U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD Q. PIERCE and DEPARTMENT OF JUSTICE, FEDERAL PRISON SYSTEM, Seagoville, TX

Docket No. 01-1007; Submitted on the Record;
Issued February 7, 2002

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On May 24, 1999 appellant, then a 42-year-old maintenance mechanic, experienced back and shoulder pain while placing plywood onto a cart. Appellant stopped work on May 26, 1999 and returned to light duty on June 7, 1999.

Accompanying appellant's claim was an attending physician's report dated May 28, 1999, prepared by Dr. Darcy Brunk, a chiropractor, who indicated that appellant was treated for an injury which occurred at work. She diagnosed appellant with musculoskeletal instability with muscle spasm in the midback and biomechanical alignment alteration as evident on AP and lateral films. Dr. Brunk indicated that with a check mark "yes" that the condition was caused or aggravated by an employment factor.

By letter dated July 23, 1999, the Office requested that appellant submit additional factual and medical evidence to support his claim and afforded him 30 days within which to do so.

In a decision dated August 26, 1999, the Office denied appellant's claim as the medical evidence was not sufficient to establish that appellant sustained an injury due to an employment factor. The Office found that appellant's chiropractor was not a physician as she did not diagnose a subluxation which was supported by x-ray.

By letter dated November 2, 2000, appellant requested reconsideration of the Office decision. Appellant submitted additional evidence from Dr. Brunk whose return to work note indicated that appellant could return to regular duty on June 30, 1999. Her October 8, 1999 note indicated that appellant sustained an injury at work while lifting a piece of plywood. Dr. Brunk diagnosed appellant with subluxations at C2, C6, T5, T9 and S1. She noted that a reexamination

was performed on July 12, 1999 to ascertain appellant's progress and a second thoracic film was taken to compare to the original thoracic films taken on May 26, 1999. Dr. Brunk's consultation note dated March 1, 2000, indicated that appellant sustained subluxation at multiple levels in the thoracic region causing irritation to both the neurological and musculoskeletal systems inclusive of the disc thoracic discs. She indicated that a reexamination was performed on July 12, 1999 which revealed some subluxations remaining in the thoracic region. Dr. Brunk noted that appellant continued to experience symptoms and in July he experienced an exacerbation of his condition and a subluxation was noted and adjusted at that time. She further noted that from October 1999 to February 2000, thoracic subluxations were noted and treated.

By decision dated December 21, 2000, the Office denied appellant's application for reconsideration on the grounds that the request was not timely and that appellant did not present clear evidence of error by the Office. The Office noted that the new evidence failed to support a subluxation of the spine as confirmed by x-rays resulting in the chiropractor not being considered a physician under the Federal Employees' Compensation Act.

The only decision before the Board on this appeal is that of the Office dated December 21, 2000. Since more than one year elapsed from the date of issuance of the Office's August 26, 1999 merit decision, to the date of the filing of appellant's appeal, March 1, 2001, the Board lacks jurisdiction to review this decision.[1]

The Board finds that the Office abused its discretion in denying appellant's request for reconsideration under section 8128(a) of the Act on the grounds that the request failed to present clear evidence of error.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
>
> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[2]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision.[3]

[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.607(b); *Annie L. Billingsley*, 50 ECAB 210 (1998).

In its December 21, 2000 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on August 26, 1999 and appellant's request for reconsideration was dated November 2, 2000, which was more than one year after August 26, 1999. Accordingly, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision. To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[4]

To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[5]

Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[6] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[7] This entails a limited review by the Office of the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[8] The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.[9]

In accordance with its internal guidelines and Board precedent, the Office properly performed a limited review to determine whether appellant's application for review showed clear evidence of error, which would warrant reopening appellant's case for merit review under section 8128(a) of the Act.

To determine whether the Office abused its discretion in denying appellant's untimely application for review, the Board must consider whether the evidence submitted by appellant was sufficient to show clear evidence of error. The Board finds that the evidence does raise a

[4] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[5] *Annie L Billingsley*, *supra* note 3.

[6] *Jimmy L. Day*, 48 ECAB 652 (1997).

[7] *Id.*

[8] *Id.*

[9] *Cresenciano Martinez*, 51 ECAB ___ (Docket No. 98-1743, issued February 2, 2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

substantial question as to the correctness of the Office's decision and is sufficient to establish clear evidence of error.

In support of his reconsideration request appellant submitted treatment notes from Dr. Brunk, a chiropractor, which diagnosed a thoracic subluxation. Dr. Brunk's October 8, 1999 note indicated that appellant was involved in an injury at work in May while lifting a piece of plywood. She diagnosed appellant with subluxations at C2, C6, T5, T9 and S1. Dr. Brunk stated that a reexamination was performed on July 12, 1999 to ascertain appellant's progress and a second thoracic film was performed on that date to compare to the original thoracic films taken on May 26, 1999. Dr. Brunk's consultation note dated March 1, 2000, indicated that appellant sustained an injury on May 24, 1999 resulting in subluxations at multiple levels in the thoracic region causing irritation to both the neurological and musculoskeletal systems inclusive of the an thoracic discs.

Section 10.311(c)[10] provides:

> "(c) A chiropractor may interpret his or her x-rays to the same extent as any other physician. To be given any weight, the medical report must state that x-rays support the finding of spinal subluxation. The OWCP will not necessarily require submittal of the x-ray, or a report of the x- ray, but the report must be available for submittal on request."

The Office determined that the evidence failed to support a subluxation of the spine as confirmed by x-rays, which resulted in Dr. Brunk not being considered a physician under the Act. However, under 20 C.F.R. § 10.311(c), she was entitled to interpret her own x-rays and was not required to submit the x-rays or reports of the x-rays unless requested.

Furthermore, the case record does not disclose that the Office at any time requested the chiropractor's x-ray films. There is no evidence that the Office submitted Dr. Brunk's findings on the x-rays referred to in her May 28 or July 12, 1999 report's to a radiologist or an Office medical adviser to ascertain whether a subluxation of the spine was confirmed by x-ray. Because the Office did not request the x-ray films or report of x-ray films in connection with the initial report of Dr. Brunk or her reports on reconsideration, the Office was unable to determine whether a subluxation of the spine was confirmed by x-ray. The record indicates that Dr. Brunk reviewed x-rays in diagnosing a subluxation and, therefore, the Board finds that she would be considered a physician under the Act.[11]

[10] *See* 20 C.F.R. § 10.311(c).

[11] Section 8101(2) of the Act provides that chiropractors are considered physicians "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." *See* 5 U.S.C. § 8101(2).

The December 21, 2000 decision of the Office of Workers' Compensation Programs is set aside and remanded for a merit review under section 8128(a) of the Federal Employees' Compensation Act.

Dated, Washington, DC
February 7, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member