United States Department of Labor
Employees' Compensation Appeals Board

BARRY A. WILSON, Appellant	)	
and	)	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, FORT LAUDERDALE INTERNATIONAL AIRPORT, Fort Lauderdale, FL, Employer	)	**Docket No. 05-1880** **Issued: January 6, 2006**

Appearances:
Barry A. Wilson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 12, 2005 appellant filed a timely appeal of a July 20, 2005 decision of the Office of Workers' Compensation Programs denying his traumatic injury claim and an August 11, 2005 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that he sustained a traumatic back injury in the performance of duty as alleged; and (2) whether the Office properly denied appellant's July 27, 2005 request for reconsideration.

FACTUAL HISTORY

On March 31, 2005 appellant, than a 47-year-old air traffic controller, filed a claim alleging that he sustained a back injury in the performance of duty that day when a chair in

which he was seating himself lost a wheel, causing him to fall. Maria Fernandez, a coworker, corroborated appellant's account of events.

In a May 16, 2005 letter, the Office advised appellant of the evidence needed to establish his claim. The Office asked appellant to submit a physician's report setting forth a history of injury, detailed findings, test results, diagnoses, and an explanation of how the reported work incident caused or aggravated the claimed injury. The Office afforded appellant 30 days in which to submit such evidence.

In an April 1, 2005 report, Dr. Xavier Escobar, a chiropractor, provided a history of injury and noted findings on examination. Dr. Escobar diagnosed "[l]umbar sprain/strain," lumbar neuritis, "[m]uscle spasms of the lumbar spine" and "[l]umbar pain." Dr. Escobar also submitted an April 1, 2005 physical therapy note describing manual manipulation of the lumbar, thoracic and cervical spines, ultrasound and a cold laser procedure. In an April 4, 2005 x-ray report, Dr. Escobar opined that four views of the lumbosacral spine revealed narrowed disc spacing at L5-S1 and "Facet Imbrication at: L5/S1."

In a June 15, 2005 letter, the Office noted discussing the Federal Employees' Compensation Act's limitation on chiropractors with appellant in a telephone conversation that day. The Office related appellant's account that he had only consulted a chiropractor regarding the March 31, 2005 injury. The Office explained that, under the Act, "the term 'physician' include[d] 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, and subject to regulation by the Secretary." The Office afforded appellant 30 days to submit a medical report from a qualified physician supporting a causal relationship between the March 31, 2005 fall and the claimed back injury.

In an April 1, 2005 chart note, Dr. Escobar noted findings on examination of the lumbar spine and indicated that he would obtain a lumbar x-ray to rule out a fracture. Dr. Escobar also prescribed physical therapy and recommended a physiatry consultation. He held appellant off work until April 4, 2005.

By decision dated July 20, 2005, the Office denied appellant's claim on the grounds that he had not established causal relationship. The Office accepted that he fell off a chair as alleged. However, it found that, as Dr. Escobar did not diagnose a spinal subluxation, he did not qualify as a physician under the Act. Therefore, his report was of no probative value in establishing appellant's claim.

In a July 27, 2005 letter, appellant requested reconsideration. He asserted that the Dr. Escobar's office manager billed his visit "incorrectly as a chiropractor instead of a physician," noting that there was a physician associated with Dr. Escobar's office.

By decision dated August 11, 2005, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review. The Office found that "[t]he fact that Back to Health has a physician in the office [was] irrelevant unless that physician actually treated and diagnosed [appellant]. … [The] statement [did] not provide a legal argument or evidence that [appellant] was actually treated by

a physician and not a chiropractor and is therefore considered to be immaterial." The Office further found that appellant's statement did not demonstrate it had erroneously applied or interpreted a point of law nor advanced a point of law or fact not previously considered.[1]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Act[2] 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; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

In order to determine whether an employee sustained a traumatic 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. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[6]

Regarding the second component of fact of injury, section 8101(2) of the Act provides that medical opinion, in general, can only be given by a qualified physician.[7] This section defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by stated law. Section 8101(3) of the Act, which defines services and supplies, limits reimbursable chiropractic services to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.[8] The Office's regulations at section 10(bb) define "subluxation" as "an incomplete dislocation, off-

[1] Following the issuance of the August 11, 2005 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. §§ 8101-8193.

