U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RALPH M. EBERHARDT and U.S. POSTAL SERVICE,
POST OFFICE, Austin, TX

Docket No. 02-364; Submitted on the Record;
Issued July 22, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has established that he sustained injuries to his low back, right hip and left leg as a result of factors of his employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On September 6, 2000 appellant, then a 49-year-old postal worker, filed a notice of occupational disease alleging that he sustained a hip injury in the performance of duty while operating a tow motor. On the reverse side of the CA-2 claim form, appellant's supervisor indicated that appellant first reported his condition on August 31, 2000 and was assigned light duty consisting of four hours on the tow motor and four hours in a sedentary position.

In a report dated August 31, 2000, Dr. Douglas T. Stakes, a chiropractor, noted that appellant complained of having injured his left knee, right hip and low back at work as a result of stepping up and down in order to drive a tow-motor and having to brace his lower body when the vehicle comes to a stop. Dr. Stakes noted that his injuries appeared to be repetitive injuries and rated appellant's pain on a scale of 0 to10 as low back pain 4/10, right hip pain 8/10, right leg pain 6/10 an left knee pain 7/10. He reported decreased range of motion of the lumbar flexion, left knee joint crepitus with motion, an anatalgic gait, painful intersegmental joint dysfunction at L3-5, S1 rated as a pain scale of 6/10. Moderate myofascial trigger points were listed and "objective orthopedic findings" were listed as low back spasm/strain, possible disc herniation, sciatic disc compression and lumbar radiculopathy on the right side.

In an October 30, 2000 letter, the Office advised appellant of the factual and medical evidence required to establish his claim for compensation. In a separate letter of the same date, the Office also informed appellant of the limited circumstances under which chiropractor were considered to be physicians for purposes of establishing entitlement under the Federal Employees' Compensation Act.

In a work status report dated October 31, 2000, Dr. Stakes noted that appellant could not work on the tow motor for two weeks due to low back, hip and left knee injuries. He listed work restrictions including no lifting over 30 pounds, standing only 4 hours per day, no kneeling, squatting, stooping or bending, no climbing and no driving or operating heavy equipment.

The record also includes numerous CA-17 duty status reports completed by Dr. Stakes indicating appellant's work restrictions from November 1997 through April 1999. Appellant was given a light-duty assignment effective February 1 to April 30, 1999.

In a December 6, 2000 decision, the Office denied compensation on the grounds that appellant failed to establish a causal relationship between his medical condition and factors of his employment.

Appellant requested reconsideration on March 24, 2001. In support of his reconsideration request appellant submitted a November 9, 2000 letter from Dr. John A. Genung, a Board-certified orthopedic surgeon, who noted that appellant began having left knee pain and swelling beginning two months prior to his evaluation. He stated that the left knee showed degenerative changes on x-ray with mild varus configuration, moderate effusion and marked crepitation noted on physical examination. Dr. Genung recommended that appellant undergo arthroscopic surgery with a medical menisectomy.

Appellant also submitted a copy of a duty status report completed by Dr. Stakes on January 16, 2001 that outlined similar work restrictions and again stated that appellant was unable to operate the tow motor.

In a decision dated May 15, 2001, the Office denied appellant's request for reconsideration on the merits.

The Board finds that appellant has failed to establish that his injuries are causally related to factors of his employment.

An employee seeking benefits under the Federal Employees' Compensation Act[1] 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 timely filed within the applicable time limitation period of the Act, 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.[2] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Willie J. Clements, Jr.*, 43 ECAB 244 (1911); *Victor J. Woodhams*, 41 ECAB 345 (1989).

implicated employment factors. The opinion of the physician must be based upon a complete factual and medical background, must be on of reasonable medical certainty and must provide a medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[4]

In this case, appellant submitted various reports from his chiropractor to show that he suffers from multiple orthopedic injuries including a possible herniated disc with radiculopathy and a left knee condition which he attributes to the physical requirements of driving a tow motor in the performance of duty.

Section 8102(2) of the Act provides that the term "physician" 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 to exist.[5] Where x-rays do not demonstrate a subluxation, a chiropractor is not considered a physician and his or her reports cannot be considered as competent medical evidence.[6] Because there is no x-ray evidence to demonstrate that appellant sustained a spinal subluxation, the reports from Dr. Stakes cannot be considered those of a physician and fail to satisfy appellant's burden of proof to establish her claim with competent medical evidence. Accordingly, the Board finds that the Office properly denied appellant's claim for compensation.

The Board also finds that the Office properly denied appellant's request for reconsideration on the merits under section 8128.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[7] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[8] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[9] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[10] When a claimant fails to meet one of the

[4] *James D. Carter*, 43 ECAB 113 (1991).

[5] *Robert H. Onge*, 43 ECAB 1169 (1992); *Carol A. Dixon*, 43 ECAB 1065 (1992).

[6] *Carol A. Dixon*, *supra* note 5.

[7] 5 U.S.C. § 8128; *see Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] 20 C.F.R. § 10.606(b) (1999).

[9] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[10] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

above standards, the [Office] will deny the application for reconsideration without reopening the case for review on the merits."[11]

In this case, appellant did not establish in her reconsideration request that the Office erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by the Office.

In support of her reconsideration request, appellant submitted a new report from Dr. Genung dated November 9, 2000, which recommended that appellant undergo arthroscopic left knee surgery. Dr Genung's report, however, does not address the work injury and states only that appellant had been complaining of knee problems for two months prior. He did not offer any opinion of causal relationship. Although Dr. Genung is a qualified "physician" under the Act, his report does not constitute relevant evidence as it fails to address any of the probative issues in this case.[12] Because appellant has failed to satisfy the criteria set forth at section 8128, the Board concludes that the Office properly denied her request for reconsideration on the merits.

The decisions of the Office of Workers' Compensation Programs dated May 15, 2001 and December 6, 2000 are hereby affirmed.

Dated, Washington, DC
July 22, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[11] 20 C.F.R. § 10.608(b).

[12] Additional chiropractic treatment notes by Dr. Stokes are likewise not found to be new and relevant evidence from a "physician" for reasons previously discussed in this decision.