U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONNIE P. STEPHENS and U.S. POSTAL SERVICE,
POST OFFICE, Fayetteville, NC

Docket No. 99-2106; Submitted on the Record;
Issued September 7, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an injury in the performance of duty on December 2, 1998, as alleged; and (2) whether the Office of Workers' Compensation Programs, by its May 13, 1999 decision, abused its discretion by refusing to reopen appellant's claim for further merit review under 5 U.S.C. § 8128(a).

On December 2, 1998 appellant, then a 32-year-old supervisor of distribution operations, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a lower back condition. Appellant alleged that "deer ran across [his] vehicle," which caused damage to his automobile. On the reverse side of the claim form, appellant's supervisor noted that appellant first received medical treatment on December 4, 1998 from Nelson & Nelson Chiropractic and he stopped work on that date.

In support of his claim, appellant submitted notes from Nelson & Nelson Chiropractic dated December 4 and 7, 1998 signed by physicians whose signatures are illegible. The note dated December 4, 1998 stated: "Please excuse [appellant] from work tonight due to recurring [lower back pain]." The note dated December 7, 1998 stated that appellant was under the physician's care for "severe [lower back pain]" and that he would be able to return to work on December 18, 1998.

By letter dated December 23, 1998, the Office notified appellant that the evidence of record was insufficient because it did not establish fact of injury. The Office explained the circumstances under which a chiropractor could be considered a "physician" under the Federal Employees' Compensation Act. The Office requested additional factual and medical evidence from appellant and allowed him 30 days to respond to its request.

In response, appellant submitted evidence from Nelson & Nelson Chiropractic consisting of invoices, instructions for payment and unsigned, partially illegible doctor's notes dated

December 8 and 23, 1998. The invoices stated that appellant's diagnoses were cervical paravertebral muscle spasm and lumbar sprain/strain. In a note dated January 13, 1999 from the Nelson & Nelson Chiropractic Insurance Department, Lacy Demeule stated that appellant entered the clinic on December 8, 1998 complaining of injuries sustained in a motor vehicle accident. Ms. Demeule noted that appellant did not work from December 1998 to February 18, 1999 and that he was released from care on January 8, 1999. She also stated: "It is our opinion that [appellant's] injuries were a result of the [motor vehicle accident] on December 2, 1998."

By decision dated February 4, 1999, the Office denied appellant's claim on the grounds that the evidence of record was insufficient to show that he sustained an injury in the performance of duty causally related to the December 2, 1998 employment incident. The Office accepted that the December 2, 1998 employment incident occurred at the time, place and in the manner alleged, but found that appellant did not meet his burden of proof to establish fact of injury. The Office noted that the medical evidence of record, consisting of medical reports from Nelson & Nelson Chiropractic, had no probative value because under the Act a chiropractor is considered a physician only to the extent that treatment consists of manual manipulation of the spine to correct a subluxation demonstrated by x-ray to exist.

Appellant submitted an automobile rental agreement dated December 3, 1998 and submitted employing establishment request for or notification of absence forms dated December 28, 1998. Appellant also submitted duplicate copies of previously submitted evidence.

By letter dated April 21, 1999, appellant requested reconsideration of the Office's prior decision. To support his reconsideration request, appellant submitted previously submitted evidence.

By decision dated May 13, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted to support his request was not new or relevant, nor did he advance a point of law or fact not previously considered or show that the Office erroneously applied or interpreted a point of law.

The Board finds that appellant did not meet his burden of proof to show that he sustained an injury in the performance of duty on December 2, 1998, as alleged.

An employee seeking benefits under the Act[1] has the burden of establishing 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

[1] 5 U.S.C. §§ 8101-8193.

related to the employment injury.[2] Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[3]

In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a physician under 5 U.S.C. § 8101(2). The term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment to correct a spinal subluxation as demonstrated by x-ray to exist.[4] The Office's regulations state that "a diagnosis of spinal 'subluxation as demonstrated by x-ray to exist' must appear in the chiropractor's report."[5] The Office's regulations further state that a chiropractor may interpret his or her x-rays to the same extent as any other physician.[6] Where a chiropractor diagnoses subluxation but fails to relate it to the employment incident by rationalized medical opinion evidence, chiropractic treatment is not reimbursable.[7]

In this case, the medical evidence of record does not show that appellant's chiropractor diagnosed spinal subluxation. To the contrary, the only diagnoses of record are cervical paravertebral muscle spasm and lubmar sprain/strain. Therefore, the evidence does not show that appellant sustained a compensable injury as a chiropractor is only considered a physician under the Act to the extent that he diagnoses spinal subluxation shown by x-ray to exist.

The Board also finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for further merit review under 5 U.S.C. § 8128(a).

To warrant a grant of a claimant's request for further merit review of his case the claimant must show that the Office erroneously applied or interpreted a point of law, advance a new legal argument not previously considered by the Office, or submit new and relevant evidence not previously considered by the Office.[8] Where such evidence and arguments are present, it is well established under Board precedent that the Office must reopen a case for further merit review.[9] Section 10.608(b) of the Office's regulations provides that when an application for review of the merits of a claim does not meet at least one of those requirements, the Office will deny the application for review without reviewing the merits of the claim.[10] The submission of evidence or argument which repeats or duplicates evidence or argument

[2] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[3] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

[4] 20 C.F.R. §§ 10.311(a)-(b) (1999).

[5] 20 C.F.R. § 10.311(b) (1999).

[6] 20 C.F.R. § 10.311(c) (1999).

[7] *See Theresa M. Fitzgerald*, 47 ECAB 689-90 (1996).

[8] *Alton L. Vann*, 48 ECAB 259, 269 (1996); 20 C.F.R. § 10.606(b)(2) (1999).

[9] *Helen E. Tschantz*, 39 ECAB 1382, 1385 (1988).

[10] 20 C.F.R. § 10.608(b) (1999).

previously submitted and considered by the Office does not constitute a basis for reopening a case for further review on the merits.[11] Evidence failing to address the particular issue involved also does not constitute a basis for reopening a case.[12]

The Office properly found that appellant's April 21, 1999 request for reconsideration did not warrant further merit review of his claim. Appellant's request was not supported by new and relevant evidence not previously considered by the Office, nor did it show that the Office erroneously applied or interpreted a specific point of law. To support his request for reconsideration, appellant merely submitted identical copies of previously submitted invoices and partially illegible doctor's notes and new evidence that was irrelevant as it did not address the issue of fact of injury.

The decisions of the Office of Workers' Compensation Programs dated May 13 and February 4, 1999 are affirmed.

Dated, Washington, D.C.
September 7, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member

[11] *David E. Newman*, 48 ECAB 305, 308 (1997)*; see Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[12] *Barbara A. Weber*, 47 ECAB 163, 165 (1995).