U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAULA SHEEHAN and DEPARTMENT OF VETERANS AFFAIRS, PALO ALTO VETERANS HOSPITAL, Palo Alto, CA

Docket No. 00-786; Submitted on the Record;
Issued March 12, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

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 merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On October 14, 1998 appellant, then a 48-year-old computer specialist, filed a notice of occupational disease and claim for compensation (Form CA-2). She asserted that on September 21, 1998 she first became aware that she sustained carpal tunnel syndrome, stiffness and pain of the wrist, arm, elbow, shoulder, upper back and shoulder due to her employment. Appellant alleged that this was a result of using the keyboard and mouse combined with exposure to nonergonomic work areas on a daily basis. She did not stop work.

Appellant provided additional documentation concerning her job description and work history.

In an October 14, 1998 report, Dr. David DeSalvo, a chiropractor, diagnosed cervicobrachial syndrome and carpal tunnel syndrome. He noted that x-rays were negative for pathology.

In a November 6, 1998 letter, the Office advised appellant of the limitations imposed by the Federal Employees' Compensation Act[1] with respect to chiropractic services. The Office further explained that the medical evidence previously submitted did not establish the existence of a spinal subluxation inasmuch as appellant had not provided any x-ray evidence. Additionally, the Office requested that appellant provide x-rays, if they were taken within the next 30 days. The Office also advised her that Dr. DeSalvo was not authorized to treat appellant's carpal tunnel syndrome if the condition was accepted as work related.

[1] 5 U.S.C. § 8101(2).

In a November 13, 1998 progress report, Dr. DeSalvo stated that the original diagnosis was thoracic strain. He indicated that the objective findings revealed cervical range of motion which was nonpainful, a painful palpation of the right neck and upper shoulder region. Dr. DeSalvo also noted that appellant was working with no disabilities.

In a November 17, 1998 report of occupational injury or illness, Dr. DeSalvo noted that x-rays were negative for pathology. He noted that appellant's diagnosis was thoracic strain.

By letter dated November 20, 1998, appellant supplied additional factual information concerning her claim, including information concerning a carpal tunnel surgery to her right hand in 1996.

By merit decision dated February 10, 1999, the Office accepted the occurrence of the claimed employment incident but found that the medical evidence was insufficient to establish an injury resulting from the event. The Office explained the limitations under the Act with respect to chiropractic services and found that, as Dr. DeSalvo was not a physician under the Act, his reports had no value.

By letter dated March 23, 1999, appellant requested reconsideration. She provided additional documentation including a March 12, 1999 report from Dr. DeSalvo. In his report, Dr. DeSalvo indicated that x-rays were taken and demonstrated a subluxation of C7 as well as osteophyte of the inferior, posterior aspect of the C4 body. Appellant also provided a photocopy of a January 15, 1999 progress report. Dr. DeSalvo inserted "839.07 7th cervical subluxation" in the space provided for original diagnosis.

In another January 15, 1999 progress report, Dr. DeSalvo indicated that appellant had a thoracic strain in the category for original diagnosis. This report appeared to be an original. Additionally, no explanation was provided to explain the amendments or changes between the two reports of this same date.

By decision dated October 13, 1999, the Office rejected appellant's request for a review of the merits on the grounds that the evidence submitted in support of appellant's request was insufficient to warrant a review of its Office's February 10, 1999 denial. An accompanying memorandum shows that a limited review of the record was undertaken.

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty.

An employee seeking benefits under the Act[2] has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of the Act and 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 or specific condition for which compensation is claimed is causally related to the employment

[2] 5 U.S.C. §§ 8101-8193.

injury.[3] 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.[4]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[5] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.[6] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized medical 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 upon a complete factual and medical background of the claimant[7], must be one of reasonable medical certainty[8] 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.

In the present case, the Office accepted that the claimed exposure occurred at the time, place and in the manner alleged. However, the Office denied appellant's claim based on her failure to prove that a medical condition existed for which compensation was claimed.

The evidence submitted in support of appellant's claim consisted of several reports from Dr. DeSalvo, who is a chiropractor. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered to be 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…."[9] 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.[10] In the instant case, although Dr. DeSalvo

[3] *Kathryn Haggerty*, 45 ECAB 383, 388 (1994); *Joe Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

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

[5] *See id* at 352.

[6] The Board has held that, in certain cases, where the causal connection is so obvious, expert medical testimony may be dispensed; *see Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959). The instant case, however, is not a case of obvious causal connection.

[7] *William Nimitz, Jr.* 30 ECAB 567, 570 (1979).

[8] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[9] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

[10] *Kathryn Haggerty, supra* note 3.

noted that x-rays were taken, he did not diagnose a spinal subluxation at that time. Thus, the Office properly determined that Dr. DeSalvo could not be considered a physician under the Act. The record does not contain any probative medical evidence establishing that appellant sustained a medical condition related to her employment. Consequently, appellant has failed to establish that she sustained an injury in the performance of duty.

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

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[11]

In the present case, appellant filed a request for reconsideration on March 23, 1999 and submitted reports from Dr. DeSalvo dated January 8, January 15 and March 12, 1999.

Dr. DeSalvo's March 12, 1999 report for the first time noted a diagnosis of spinal subluxation based on x-rays. Because he diagnosed a spinal subluxation based on x-rays, Dr. DeSalvo is a physician with regard to this report. However, the services of chiropractors are limited under the Act to treatment consisting of manual manipulation to correct a spinal subluxation.[12] In this case, appellant's claim is based on the condition of carpal tunnel syndrome. Based on the limitations placed on chiropractors under the Act and implementing regulations, the Board notes that Dr. DeSalvo's opinion on appellant's carpal tunnel syndrome does not constitute relevant medical evidence.[13] Based on this limitation of chiropractors to treat claimants, the Office properly denied reconsideration.

[11] 20 C.F.R. § 10.608(b) (1999).

[12] *See* 20 C.F.R. § 10.311(a) (1999).

[13] *See Beverly G. Atkins*, 47 ECAB 647 (1996).

The decisions of the Office of Workers' Compensation Programs dated October 12 and February 10, 1999 are affirmed.

Dated, Washington, DC
March 12, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member