U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELFA G. CARREJO and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, Los Angeles, CA

Docket No. 98-1886; Submitted on the Record;
Issued July 17, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

On July 1, 1997 appellant, a 59-year-old investigative assistant, allegedly injured her lower back when she fell to the floor. On July 17, 1997 appellant filed a claim for benefits based on the alleged injury to her lower back. The Office initially handled the case administratively and paid appellant medical benefits.

By letter dated January 21, 1998, the Office informed appellant that, because her medical bills now exceeded $1,500.00, it was required by its regulations to formally adjudicate her claim on the merits. The Office, noting that she had been receiving treatment from a chiropractor, advised appellant that, in order for a chiropractor to be considered a physician under the Federal Employees' Compensation Act, she needed to submit a medical report, which indicated she had been treated for subluxation shown by x-ray.[1] The Office further advised appellant that, in order to establish her entitlement to benefits under the Act, she was required to submit additional information in support of her claim including a medical report, opinion and diagnosis from a physician, supported by medical reasons as to how the reported work incident caused or aggravated the claimed injury. The Office informed the employee that she had 30 days to submit the requested information.

In response, appellant submitted a physician's first report of injury form from Stephen J. Curry, a chiropractor, dated July 9, 1997, which stated findings on examination and diagnosed a lumbar sprain/strain in addition to two forms titled "Treating Physician's Determination of

[1] 5 U.S.C. § 8101(2).

Medical Issues," dated July 30 and November 24, 1997, which were also completed by Dr. Curry. None of these documents contained a diagnosis of subluxation as shown by x-ray.

By decision dated March 10, 1998, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that appellant sustained the claimed injury in the performance of duty. In the memorandum accompanying the decision, the Office found that, although appellant submitted sufficient evidence that she experienced the claimed accident at the time, place and in the manner alleged, she failed to submit medical evidence to establish that the employment incident caused a personal injury or resultant disability. The Office noted that it had informed appellant of the type of medical evidence required to establish her entitlement to benefits, but that she failed to submit such evidence.

By letter dated March 27, 1998, appellant requested reconsideration of the Office's previous decision. In support of her request, appellant submitted a March 24, 1998 report from Dr. Curry, which contained a diagnosis of subluxation by x-ray of the lumbar spine at L5 and the thoracic spine at T12.

By decision dated April 29, 1998, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision. The Office stated that appellant had failed to provide a probative medical report by a physician because the report from the chiropractor did not include an actual copy of the x-ray report and because there had been no mention of any such x-rays prior to the submission of Dr. Curry's March 24, 1998 report. The Office, therefore, found the report to be invalid and appellant had, therefore, failed to submit new and relevant medical evidence.

The Board affirms the Office's March 10, 1998 decision, finding that appellant did not meet her burden of proof to establish that she sustained the claimed injury in the performance of duty.

An employee seeking benefits under the Act[2] has the burden of establishing that 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.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established.

[2] 5 U.S.C. § 8101 *et seq.*

[3] *Joe D. Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[6] The medical evidence required to establish causal relationship is usually rationalized medical evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[7]

In the present case, it is uncontested that appellant experienced the employment incident at the time, place and in the manner alleged. However, the question of whether an employment incident caused a personal injury generally can be established only by medical evidence[8] and appellant has not submitted rationalized, probative medical evidence to establish that the employment incident on July 1, 1997 caused a personal injury and resultant disability.

In the present case, the only medical evidence appellant had submitted was the July 9, 1997 report of injury form and the July 30 and November 24, 1997 form reports from Dr. Curry, appellant's chiropractor. In determining whether appellant is entitled to reimbursement and authorization for chiropractic services, the initial question is whether the chiropractor is considered a physician under the 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."[9] Therefore, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by an x-ray. Dr. Curry's reports do not constitute medical evidence from a physician, as he did not submit a report demonstrating a spinal subluxation as shown by x-rays. Accordingly, as appellant did not provide a medical opinion to sufficiently describe or explain the medical process, which the July 1, 1997 work accident would have been competent to cause the claimed injury, the Office's March 10, 1998 decision is affirmed.

The Board has duly reviewed the case record and finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Id.* For a definition of the term "injury," see 20 C.F.R. §10.5(a)(14).

[7] *Id.*

[8] *See John J. Carlone, supra* note 5.

[9] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[10] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[11] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[12] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[13]

In the present case, appellant submitted with her request for reconsideration a March 24, 1998 report from her chiropractor, Dr. Curry, in which he stated that x-rays taken on July 11, 1997 demonstrated subluxations at L5 and T1. The Office found that this report was inconsistent with evidence previously submitted and was, therefore, irrelevant. This finding is erroneous, however. The evidence submitted by appellant constitutes new and relevant evidence in that, although appellant had previously submitted reports from Dr. Curry, she had not provided a report containing a diagnosis of subluxation by x-ray. This evidence constitutes relevant medical evidence in that, as previously noted, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by an x-ray.[14] The Office further found that Dr. Curry's March 24, 1998 report was not sufficient to constitute probative medical evidence in that it did not contain copies of the actual x-ray. This finding by the Office, however, is not germane to a determination of whether evidence submitted by appellant on reconsideration is new and relevant. If the Office deemed the actual x-ray films necessary in determining the merits of appellant's claim, it should have requested these films from Dr. Curry.[15] Thus, Dr. Curry's March 24, 1998 report constitutes relevant and pertinent medical evidence, which had not been previously considered by the Office and warrants a merit review. This case must, therefore, be remanded for the Office to exercise its discretion pursuant to 5 U.S.C. § 8128 to reopen appellant's claim for merit review.

The March 10, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

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[10] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[11] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[12] 20 C.F.R. § 10.138(b)(2).

[13] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[14] 5 U.S.C. § 8101(2).

[15] Under the Act, although it is the burden of an employee to establish his or her claim, the Office also has a responsibility in the development of the evidence; *see Willie A. Dean*, 40 ECAB 1208, 1212 (1989).

The decision of the Office dated April 29, 1998 is, therefore, set aside and the case is remanded to the Office for review of the merits of appellant's claim and any other proceedings deemed necessary by the Office, to be followed by an appropriate decision.

Dated, Washington, D.C.
July 17, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member