U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIRGINIA PRICE and U.S. POSTAL SERVICE,
POST OFFICE, Florissant, Mo.

Docket No. 97-16; Submitted on the Record;
Issued March 3, 1999

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained injury to her shoulder and wrist while in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by not reopening appellant's claim for a merit review under 5 U.S.C. § 8128.

On January 17, 1996 appellant, then a 44-year-old letter carrier, filed an occupational disease claim alleging that she sustained left wrist and shoulder pain which she attributed to carrying her mail pouch and casing letters. Appellant noted that she first received medical treatment on September 12, 1995 and did not stop work.

In support of her claim, appellant submitted reports from her attending chiropractors. In a report dated November 28, 1995, Dr. Fawn Dunphy stated that she first saw appellant on November 13, 1995 with complaint of left wrist pain over the carpal bones. Dr. Dunphy diagnosed median and ulnar nerve compression and noted that she recommended exercises for appellant to perform at home and during work. In a report dated January 22, 1996, Dr. Ralph Barrale noted that he first saw appellant on September 12, 1995 and referred her for examination by Dr. Dunphy. Dr. Barrale noted that he agreed with Dr. Dunphy's diagnosis, together with a diagnosis of cervical myositis and upper to mid-thoracic myositis. He stated that appellant was treated with manipulation of the wrist and shoulder.

On April 3, 1996 the Office advised appellant that the evidence submitted in support of her claim was insufficient to establish injury, noting that a chiropractor was defined as a "physician" under the Federal Employees' Compensation Act only to the extent that reimbursable services were limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[1] The Office noted that appellant's treatment by Drs. Dunphy and Barrale did not demonstrate the presence of a spinal subluxation

[1] *See* 5 U.S.C. § 8101(2).

by x-ray and requested that additional evidence be submitted in support of her claim within 30 days. Appellant did not respond.

By decision dated May 7, 1996, the Office denied appellant's claim. The Office found that the medical evidence submitted by appellant was not sufficient to establish that an injury had been sustained, as alleged, as the chiropractic reports did not constitute competent medical evidence under the Act.

On May 16, 1996 appellant requested reconsideration of her claim. Appellant submitted the April 22, 1996 report of Dr. Daniel G. Sohn, a neurologist, who diagnosed bilateral carpal tunnel syndrome based on diagnostic testing and physical examination.

By decision dated July 12, 1996, the Office denied appellant's request for reconsideration, finding the report of Dr. Sohn to be immaterial to the issues in the claim.

The Board finds that the Office abused its discretion in not reopening appellant's claim for further merit consideration.

Section 10.138(b)(1) of the Office's implementing 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 point of law; or (2) advancing a point of law or fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[2] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under Section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.[3]

As noted above, appellant initially submitted evidence from her attending chiropractors in support of her claim of injury due to factors of her federal employment. Following notification by the Office as to the limitation of a chiropractor as a "physician" under the Act, appellant submitted the April 22, 1996 medical report of Dr. Sohn, which addressed the results of a physical examination and diagnostic testing performed on appellant. The Office found in the July 12, 1996 decision that Dr. Sohn's report was insufficient to warrant a merit review because the physician did not provide an opinion on the cause of the condition or a history of injury. The Board notes, however, that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant, pertinent and not previously considered by the Office.[4] In this case, the Board finds that the report submitted by Dr. Sohn constitutes new evidence not previously considered by the Office and relevant to the issue of establishing fact of injury. Therefore, the Board will remand the case

[2] 20 C.F.R. § 10.138(b)(1).

[3] 20 C.F.R. §10.138(b)(2).

[4] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

to the Office in order that a merit review of the claim be conducted.[5] Based on this determination, the disposition of the first issue on appeal is moot.

It is ordered that the July 12, 1996 decision of the Office of Workers' Compensation Programs be set aside and the case remanded to the Office for further proceedings consistent with this decision.

Dated, Washington, D.C.
March 3, 1999

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] On appeal, appellant submitted additional factual and medical evidence which has not been considered by the Office in the adjudication of her claim. As such, the Board may not consider this evidence for the first time on appeal; *see* 20 C.F.R. § 501.(2)(c).