U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALERIE L. KOGER and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Fremont, CA

Docket No. 97-2861; Submitted on the Record;
Issued August 13, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the written record.

On October 25, 1996 appellant, then a 42-year-old air traffic control specialist, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on that same day she sustained an injury to her back and neck. Appellant stated that she "snapped back" to avoid a cord that was stretched across the work area. She did not cease work at the time and did not initially submit any medical evidence in support of her claim. By letter dated November 27, 1996, the Office advised appellant of the need for additional medical evidence, and allowed appellant 25 days within which to submit such evidence.

On December 24, 1996 the Office denied appellant's claim on the basis that she had not demonstrated the existence of a medical condition and, therefore, failed to establish fact of injury. In rendering its decision, however, the Office overlooked a December 4, 1996 report from Dr. Mark A. Lopes, a chiropractor.[1] Upon considering Dr. Lopes' opinion, the Office advised appellant, by letter dated January 3, 1997, that this evidence, although overlooked initially, would not have altered the prior decision. The Office explained that as a chiropractor, Dr. Lopes' opinion was of no medical value in establishing appellant's claim because the diagnosed condition was not a subluxation based upon x-ray findings. The Office further advised appellant that her appeal rights, as set forth in the prior decision, remained available.

On January 30, 1997 the Office received another report from Dr. Lopes dated January 23, 1997. He explained, among other things, that his diagnosis of "'sprain/strain'" was

[1] Based on an October 25, 1996 examination, Dr. Lopes diagnosed "sprain/strain of the muscles and ligaments at the cervicothoracic junction and the lumbosacral area primarily, with slight involvement of the middle thoracic area." Additionally, the doctor attributed appellant's condition to her employment injury of October 25, 1996.

equivalent to a diagnosis of subluxation. And with respect to the absence of x-ray evidence, Dr. Lopes explained he was unaware that initial x-rays were required. He further indicated that appellant's condition did not require new x-rays as he already had prior x-rays of her spine on file and "there was no indication of possible fracture, dislocation or pathology that warranted additional films to render safe and effective care."

In a letter addressed to Dr. Lopes, dated February 11, 1997, the Office explained that unfortunately, appellant was not exempt from the Federal Employees' Compensation Act's limitations regarding chiropractic treatment. The Office further indicated that appellant's only recourse was to pursue her appeal rights. A copy of this letter was also forwarded to appellant.

Appellant subsequently filed a request for review of the written record, post marked March 11, 1997. In a decision dated April 15, 1997, the Office found that appellant did not submit her request for review within 30 days of the Office's December 24, 1996 decision and, therefore, she was not entitled to a review of the written record as a matter of right. Additionally, the Office considered the matter in relation to the issue involved, and denied appellant's request on the basis that the issue of fact of injury could equally well be addressed through the reconsideration process.

On May 23, 1997 appellant filed a request for reconsideration. Appellant also submitted three additional reports from Dr. Lopes, dated May 2 and 12, and June 27, 1997, in which he noted that appellant continued to experience neck and back pain associated with her employment injury of October 25, 1996.

In a merit decision dated July 8, 1997, the Office denied modification on the basis that the record failed to include any medical evidence demonstrating the existence of a condition for which compensation was being claimed. In an accompanying memorandum, the Office explained that Dr. Lopes' various reports could not be considered medical evidence under section 8101(2) of the Act. Appellant subsequently filed an appeal with the Board on September 8, 1997.[2]

The Board finds that appellant has failed to establish that she sustained an injury in the performance of duty.

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 that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.[3] In the instant case, the Office accepted the fact that the employment incident of October 25, 1996 occurred as

[2] The record includes additional reports from Dr. Lopes, dated July 23 and September 11, 1997, that were received by the Office after it issued its July 8, 1997 decision denying modification. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

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

alleged. The second component in a fact of injury analysis is whether the employment incident caused a personal injury. This latter component generally can be established only by medical evidence.[4] Here, the Office denied appellant's claim based on her failure to satisfy this second component.

As previously noted, the evidence submitted in support of appellant's claim consisted of several reports from Dr. Lopes, who is a chiropractor. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under the Act. Section 8101(2) of the Act provides that 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…."[5] Therefore, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence.[6] In the instant case, based upon the evidence that was properly before the Office, it is apparent that Dr. Lopes did not rely upon a x-ray interpretation in the diagnosis or treatment of appellant's condition. In his January 23, 1997 report, Dr. Lopes clearly indicated that he did not have an x-ray taken at the time of appellant's October 25, 1996 employment incident. Consequently, Dr. Lopes' reports are of no probative value as he is not considered a physician under the Act.[7] Therefore, the Board that finds appellant has not met her burden of proof.

The Board also finds that the Office properly denied appellant's request for review of the written record.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for review of the written record must be submitted, in writing, within 30 days of the date of issuance of the decision. A claimant is not entitled to a review if the request is not made within 30 days of the date of issuance of the decision, as determined by the postmark of the request.[8] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[9] In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[10]

The Office initially rejected appellant's claim for compensation in a decision dated December 24, 1996. Because appellant made her request for review of the written record on March 9, 1997; more than 30 days after the Office's December 24, 1996 decision, she is not

[4] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[5] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

[6] *Kathryn Haggerty*, 45 ECAB 383 (1994).

[7] *Id.*

[8] 20 C.F.R. § 10.131(a) and (b).

[9] *Herbert C. Holley*, 33 ECAB 140 (1981).

[10] *Rudolph Bermann*, 26 ECAB 354 (1975).

entitled to a review as a matter of right. Moreover, the Office considered whether to grant a discretionary review, and correctly advised appellant that the issue could equally well be addressed by requesting reconsideration. As previously noted, appellant did, in fact, pursue this option. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for review of the written record.[11]

The decisions of the Office of Workers' Compensation Programs dated July 8 and April 15, 1997, and December 24, 1996 are hereby affirmed.

Dated, Washington, D.C.
August 13, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[11] The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).