[3] *Joe D. Cameron*, 41 ECAB 153 (1989).

[4] *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

[5] *Gary J. Watling*, 52 ECAB 278 (2001).

[6] *Deborah L. Beatty*, 54 ECAB ___ (Docket No. 02-2294, issued January 15, 2003).

[7] 5 U.S.C. § 8101(2).

[8] 5 U.S.C. § 8101(3), 20 C.F.R. § 10.311(a). *See Thomas W. Stevens*, 50 ECAB 288 (1999); *George E. Williams*, 44 ECAB 530 (1993).

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."[9]

ANALYSIS -- ISSUE 1

Appellant claimed that he sustained a traumatic back injury on March 31, 2005 when the chair in which he was about to sit lost a wheel, causing him to fall. The Office accepted that this incident occurred at the time, place and in the manner alleged. However, the Office denied the claim on the grounds that appellant did not submit medical evidence establishing the claimed causal relationship.

Appellant submitted April 1 and 4, 2005 reports from Dr. Escobar, a chiropractor, who diagnosed a lumbar sprain or strain, lumbar pain and spasm and lumbar neuritis. He found that April 4, 2005 x-rays showed narrowed disc spacing at L5-S1 and "Facet Imbrication at: L5/S1." However, Dr. Escobar did not diagnose a spinal subluxation. He did not opine that the "narrowed disc spacing" or "Facet Imbrication" observed at L5-S1 constituted a spinal subluxation according to the regulatory definition at section 10(bb). As Dr. Escobar's opinion does not relate to the diagnosis of a spinal subluxation by x-ray or its treatment by chiropractic manual manipulation, he does not qualify as a physician and his opinion carries no probative medical value.[10] Appellant has not submitted medical evidence establishing that the accepted March 31, 2005 fall caused any injury or condition.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations 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.[11] 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 section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[12]

In support of his request for reconsideration, the employee is not required to submit all evidence which may be necessary to discharge his burden of proof.[13] The employee need only submit relevant, pertinent evidence not previously considered by the Office.[14] When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the

[9] 20 C.F.R. § 10(bb).

[10] 5 U.S.C. § 8101(3). *See Thomas W. Stevens*, *supra* note 8; *George E. Williams*, *supra* note 8.

[11] 20 C.F.R. § 10.606(b)(2) (2003).

[12] 20 C.F.R. § 10.608(b) (2003).

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

[14] *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

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.[15]

ANALYSIS -- ISSUE 2

The Office denied appellant's traumatic back injury claim by July 20, 2005 decision, finding that he had not submitted sufficient medical evidence to establish that he sustained an injury in the performance of duty. The Office found that the opinion of Dr. Escobar, a chiropractor, was of no probative medical value as he did not diagnose a spinal subluxation by x-ray.

Appellant requested reconsideration in a July 27, 2005 letter and form. He asserted that the office in which Dr. Escobar practiced also had a physician on staff and that the billing manager erred by characterizing his visit as a chiropractic visit. However, these contentions are irrelevant to the claim. Appellant submitted no evidence indicating that he was examined or treated by any physician or that a physician reviewed Dr. Escobar's reports. The Board finds that appellant's July 27, 2005 letter requesting reconsideration, is irrelevant to the underlying, medical issue in this case.[16] The Office properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that appellant has not established that he sustained an injury in the performance of duty on March 31, 2005 as alleged. The Board further finds that the Office properly denied appellant's July 27, 2005 request for reconsideration.

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

[16] *Mark H. Dever*, *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 11 and July 20, 2005 are affirmed.

Issued: January 6, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board