United States Department of Labor
Employees' Compensation Appeals Board

CONSTANCE J. PEREZ, Appellant	)	
and	)	**Docket No. 04-1182**
	)	**Issued: March 4, 2005**
DEPARTMENT OF THE ARMY, MILITARY ACADEMY, West Point, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On April 1, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated January 20, 2004, which denied her request for reconsideration. The last merit decision in this case was the Board's decision dated December 5, 2002. As there have been no merit decisions issued within one year of the date appellant filed her appeal, the Board lacks jurisdiction to review the merits of her claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This is the second appeal in this case to the Board. In a December 5, 2002 decision, the Board affirmed the Office's termination of appellant's compensation benefits. The facts and circumstances of this case are set forth in that decision, which are hereby incorporated by

reference.[1] In summary, the Office accepted appellant's claim that she sustained a head contusion and aggravation of lumbar radiculopathy on October 11, 1988 when she fell while in the performance of duty as a clerk typist. Due to a conflict in the medical evidence between the opinions of both Board-certified psychiatrists and neurologists, Dr. Stanley Mandell, appellant's physician, and Dr. Patrick Hughes, a second opinion physician, she was referred by the Office to Dr. Jeffrey S. Oppenheim, a Board-certified neurosurgeon, for an impartial medical examination. He found that appellant had no residuals from her work-related injury and no remaining injury or disability and the Office terminated her compensation effective December 2, 2001.

Appellant, through her attorney, sought reconsideration before the Office and submitted a July 8, 2003 report from Dr. Steven Birnbuam, a chiropractor, who indicated that he first examined her in May 1992. He reviewed her medical record and performed an examination, finding that injuries to appellant's cervical and lumbar spine were causally related to the October 11, 1988 employment injury and that she remained totally disabled. Dr. Birnbuam further indicated that she has not reached maximum medical improvement. In interpreting recent medical evidence, he noted that a magnetic resonance imaging (MRI) scan conducted on February 21, 2003 showed an L4-5, L5-S1 subluxation. Dr. Birnbuam also interpreted the July 29, 2003 x-ray as showing postsurgical fusion of C5-6-7, with titanium plate and screws and subluxation C5-6, C6-7. He noted:

> "It is with the highest probability that the current lumbar subluxation of L5-S1 seen on the [x]-ray of [July 29, 2003] is the same as the one noted on the [computerized tomography (CT)] scan of [May 5, 1989] and that the incident of [October 11, 1988] was the proximate cause of the original subluxation, disc herniations and disability determined by Dr. Mandell, as well as the proximate cause of the current medical condition."

Dr. Birnbaum noted that appellant was going to require additional physical therapy and chiropractic care on a long-term basis due to the progressive deterioration of her cervical and lumbar spine. He noted that studies were done after Dr. Oppenheim's report which showed verifiable objective evidence of subluxation, disc herniations, thecal sac deformation, neuroforaminal stenosis and overriding of facet joints, all of which clearly explained her muscle weakness.

An x-ray of appellant's cervical spine on June 19, 2003 was interpreted by Dr. Heidi Fine as showing postsurgical changes with anterior cervical changes at C5 through C7. An MRI scan on June 27, 2002 was interpreted by Dr. Mahesh Kinkhabwala, a Board-certified radiologist, as showing that she had a small posterior herniation of the disc with posterior osteophytes at C4-5 level, but that the nerve roots at this level were normal. A February 21, 2003 MRI scan of appellant's lumbar spine was interpreted by Dr. Robert Greco, a Board-certified internist, as indicating multilevel disc disease. Finally, she submitted an August 26, 2003 report by Dr. Louis Cappa, a podiatrist, who indicated that appellant had a bunion deformity secondary to fracture of the medial sesamoid.

[1] *Constance J. Perez*, Docket No. 02-1638 (issued December 5, 2002).

In a September 8, 2003 opinion, Dr. Susan M. Jenson, a treating Board-certified internist, indicated that appellant's previous doctor, Dr. Mandell, had retired and she provided medical care. Dr. Jenson stated that appellant continued to have weakness in her right arm, right shoulder and right side of her neck and Dr. Jenson opined that she was disabled since 1988 due to acute pain that began when she was injured at work.

By decision dated January 20, 2004, the Office denied appellant's request for reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT

To require the Office to reopen a case under section 8128(a) of the Federal Employees' Compensation Act, section 10.608(a) of the implementing regulation provides 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 10.606(b)(2).[2] This section provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (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.[3] Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[4] When reviewing the Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[5]

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.[6] The requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[7]

Section 8101(2) of the Act[8] provides that the term "physician," as used therein, "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

[2] 20 C.F.R. § 10.608(a).

[3] 20 C.F.R. § 10.606(b)(2)(2003).

[4] 20 C.F.R. § 10.608(b)(2003).

[5] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[6] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[7] *See* 20 C.F.R. § 10.606(b)(3).

[8] 5 U.S.C. § 8101(2).

to exist and subject to regulation by the Secretary."[9] Subluxation is defined by the regulation as an incomplete dislocation, off centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[10] Without diagnosing a subluxation from x-ray, a chiropractor is not a "physician" under the Act and his opinion on causal relationship does not constitute competent medical evidence.[11] A chiropractor may interpret his or her x-rays to the same extent as any other physician.[12]

ANALYSIS

The Board finds that the Office improperly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. 8128(a).

In support of her claim that benefits were improperly terminated, appellant submitted additional evidence. This evidence included a new report by her chiropractor, Dr. Birnbaum, who indicated that tests conducted after the opinion of the impartial medical examiner, Dr. Oppenheim, including two MRI scans and an x-ray, indicate subluxation. The Board finds that there is no provision in the Act or regulation for acceptance of a chiropractor's report as probative medical evidence where subluxation is diagnosed by an MRI scan.[13] Furthermore, a chiropractor is only a physician when he diagnoses a subluxation by an x-ray either taken or ordered by him. Accordingly, as there is no evidence that Dr. Birnbaum either ordered or took the x-ray, the Board finds that he is not considered a physician under the Act.[14] Nevertheless, Dr. Jenson, appellant's new treating Board-certified internist, indicated that appellant continued to have symptoms, including weakness of her right arm, right shoulder and right side of her neck, which began when she was injured at work and that she was disabled due to her injury. The Board finds that the report of Dr. Jenson constitutes pertinent new and relevant medical evidence which requires reopening of appellant's claim for merit review. The underlying issue in the present case is whether the Office properly terminated her compensation; Dr. Jenson indicated that appellant continued to have residuals and disability due to her employment injury.

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge her burden of proof, but only that it be relevant and new evidence. Accordingly, the Board finds that the Office's denial of appellant's request for review of the merits of her claim constituted an abuse of discretion. Consequently, the case must be remanded for the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.

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[9] *See* 20 C.F.R. § 10.311(b).

[10] 20 C.F.R. § 10.5(bb).

[11] *Jay K. Tomokiyo*, 51 ECAB 361 (2000).

[12] 20 C.F.R. § 10.311(c).

[13] *Jay K. Tomokiyo*, *supra* n. 11.

[14] 20 C.F.R. § 10.311(c).

CONCLUSION

The Board finds that the Office improperly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 20, 2004 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: March 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member