U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN M. OLDAKER and DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Columbus, Ohio

Docket No. 96-403; Submitted on the Record;
Issued July 8, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether appellant has met her burden of proof in establishing that her back and head conditions were causally related to factors of her federal employment.

On February 24, 1995 appellant, then a 28-year-old input technician, filed a traumatic injury claim, alleging that she injured her back and sustained headaches as a result of a fall on ice in the employing establishment parking lot. In a decision dated August 28, 1995, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that no injury was sustained as alleged. In the memorandum accompanying the decision, the Office noted that the report by Dr. James F. Creamer, a chiropractor, did not constitute the report of a physician under the Federal Employees' Compensation Act as he did not diagnose subluxation of the spine in his report. In merit decisions dated September 18 and October 30, 1995, the Office denied appellant's request for modification on the grounds that the evidence submitted was insufficient to establish a basis for modification.

The Board finds that appellant has established that she sustained an injury causally related to factors of her federal employment.

A person who claims benefits under the Act[1] has the burden of establishing the essential elements of her claim, including the fact that she sustained an injury while in the performance of duty and that she had disability as a result.[2] In accordance with the Federal (FECA) Procedure Manual, in order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with the analysis of whether "fact of injury" has been established. Generally, "fact of injury" consists of two components which must be considered one in conjunction with the other. The first component to be established is that the employee

[1] 5 U.S.C. §§ 8101-8193.

[2] *Daniel R. Hickman*, 34 ECAB 1220 (1983); *see* 20 C.F.R. § 10.110(a)

actually experienced the employment incident or exposure which is alleged to have occurred.[3] In order to meet her burden of proof to establish the fact that she sustained an injury in the performance of duty, an employee must submit sufficient evidence to establish that she actually experienced the employment injury or exposure at the time, place and in the manner alleged. The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[4] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[5] The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish a causal relationship.[6]

Appellant has submitted sufficient evidence to establish that she sustained a head and back injury while in the performance of duty on February 24, 1995. Appellant reported her injury and the "mishap" to her supervisor on the date of injury, and her supervisor filled out a "Record of Injury or Illness/Mishap Report" form and sent appellant to the employing establishment health unit. Appellant provided a consistent history of injury to her supervisor and the nurse in the health unit. She was diagnosed with a contusion of the back and had a cold pack applied. Appellant's statement concerning how, where and when her injuries occurred is uncontroverted. Therefore, appellant has established that the incident occurred in the time, place and in the manner alleged, and the first component of fact of injury is established.

With respect to appellant's burden of establishing that a personal injury occurred, the Board has held that a medical opinion, in general, can only be given by a qualified physician.[7] In a form report dated April 28, 1995, Dr. Creamer noted that appellant fell on ice in a parking lot on February 24, 1995, diagnosed a cervical sprain strain, and reported that she was involved in an automobile accident on March 1, 1995 which exacerbated that injury. He indicated that the x-rays showed a loss of normal cervical curve. After being advised by the Office in a letter dated June 26, 1995 that chiropractors are not considered as physicians under the Act unless a diagnosis of subluxation is provided, Dr. Creamer submitted a report dated October 13, 1995. He indicated that appellant was examined on February 25, 1995 and had x-rays taken on that date which revealed a subluxation at C2 due to cervical strain. Dr. Creamer reported that appellant had a decreased range of motion with pain in all planes of movement, positive foraminal compression pain and tenderness in the cervical spine only from her fall on the ice. He also advised that appellant was involved in an automobile accident on February 27, 1995 which caused pain in her dorsal spine, and that new x-rays revealed no change in the cervical spine but indicated a subluxation at T8 with dorsal sprain strain. The October 13, 1995 report which clarifies the history of injury for appellant and diagnoses subluxation related to the

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 3.803.2a (September 1980).

[4] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) ("injury"defined); 20 C.F.R. §§ 10.5(a)(15), 10.5(a)(16) ("traumatic injury" and "occupational disease" defined).

