U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHRISTOPHER M. BERINI and DEPARTMENT OF THE ARMY, ARMY COLD REGIONS RESEARCH & ENGINEERING LABORATORY, Hanover, N.H.

Docket No. 96-2447; Submitted on the Record;
Issued August 6, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he had an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On February 12, 1996 appellant, then a 41-year-old civil engineering technician, lifted a container of water which contained four concrete beams and subsequently developed back pain. He stopped working that day and returned to work on February 22, 1996. In a May 8, 1996 decision, the Office rejected appellant's claim on the grounds that the fact of an injury was not established.

In a letter postmarked June 12, 1996, appellant requested a hearing before an Office hearing representative. In a July 18, 1996 decision, the Office found that appellant was not entitled to a decision as a matter of right because his request for a hearing was untimely. The Office considered appellant's request further and denied his request for a hearing on the grounds that the issue in the case could equally be addressed by requesting reconsideration and submitting evidence not previously submitted.

The Board finds that appellant has not met his burden of proof in establishing that he has an injury in the performance of duty.

A person who claims benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim. Appellant has the burden of establishing by reliable, probative and substantial evidence that his medical condition was causally related to a specific employment incident or to specific conditions of employment.[2] As

[1] 5 U.S.C. §§ 8101-8193.

[2] *Margaret A. Donnelly*, 15 ECAB 40, 43 (1963).

part of such burden of proof, rationalized medical opinion evidence showing causal relation must be submitted.[3] The mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between the condition and the employment.[4] Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability.[5]

The only relevant report submitted by appellant was a February 26, 1996 report from Dr. Marc W. Sinclair, a chiropractor who reviewed appellant's history of injury and indicated that testing showed intersegmental joint dysfunction/subluxation at the SI joints bilaterally and T4-5. He diagnosed acute, mild lumbosacral sprain/strain syndrome and lumbar myospasms. The Office indicated that Dr. Sinclair's report could not be considered medical evidence because he did not fulfill the requirement of section 8101(2) of the Act which recognizes a chiropractor as a physician "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."[6] Regulations for the Office define a subluxation as "an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on an x-ray film to individuals trained in the reading of x-rays."[7] Dr. Sinclair contended that the Office's definition of a subluxation was outdated, citing a definition adopted by the American Chiropractic Association in 1993 that stated "subluxation is a motion unit in which movement integrity and/or physiological function are altered, although contact between joint surfaces remain intact." Dr. Sinclair indicated that x-rays were a static procedure which was inappropriate to determine a function abnormality. He also argued that under state law, he was considered to be a physician without being required to take x-rays. He also contended that the guidelines for clinical practice for acute low back pain indicated that x-rays should not be taken in the first month of symptoms in the absence of specific indicators. He questioned why he would be required to expose his patients to unnecessary radiation.

The recognition of chiropractors as physicians has been provided by Congress in the Act at section 8101(2). Under that definition Dr. Sinclair cannot be considered a "physician" for the purposes of this the Act because he did not take any x-rays to demonstrate that a subluxation, as defined by the regulations, exists. As Dr. Sinclair did not obtain x-rays as required by the Act, he is not considered a "physician" under the Act and his report cannot be considered medical evidence. Appellant therefore has not met his burden of proof in submitting reliable, probative, substantial medical evidence of record that his back condition is causally related to his February 12, 1996 employment injury.

[3] *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983).

[4] *Juanita Rogers*, 34 ECAB 544, 546 (1983).

[5] *Edgar L. Colley*, 34 ECAB 1691, 1696 (1983).

[6] 5 U.S.C. § 8101(2); *see Marjorie S. Geer*, 39 ECAB 1099, 1101-02 (1988).

[7] 20 C.F.R. § 10.400(e).

The Board further finds that the Office properly denied appellant request for an hearing before an Office.

Section 8124(b)(1) of the Act[8] dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings."[9] Appellant stated that he received the Office's decision on May 12, 1996 and his request for a hearing was postmarked June 12, 1996. However, under the specific language of the Act, the time for requesting a hearing is taken from the date of the issuance of the decision, not the date of receipt of the decision by appellant. Therefore, appellant's request for a hearing was submitted more than 30 days after the Office issued its final decision and therefore was untimely.

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[10] The Office exercised its discretion in this case by finding that the issues raised by appellant could be reviewed in a request for reconsideration. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[11] There is no evidence that the Office abused its discretion in denying appellant his request for a hearing.

[8] 5 U.S.C. § 8124(b)(1).

[9] *Ella M. Garner,* 36 ECAB 238 (1984); *Charles E. Varrick,* 33 ECAB 1746 (1982).

[10] *Henry Moreno,* 39 ECAB 475 (1988).

[11] *Daniel J. Perea,* 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs, dated July 18 and May 8, 1996, are hereby affirmed.

Dated, Washington, D.C.
August 6, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member