U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSEMARY HENDRY and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 02-456; Submitted on the Record;
Issued July 5, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

The Board finds that the Office properly denied appellant's request for reconsideration.

The Code of Federal Regulations provides 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 evidence not previously considered by the Office.[1] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[2]

On June 23, 1998 appellant, then a 33-year-old manual clerk, filed an occupational disease claim alleging that she sustained scoliosis and a pinched nerve in the performance of duty due to heavy lifting and twisting in her job. She indicated that she first became aware of her condition on February 16, 1994 and first became aware that her condition might be related to her employment on May 16, 1998.

By decision dated September 29, 1998, the Office denied appellant's claim on the grounds that the evidence of record did not establish that she sustained a back injury causally related to factors of her employment.

By decisions dated February 11, 2000 and January 26, 1999, the Office denied modification of its decision.

[1] 20 C.F.R. § 10.606(b)(2).

[2] 20 C.F.R. § 10.608(b).

By letters dated February 6 and September 11, 2001, appellant requested reconsideration and submitted additional evidence and argument.

By decision dated October 9, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was of an immaterial nature and not sufficient to warrant further merit review.[3]

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[4] As appellant filed her appeal with the Board on January 7, 2002, the only decision properly before the Board is the Office's October 9, 2001 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's September 29, 1998 decision denying appellant's claim or the February 11, 2000 or January 26, 1999 decisions denying modification of the September 29, 1998 decision.[5]

In a report dated August 22, 2001, Dr. A. Alexander Pireno, a chiropractor, stated that he was submitting an addendum to a September 17, 1998 report. He stated that x-rays taken of appellant's back on August 17, 2001 showed decreased cervical spine reversed lordotic curve, short radius scoliosis of the thoracic spine, and fixation of the cervical spine of flexion/extension and electromyogram findings on August 22, 2001 indicated mild radiculopathy on the right. However, under section 8101(2) of the Act, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[6] Dr. Pireno did not diagnosis a subluxation in his August 22, 2001 report. Therefore, he is not deemed a physician under the Act and his report does not constitute relevant and pertinent medical evidence not previously considered by the Office.[7]

Appellant also argued that the Office should not have questioned the probative value of a November 11, 1999 report from Dr. Sebastian Lattuga on the basis that there was a handwritten change regarding the date of injury, from October 19 to May 16, 1998, and the Office should have obtained "expert handwriting opinion." However, the Office, in its February 11, 2000 decision, found the November 11, 1999 report deficient regarding the issue of causal relationship and therefore the issue of the changed date is not a relevant legal argument not previously considered by the Office or relevant and pertinent evidence not previously considered by the Office. Appellant argued that the Office conducted an "abbreviated review" of the November 11, 1999 report in its February 11, 2000 decision that did not constitute a merit review

[3] The record contains additional evidence that was not before the Office at the time it issued its October 9, 2001 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

[4] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

[5] *See Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

[6] 5 U.S.C. § 8101(2); *see Jack B. Wood*, 40 ECAB 95, 109 (1988).

[7] The Board notes that even if Dr. Pireno qualified as a physician under the Act, he provided no opinion in his August 22, 2001 report regarding causal relationship of appellant's conditions to her employment and therefore his report would not constitute relevant and pertinent evidence not previously considered by the Office.

of the evidence. However, this argument is not relevant as the Office did conduct a merit review of the original (unaltered) November 11, 1999 report in its February 11, 2000 decision. Appellant argued that on June 22, 1998 she submitted a Form CA-1 for a traumatic injury on May 16, 1998. However, such a claim form[8] for a traumatic injury would not constitute relevant and pertinent evidence not previously considered by the Office because this case involves appellant's claim for an occupational disease sustained prior to May 16, 1998. Appellant argued that her treating chiropractor should not be expected to provide an opinion on scoliosis because that is a medical condition outside his expertise under the Act. However, it is appellant's burden to provide competent medical evidence.[9] Her choice of a chiropractor to treat her condition does not relieve her of her burden of proof.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or submit relevant and pertinent evidence not previously considered by the Office, the Office properly denied her claim for compensation.

The decision of the Office of Workers' Compensation Programs dated October 9, 2001 is affirmed.

Dated, Washington, DC
July 5, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

A. Peter Kanjorski
Alternate Member

[8] The CA-1 claim form is not of record.

[9] *See Mary J. Briggs*, 37 ECAB 578, 581 (1986); *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983); *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).