[5] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[6] *Manuel Garcia*, 37 ECAB 767 (1986).

[7] *Donald B. Miletta*, 34 ECAB 1822 (1983).

February 24, 1995 fall at work is consistent with appellant's account of her injury and supports her burden of proof. Moreover, pursuant to section 8102 of the Act,[8] the Board has recognized chiropractors as physicians to the extent of diagnosing spinal subluxations according to the Office's definition[9] and treating such subluxation by manual manipulation.[10] Dr. Creamer took timely x-rays which he ultimately interpreted as demonstrating a subluxation at C2. These x-rays were not challenged by the Office nor reread by a Board-certified radiologist.[11] Thus, Dr. Creamer is entitled to interpret his own x-rays. Dr. Creamer is found to be a physician as defined by the Act and regulations as of the date of his October 13, 1995 report.[12] The Board also notes that Dr. Kay's August 1, 1995 report in which he interpreted appellant's x-rays as demonstrating two cervical subluxations but not a C2 subluxation is not entirely inconsistent with the reports by Dr. Creamer inasmuch as Dr. Kay ultimately concluded that appellant's "x-rays and clinical exam[ination] are consistent with the appropriate diagnosis that would require chiropractic treatment such as severe cervical strain with subluxation of the cervical spine." Therefore, Dr. Kay essentially concurred with Dr. Creamer as to the diagnosis of subluxation of the cervical spine, cervical strain sprain and the treatment of these conditions. Consequently, the Board finds that appellant sustained her burden of proof in establishing that a personal injury occurred based on the reports of Drs. Creamer and Kay.

The issue of the period of disability is not in posture for decision. A review of the record in relation to the determination of the period of total disability reveals that Dr. Creamer reported that appellant was totally disabled from February 27 to March 3, 1995. However, that time period appears to include appellant's intervening exacerbation of her injury due to a car accident on February 27 or March 1, 1995. Dr. Kay has not provided a diagnosis concerning the extent of appellant's disability due to her employment injury.

While the reports by Dr. Creamer are not sufficient to establish the period of disability, the Board finds that these reports, given the absence of evidence to the contrary, are sufficient to require further development of the evidence. The Board notes that when an employee initially submits supportive factual and/or medical evidence which is not sufficient to carry the burden of proof, the Office must inform the claimant of the defects in proof and grant at least 30 calendar days for the claimant to submit the evidence required to meet the burden of proof. The Office may undertake to develop either factual or medical evidence for determination of the claim.[13] It is well established that proceedings under the Act are not adversarial in nature,[14] and while the

[8] 5 U.S.C. § 8102.

[9] 20 C.F.R. § 10.400(e).

[10] *See Christine L. Kielb*, 35 ECAB 1060 (1984).

[11] These x-rays appear to have been reread by Dr. Bruce S. Kay, a Board-certified orthopedic surgeon, who diagnosed subluxations at C3-4 and a little at C6-7.

[12] *Kielb, supra* note 10.

[13] 20 C.F.R. § 10.11(b); *see also John J. Carlone, supra* note 4.

[14] *See, e.g., Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985); *Michael Gallo*, 29 ECAB 159 (1978).

claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.[15] The Office has the obligation to see that justice is done.[16]

On remand the Office should further develop the evidence by providing Dr. Creamer with a statement of accepted facts and request that he provide an opinion regarding the period appellant was totally disabled causally related to the employment injury. After such development as the Office deems necessary, the Office shall determine the period or periods of disability, if any, and whether appellant is entitled to continuation of pay and/or payment of appropriate medical expenses.

The decisions of the Office of Workers' Compensation Programs dated October 13, September 18 and August 28, 1995 are reversed, and the case is remanded for further proceedings consistent with the decision of the Board.

Dated, Washington, D.C.
July 8, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[15] *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[16] *William J. Cantrell*, 34 ECAB 1233 (1983).