U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERTHA G. FORD and DEPARTMENT OF THE AIR FORCE, CALIFORNIA AIR NATIONAL GUARD, Port Hueneme, CA

Docket No. 98-2493; Submitted on the Record;
Issued March 10, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On January 31, 1997 appellant, then a 50-year-old military personnel technician, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on January 29, 1997 she sustained injuries to the left side of her body, including her neck, upper back, shoulder, arm and hand. She described the nature of her injury as thoracic strain and explained that the injury occurred while performing stretching exercises. Appellant was participating in the employing establishment's physical training program at the time of her injury. She ceased work on February 5, 1997. In support of her claim, appellant submitted several reports from Dr. Brian T. Donley, a chiropractor, who initially examined appellant on February 10, 1997 and diagnosed thoracic strain and subluxation at T1-4. At that time, Dr. Donley recommended that appellant be placed on temporary total disability status until February 11, 1997. In his most recent report dated March 13, 1997, Dr. Donley diagnosed cervical and thoracic sprain and strain as well as subluxations at C6-7 and T1-3. He also noted that appellant's x-rays demonstrated "congenital right thoracic scoliosis apex at T6." Dr. Donley indicated that appellant was capable of performing light duty as of March 10, 1997 and he opined that appellant would be fully recovered by April 15, 1997.

By letter dated November 25, 1997, the Office advised Dr. Donley of the limitations imposed by the Federal Employees' Compensation Act[1] with respect to chiropractic services. The Office further explained that the medical evidence previously submitted did not establish the existence of a spinal subluxation inasmuch as the only x-ray evidence referenced by he reportedly demonstrated "congenital right thoracic scoliosis apex at T6." Additionally, the

[1] 5 U.S.C. § 8101(2).

Office requested that Dr. Donley submit within 30 days any reports of x-rays taken following appellant's injury, which indicated that a subluxation had occurred.

By decision dated January 8, 1998, the Office denied appellant's claim on the basis that the evidence of record failed to establish that appellant suffered a medical condition related to her January 29, 1997 injury. The Office again explained the limitations under the Act with respect to the use of chiropractic services and further noted that the record did not contain any x-ray evidence contemporaneous with the date of injury that demonstrated appellant suffered a subluxation.

Appellant subsequently requested a review of the written record, dated February 20, 1998 and received by the Office on February 24, 1998. Additionally, appellant resubmitted Dr. Donley's March 13, 1997 report along with a March 21, 1997 x-ray report from Dr. Martin W. Rauch, a Board-certified radiologist.

In a decision dated March 17, 1998, the Office found that appellant did not submit her request for a review of the written record within 30 days of the Office's January 8, 1998 decision and, therefore, she was not entitled to a review as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of fact of injury could equally well be addressed through the reconsideration process. Appellant subsequently filed an appeal with the Board on August 4, 1998.

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty.

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.[2] The second component is whether the employment incident caused a personal injury. This latter component generally can be established only by medical evidence.[3]

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] Therefore, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence.[5] In the instant case, although Dr. Donley noted a diagnosis of subluxation at C6-7 and T1-3, the diagnosed subluxation was

[2] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[4] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

[5] *See Kathryn Haggerty*, 45 ECAB 383 (1994).

not demonstrated by x-ray evidence. While Dr. Donley's March 13, 1997 report referenced unidentified x-rays, this evidence was interpreted as demonstrating "congenital right thoracic scoliosis apex at T6." In the absence of contemporaneous x-ray evidence to support Dr. Donley's diagnosis of subluxation at C6-7 and T1-3, the Office properly determined that Dr. Donley could not be considered a physician under the Act.[6] The record does not contain any probative medical evidence establishing that appellant sustained a medical condition related to her January 29, 1997 injury. Consequently, appellant has failed to establish that she sustained an injury in the performance of duty.

The Board also finds that the Office properly denied appellant's request for a review of the written record.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted in writing within 30 days of the date of issuance of the decision. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of issuance of the decision, as determined by the postmark of the request.[7] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[8] In such a case, the Office will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant with reasons.[9]

The Office denied appellant's claim for compensation in a decision dated January 8, 1998. Appellant's request for a review of the written record is postmarked February 21, 1998, which is more than 30 days after the Office's January 8, 1998 decision. As such, appellant is not entitled to a review of the written record as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether appellant sustained a work-related injury on January 29, 1997 could equally well be addressed by requesting reconsideration. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a review of the written record.[10]

[6] As previously noted, appellant's March 21, 1997 x-ray was not a part of the record when the Office issued its January 8, 1998 decision denying compensation. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

[7] 20 C.F.R. § 10.131(a).

[8] *Herbert C. Holley*, 33 ECAB 140 (1981).

[9] *Rudolph Bermann*, 26 ECAB 354 (1975).

[10] The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

The decisions of the Office of Workers' Compensation Programs dated March 17 and January 8, 1998 are hereby affirmed.

Dated, Washington, D.C.
March 10, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member