U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET FILS-AIME and DEPARTMENT OF THE NAVY, NAVAL STATION, Washington, DC

Docket No. 00-2654; Submitted on the Record;
Issued November 26, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained an injury while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion pursuant to 5 U.S.C. § 8128 by denying merit review.

On February 24, 1999 appellant, then a 45-year-old child care worker, filed a claim alleging that on that day she injured her lower back while in the performance of duty. On the reverse side of the claim, the employing establishment stated that appellant's injury was caused by a child, who jumped on her back while her attention was diverted. It was noted that the child had jumped on appellant's back initially on February 19, 1999, but that she did not report that incident. Appellant stopped work on February 25, 1999. The claim included a witness statement corroborating the incident as related by appellant.

Appellant submitted multiple bills for chiropractor services from March 24 to June 14, 1999 based on her February 24, 1999 injury.

In an attending physician's report dated June 3, 1999, Dr. D.W. Robinson, a chiropractor, stated that he had examined appellant on February 24, 1999, diagnosed her with L-4 subluxation and placed her on total disability from April 12, 1999 onward. He noted that appellant had been referred to Dr. Phil Chamberlain, an orthopedist, for consultation.

By letter dated June 10, 1999, the Office advised appellant that chiropractors are considered physicians under the Federal Employees' Compensation Act[1] "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulations of the spine to correct a subluxation of the spine as demonstrated by x-ray to exist." Since the medical evidence did not support the existence of spinal subluxations, the services submitted for reimbursable expenses were denied.

[1] 5 U.S.C. §§ 8101-8193.

By letter dated the same day, the Office advised appellant that the information submitted in her February 24, 1999 claim was insufficient to establish that she sustained an injury on that day. The Office requested additonal information including a physician's opinion, supported by medical rationale, on the causal relationship between her disability and the incident as reported. The Office allowed 30 days for appellant to submit medical evidence and stated: "Your physician's discussion of the issue of causal relationship is crucial to your claim."

Appellant subsequently submitted additional bills for chiropractor services from May 6 to June 1, 1999. On May 14, 1999 appellant filed a CA-8, claim for continuing compensation, for lost wages from April 12 to May 11, 1999.

On June 14, 1999 the Office notified appellant that it was unable to process payment for compensation based on her CA-8 claim forms because she was required to file a CA-7, claim for compensation, prior to a claim for continuing compensation. The Office advised her to notify her employing establishment's compensation specialist.

By decision dated July 14, 1999, the Office denied appellant's claim on the grounds that the evidence of file failed to establish that appellant sustained an injury as a result of the February 24, 1999 incident.

By letter dated August 11, 1999, appellant requested reconsideration.[2]

By decision dated August 12, 1999, the Office denied appellant's request for review of its July 14, 1999 decision.

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a work-related injury on February 24, 1999.

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim[3] including the fact that the individual is an "employee of the United States" within the meaning of the Act,[4] that the claim was timely filed within the applicable time limitation period of the Act,[5] that an injury was sustained 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.[6] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

[2] In a letter dated August 12, 1999, the Office advised appellant that it had doubled her claim with her March 11, 1998 prior back claim.

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

[4] *See James A. Lynch*, 32 ECAB 216 (1980); *see also* 5 U.S.C. § 8101(1).

[5] 5 U.S.C. § 8122

[6] *See Melinda C. Epperly*, 45 ECAB 196 (1993).

[7] *See Delores C. Ellyett*, 41 ECAB 992 (1990); *Victor J. Woodhams*, 41 ECAB 345 (1989).

To determine whether an employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[8] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[9] An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that his or her disability and/or specific condition for which compensation is claimed are causally related to the injury.[10]

To accept fact of injury in a traumatic injury case, the Office, in addition to finding that the employment incident occurred in the performance of duty as alleged, must also find that the employment incident resulted in an "injury." The term "injury" as defined by the Act, as commonly used, refers to some physical or mental condition caused either by trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[11] The question of whether an employment incident caused a personal injury generally can be established only by medical evidence.[12]

In this case, appellant has not submitted medical evidence to establish that she incurred an employment-related injury. The only evidence submitted by appellant were reports from Dr. Robinson, a chiropractor, and physical therapy notes. The Board has held that medical opinion, in general, can be given only by a qualified physician.[13] Pursuant to sections 8101(2) of the Act,[14] a chiropractor is a "physician" to the extent of diagnosing spinal subluxations according to the Office's definition[15] and treating such subluxations by manual manipulation of the spine.

Consequently, because the chiropractor's report was not supported by x-ray evidence of a spinal subluxation, it does not constitute probative medical evidence.[16] Further, the physical therapist's notes do not constitute medical evidence and are thus insufficient to establish

[8] *See John J. Carlone*, 41 ECAB 354 (1989).

[9] *Id.*

[10] As used in the Act, the term "disability" means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; *see Frazier V. Nichol*, 37 ECAB 528 (1986).

[11] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[12] *See Carlone*, *supra* note 8.

[13] *George E. Williams*, 44 ECAB 530 (1993).

[14] 5 U.S.C. §§ 8101(2).

[15] 20 C.F.R. § 10.311.

[16] *See George E. Williams*, *supra* note 13.

appellant's claim.[17] Although the Office advised appellant of the type of evidence needed to establish her claim, such evidence was not submitted. Therefore, the evidence of record is insufficient to meet appellant's burden of proof.

The Board also finds that the Office acted within its discretion by denying merit review on August 12, 1000.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[18] the Office's regulations provide that an application for reconsideration must set forth arguments that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (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.[19] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[20] To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.[21]

In this case, appellant submitted reports from Dr. Robinson that the Office had considered previously. Her evidence neither established that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by the Office, nor constituted relevant and pertinent new evidence not previously considered by the Office. Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.606. For these reasons, the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

[17] As a physical therapist is not a physician for the purposes of the Federal Employees' Compensation Act, these notes do not constitute medical evidence and are insufficient to establish appellant's claim; *see Jane A. White*, 34 ECAB 515 (1983).

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

[19] 20 C.F.R. § 10.606(b).

[20] *Carol Cherry*, 47 ECAB 658 (1996).

[21] 20 C.F.R. § 10.607.

The decisions of the Office of Workers' Compensation Programs dated August 12 and July 14, 1999 are affirmed.

Dated, Washington, DC
November 26, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member