appellant requested reconsideration of the May 29, 1996 hearing representative's decision. In support of the request appellant submitted a July 16, 1996 letter from the employing establishment, the original request for examination and/or treatment (Form CA-16), a modified Form CA-16 dated October 18, 1994, nurses notes and several medical bills.

[3] The Office explained why Dr. Watlington, a chiropractor, was not considered a "physician" under the Act and that the evidence submitted from him was not considered competent medical evidence.

[4] The hearing representative discussed in detail the restrictions upon chiropractors as physician under the Act and that Dr. Watlington, a chiropractor, did not qualify as a physician in this case because the medical evidence failed to include documentation that he based his diagnosis of subluxation upon an x-ray examination of the spine.

By decision dated July 23, 1996, the Office denied appellant's request for reconsideration. The Office found that the evidence submitted in support of the request for review was irrelevant in nature and insufficient to warrant review of the prior decision.

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained an injury in the performance of duty on October 4, 1994 as alleged.

An employee seeking benefits under the Federal Employees' Compensation Act[5] has the burden of establishing 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, and that the claim was filed within the applicable time limitations of the Act.[6] An individual seeking disability compensation must also establish that an injury was sustained at the time, place and in the manner alleged,[7] that the injury was sustained while in the performance of duty,[8] and that the disabling condition for which compensation is claimed was caused or aggravated by the individual's employment.[9] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[10]

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[11] In the instant case, there is no dispute that the claimed incident occurred at the time, place and in the manner alleged. However, the Office found that the medical evidence was insufficient to support that appellant sustained an injury as a result of the incident.

The second component of fact of injury is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.[12]

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[5] 5 U.S.C. §§ 8101-8193.

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

[7] *Robert A. Gregory*, 40 ECAB 478 (1989).

[8] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[9] *Steven R. Piper*, 39 ECAB 312 (1987).

[10] *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[11] *Elaine Pendleton, supra* note 6.

[12] *Kathryn Haggerty*, 45 ECAB 383 (1994); *see* 20 C.F.R. §10.110(a).

In this case, the only evidence submitted was a disability certificate, return to work certificate and a request for examination and/or treatment (Form CA-16) all completed by Dr. Watlington, a chiropractor. While he, indicated on the Form CA-16 a subluxation at L1 through L5, no report was received from Dr. Watlington indicating that he treated appellant for a subluxation as demonstrated by x-ray to exist. Therefore, he is not considered a "physician" under the Act and none of the documents from Dr. Watlington constitute competent medical evidence. Although the Office advised appellant of the type of evidence needed to establish her claim, specifically what was needed when the evidence was from a chiropractor, such evidence has not been submitted. Therefore, the Board finds that the evidence of record is insufficient to meet appellant's burden of proof.

The Board further finds that in its decision dated July 23, 1996, the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of her claim on the merits under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.[13] Section 10.138(b)(2) provides that when application for review of the merits of a 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.[14]

In his undated request for reconsideration received on June 20, 1996, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did she advance a point of law or fact not previously considered by the Office. In support of her reconsideration request, appellant submitted a July 16, 1996 letter from the employing establishment regarding Form CA-16, the original request for examination and/or treatment (Form CA-16), a modified CA-16 dated October 18, 1994, nurses notes and several medical bills. None of the medical evidence submitted was material to the issue of whether appellant sustained an injury in the performance of duty on October 4, 1994.

The Office also found that the original request for examination and/or treatment (Form CA-16) was issued without a signature of an agency representative and without authorization of a specific provider and did not represent a binding contract. The employing establishment stated that it issued "authorization to seek medical care retroactive to [appellant's] date of injury, October 4, 1994." No date was given as to when this retroactive authorization was made.

The Board finds that, in the absence of an emergency, a Form CA-16 does not create a contractual obligation where it is issued after the treatment for which payment is sought has

[13] 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

[14] 20 C.F.R. § 10.138(b)(2).

already been rendered.[15] Therefore, the request for examination and/or treatment (Form CA-16) was not a binding contract.

The decisions of the Office of Workers' Compensation Programs dated July 23 and May 29, 1996 are affirmed.

Dated, Washington, D.C.
December 18, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[15] *Mary J. Briggs*, 37 ECAB 578 (1986); 20 C.F.R. § 10.402(b).