U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIS A. DAVIS and DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Norfolk, Va.

Docket No. 97-1549; Submitted on the Record;
Issued March 24, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, A. PETER KANJORSKI

The issue is whether appellant has established a recurrence of disability commencing August 6, 1995 causally related to her March 21, 1995 employment injury.

In the present case, appellant filed a claim alleging that she sustained an injury in the performance of duty on March 21, 1995, when she slipped and fell. The Office of Workers' Compensation Programs accepted that appellant sustained a back sprain. The record indicates that appellant returned to work on May 31, 1995.

On September 14, 1995 appellant filed a notice of recurrence of disability commencing August 6, 1995. By decision dated November 15, 1995, the Office denied the claim for a recurrence of disability. This decision was affirmed by an Office hearing representative in a decision dated January 3, 1997.

The Board has reviewed the record and finds that appellant has not established a recurrence of disability commencing August 6, 1995.

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which she claims compensation is causally related to the accepted injury.[1]

The Board notes that in this case, appellant was released as fit for duty in a note dated May 30, 1995 from Dr. Lawrence Morales, an orthopedic surgeon, and appellant returned to work on May 31, 1995. Appellant has claimed a recurrence of disability commencing August 6, 1995. Office procedures specifically discuss claims for recurrent disability within 90 days of a return to duty, noting that "the claimant is not required to produce the same evidence as

[1] *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

for a recurrence claimed long after apparent recovery and return to work."[2] In addition, the procedures note that the claims examiner "may accept the attending physician's statement supporting causal relationship between the claimant's current condition and the accepted condition, even if the statement contains no rationale," unless there are circumstances such as a intervening injury, or a different diagnosis from the accepted claim.[3]

In this case, the medical evidence is not sufficient to establish appellant's recurrence of disability commencing August 6, 1995, because there is no clear statement on causal relationship between his medical treatment on or after August 6, 1995 and the accepted employment injury. The record contains treatment notes from a chiropractor, Dr. Ronald R. Toht, Jr., dated August 9 and 11, 1995, but these are of no probative value since Dr. Toht is not considered a physician under the Federal Employees' Compensation Act. Section 8101(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."[4] Dr. Toht did not diagnose a subluxation and therefore is not a physician under the Act. Notes from a physical therapist dated August 31, and September 1, 1995 are also of no probative value since a physical therapist is not a physician under the Act.[5]

Appellant submitted a note from Dr. J.T. De Los Angeles, a specialist in preventive medicine, dated August 11, 1995, which stated only that appellant was treated for muscle spasm in the neck. A note dated August 24, 1995 stated that appellant had been under his care for low back strain, and should be on light duty until notified, but Dr. De Los Angeles offered no opinion on causal relationship between any disability and the employment injury. An August 30, 1995 prescription note provides light-duty restrictions, but also fails to discuss causal relationship with employment. The record also contains a report, dated September 25, 1995 from an unidentified orthopedic surgeon, which does not contain an opinion on causal relationship with the employment injury.

In the absence of any probative medical evidence as to a disabling condition on or after August 6, 1995 causally related to appellant's employment injury, the Board finds that appellant has not met her burden of proof in this case.

The Board notes that the record contains an Office decision dated April 7, 1997 with respect to a request for reconsideration. Appellant filed her appeal with the Board on April 3, 1997. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case, and those Office decisions which change the status of the decision on appeal are null and void.[6] The April 7, 1997 reconsideration decision, issued while the Board had jurisdiction over the case, is null and void. The Board notes that any evidence

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a) (January 1995).

[3] *Id.*, Chapter 2.1500.5(a).

[4] 5 U.S.C. § 8101(2).

[5] *Barbara J. Williams*, 40 ECB 649 (1989).

[6] *Douglas E. Billings*, 41 ECAB 880, 895 (1990).

submitted after the January 3, 1997 decision cannot be considered by the Board on the present appeal.[7]

The decision of the Office of Workers' Compensation Programs dated January 3, 1997 is affirmed.

Dated, Washington, D.C.
March 24, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

A. Peter Kanjorski
Alternate Member

[7] The Board is limited to review of evidence that was before the Office at the time of the final Office decision being appealed. 20 C.F.R. § 501.2(c).