United States Department of Labor
Employees' Compensation Appeals Board

MARY A. CEGLIA, Appellant	)	
and	)	**Docket No. 04-113**
	)	**Issued: July 22, 2004**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Medford, OR, Employer	)	

Appearances:
Mary A. Ceglia, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On October 15, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated November 26, 2002, denying her claim for a recurrence and a nonmerit decision dated March 14, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues on appeal are: (1) whether appellant sustained a recurrence on or after March 12, 2002 causally related to her accepted July 11, 2001 employment injury; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 11, 2001 appellant, a 44-year-old forestry technician/firefighter, filed a traumatic injury claim alleging that she sustained bruises or broken ribs on her left side on that date when she slipped while stepping onto a truck and hit the corner of the pickup bed. She did not stop work, but was released to work with restrictions on July 16, 2001 and to full-duty work on August 23, 2001 by Dr. N. Kather, of Valley Immediate Care, Medford, Oregon. The Office accepted the claim for a left rib contusion on September 23, 2002.

In a March 12, 2002 report, Dr. Maria Miller, an attending physician, noted appellant's injury of history and reported that she had "ongoing tenderness on the left side just under and lateral to her right breast." She recommended that appellant consult a chiropractor for her ongoing rib discomfort during an examination on February 22, 2002.

On March 12, 2002 the employing establishment issued authorization for treatment (Form CA-16), by Dr. Robert Bennett, a chiropractor, for chiropractic and physical therapy treatment. On the back of the form Dr. Bennett noted March 14, 2002 as the first date of examination, noted that appellant injured herself by falling off of a pickup bed on July 11, 2001 and diagnosed spinal subluxations, fibrosis and muscle spasm. He checked "yes" to the question asking whether the condition was caused or aggravated by the employment injury.

Appellant filed a claim for a recurrence beginning March 12, 2002. She did not stop working, but the claim form indicated that she sought medical treatment from Valley Immediate Care and from a chiropractor for her condition on July 11, 16 and 26, 2001.

In an August 26, 2002 letter, the Office advised appellant regarding the information required to support her recurrence claim.

In a September 4, 2002 report, Dr. Bennett diagnosed chronic traumatic moderate costal strain/sprain, spinal subluxation, costal contusion and muscle spasms and tissue contracture. He noted that appellant "reported to this office on March 14, 2002."

In a September 10, 2002 computerized tomography (CT) scan, Dr. Roberta L. Jackson, a Board-certified diagnostic radiologist, reported a negative upper abdomen and chest CT scan.

In a September 16, 2002 report, Dr. Bennett informed the Office that an x-ray was taken on March 14, 2002 which showed a spinal subluxation.

In an October 3, 2002 decision, the Office denied appellant's claim for a recurrence on the basis that Dr. Bennett failed to provide any rationale explaining how appellant's current condition was causally related to her accepted injury of chest wall contusion. The Office also noted that the accepted condition was not covered under chiropractic treatment. The Office informed appellant that reimbursable chiropractic services were limited to treatment of spinal subluxations of the spine as diagnosed by x-ray pursuant to 5 U.S.C. § 8101(2).

In an October 14, 2002 letter, appellant requested reconsideration and submitted a March 12, 2002 treatment report by Dr. Miller and September 16, 2002 letter from Dr. Bennett and the authorization for treatment (Form CA-16).

On October 24, 2002 the Office received a September 6, 2002 report by Dr. Alan Binette, an attending Board-certified gynecologist and obstetrician, who found "mild diffuse tenderness in the rib cage on the left side just above her spleen." He noted the "pain occurred immediately after her injury and has persisted since that time."

On November 11, 2002 the Office received a November 5, 2002 report from Dr. Bennett, who noted that appellant's injury was not a recurrence but "is for the original ongoing pain and injury, which did not heal or resolve." He attributed her condition to a spinal subluxation, as demonstrated by x-ray to exist.

In a decision dated November 26, 2002, the Office denied modification of the October 3, 2002 decision. The Office determined that appellant's chiropractic services for the period March 12 to May 11, 2002, were reimbursable based upon the March 12, 2002 CA-16 form.

In a January 26, 2003 letter, appellant requested reconsideration and submitted a December 17, 2002 letter from Dr. Bennett, who stated that the accepted rib contusion caused a spinal subluxation as demonstrated by x-ray. He further noted that appellant's injury had not resolved as "The subluxation and attendant soft tissue injury was not treated by a chiropractor."

In a March 14, 2003 decision, the Office denied appellant's request for reconsideration.[1]

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking compensation under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.[3] In this case, appellant has the burden of establishing that she sustained a recurrence of a medical condition[4] on March 12, 2002 causally related to her July 11, 2001 employment injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[5] Where no such rationale is present, the medical evidence is of diminished probative value.[6]

The Board has previously held that, when diagnostic testing is delayed, uncertainty mounts regarding the cause of the diagnosed condition and a question arises as to whether that testing in fact documents the injury claimed by the employee.[7] The greater the delay in testing,

[1] Subsequent to the issuance of the Office decision, appellant submitted additional evidence. As this evidence was not previously submitted to the Office for consideration prior to its decision of March 14, 2003, it represents new evidence which cannot be considered by the Board in the current appeal. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. §§ 8101-8193

[3] *Edward W. Spohr*, 54 ECAB ___ (Docket No. 03-1173, issued September 10, 2003).

[4] Recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a "need for further medical treatment after release from treatment," nor is an examination without treatment. 20 C.F.R. § 10.5(y) (2002).

[5] *Ronald A. Eldridge*, 53 ECAB ___ (Docket No. 01-67, issued November 14, 2001).

[6] *Albert C. Brown*, 52 ECAB 152 (2000).

[7] *Linda L. Mendenhall*, 41 ECAB 532 (1990).

the greater the likelihood that an event not related to employment has caused or worsened the condition for which the employee seeks compensation. When the delay becomes so significant that it calls into question the validity of an affirmative opinion based at least in part on the testing, such delay diminishes the probative value of the opinion offered.[8]

In order to establish that her claimed recurrence of the condition was caused by the accepted injury, medical evidence of bridging symptoms between her present condition and the accepted injury must support the physician's conclusion of a causal relationship.[9]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left rib contusion on July 11, 2001. Appellant was released to return to work with physical restrictions on July 16, 2001. She returned to unrestricted fully-duty work on August 23, 2001.

The medical evidence submitted in support of appellant's March 12, 2002 recurrence claim consists of reports from Dr. Bennett, a chiropractor, a March 12, 2002 treatment note by Dr. Miller, a September 10, 2002 CT scan by Dr. Jackson and a September 6, 2002 report by Dr. Binette.

In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under 5 U.S.C. § 8101(2). A chiropractor is not considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.[10] Appellant's treatment with Dr. Bennett began on March 14, 2002 and on that date he took an x-ray of her spine and diagnosed a spinal subluxation.[11] The Board notes that, as Dr. Bennett diagnosed spinal subluxations based upon x-ray evidence, he is considered to be a "physician" under the Act.

As Dr. Bennett is considered a "physician" under the Act, the question is whether he has provided sufficient evidence to show a causal relationship between the diagnosed spinal subluxation and the accepted left rib contusion injury. In a September 4, 2002 report, Dr. Bennett diagnosed a spinal subluxation, but provided no opinion as to the cause of the spinal subluxation. In a subsequent November 5, 2002 report, he concluded appellant's original injury had not healed or resolved and attributed her condition to a spinal subluxation. Dr. Bennett on December 17, 2002 attributed appellant's spinal subluxation to the accepted rib contusion and opined her injury had not resolved as her soft tissue injury and spinal subluxation had not been treated by a chiropractor.

[8] *Id.*

[9] *See Ricky S. Storms*, 52 ECAB 349 (2001).

[10] *See Brenda C. McQuiston*, 54 ECAB ___ (Docket No. 03-1725, issued September 22, 2003); *Kathryn Haggerty*, 45 ECAB 383 (1994).

[11] The Office's implementing federal regulation define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See* 20 C.F.R. § 10.5(bb) (2002). *See also Michelle Salazar*, 54 ECAB ___ (Docket No. 03-623, issued April 11, 2003).

None of the reports from Dr. Bennett provide rationale beyond conclusory statements, explaining how the accepted July 11, 2001 employment injury of a left rib contusion caused a spinal subluxation, first diagnosed by x-ray on March 14, 2002. Moreover, the only condition accepted by the Office is a rib contusion. The Office never accepted the condition of spinal subluxation. It is appellant's burden to establish a causal relationship between the spinal subluxation and the accepted employment injury. As Dr. Bennett failed to provide a rationalized medical opinion explaining how a spinal subluxation first diagnosed some eight months following the accepted July 11, 2001 employment injury was related to the injury, appellant has not met her burden of proof. The Board finds that appellant has not submitted the necessary rationalized medical evidence to substantiate that her spinal subluxation condition is causally related to the July 11, 2001 employment injury.

Appellant also submitted reports from Drs. Binnette and Miller in support of her recurrence claim. Dr. Miller reported that she had "ongoing tenderness on the left side just under and lateral to her breast" and recommended appellant consult a chiropractor in her March 12, 2002 report. In a September 6, 2002 report, Dr. Binette found "mild diffuse tenderness in the rib cage on the left side just above her spleen" and noted that appellant had this pain since her injury. Neither Dr. Binnette nor Dr. Miller specifically addressed a causal relationship between the reported conditions and the accepted July 11, 2001 employment injury.

The September 10, 2002 results of the CT scan performed by Dr. Jackson were negative for the upper abdomen and chest and did not contain any discussion on causal relationship. Thus, this report does not support appellant's claim for a recurrence.

It is appellant's burden of proof to submit the necessary medical evidence to establish a claim for a recurrence. The record does not contain a medical report providing a reasoned medical opinion that appellant sustained a recurrence beginning March 12, 2002 causally related to the July 11, 2001 employment injury. The Board accordingly finds that appellant did not meet her burden of proof and the Office properly denied the claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act[12] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[13] Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.[14]

Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section

[12] 5 U.S.C. § 8128(a) ("the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[13] *Raj B. Thackurdeen,* 54 ECAB ___ (Docket No. 02-2392, issued February 13, 2003); *Veletta C. Coleman,* 48 ECAB 367 (1997).

[14] 20 C.F.R. § 10.608(a).

10.606(b)(2).[15] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[16]

Section 10.608(b) provide that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[17]

ANALYSIS -- ISSUE 2

Appellant's January 26, 2003 reconsideration request neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence, appellant submitted a report dated December 17, 2002 from Dr. Bennett. His December 17, 2002 report is cumulative and repetitive of previous reports as it merely restates his opinion that appellant's left rib contusion caused a spinal subluxation as demonstrated by x-ray.[18] Dr. Bennett's December 17, 2002 report is, thus, insufficient to meet the third requirement. The Board finds that the Office properly denied appellant's request for a review on the merits as she failed to meet any of the three requirements.

CONCLUSION

The Board finds that appellant failed to establish that she sustained a recurrence [19]on and after March 12, 2002 causally related to her accepted July 11, 2001 employment injury. The Board finds that the Office properly denied appellant's request for a merit review.

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[15] 20 C.F.R. § 10.606(b)(1)-(2); *see Sharyn D. Bannick*, 54 ECAB ___ (Docket No. 03-567, issued April 18, 2003).

[16] 20 C.F.R. § 10.608(b).

[17] *Id.*

[18] *Roger W. Robinson*, 54 ECAB ___ (Docket No. 03-348, issued September 30, 2003). (Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

[19]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 14, 2003 and November 26, 2002 are affirmed.

Issued: July 22, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member