U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY L. McGILLVARY and U.S. POSTAL SERVICE,
POST OFFICE, Troy, OH

Docket No. 00-2363; Submitted on the Record;
Issued August 13, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant sustained a back condition causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On August 12, 1999 appellant, then a 42-year-old letter carrier, filed a notice of occupational disease alleging that he suffered back and neck pain, which also caused headaches due to carrying mail. He alleged that he first became aware of the condition and realized that the condition was caused by his employment on August 9, 1999. Appellant missed no time from work due to the alleged injury.

On August 31, 1999 the Office advised appellant to submit additional information within 30 days so that a determination could be made on his claim. He indicated on his claim form that he was receiving treatment for the claimed condition by a chiropractor, thus the Office also informed him that section 8101(2) of the Federal Employees' Compensation Act strictly limits treatment by chiropractors as opposed to other physicians for work injuries. The Office indicated that chiropractic services for which the Office is authorized to pay are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. The Office then requested that appellant submit medical reports from his chiropractor to determine eligibility of benefits.

On September 27, 1999 appellant submitted a narrative statement and on October 6, 1999 appellant submitted an incident report, treatment information and a second statement detailing the claimed injury. He also submitted treatment notes and a report from Dr. Brian

Olson, a chiropractor, dated October 4, 1999, which was received by the Office on November 3, 1999.[1] Dr. Olson reported that appellant presented on August 9, 1999 complaining of mid-back and low back pain, which had begun two weeks prior and progressively worsened. He further reported that appellant first noticed the pain while carrying his mailbag and that the pain was most evident when performing work duties. Dr. Olson opined that appellant developed a strain of his mid and low back due to microtrauma from the demands of carrying mail.

On November 4, 1999 the Office denied appellant's claim on the grounds that appellant failed to submit sufficient evidence establishing that he sustained an injury due to the claimed employment factor as required by the Act.

In a letter received by the Office on February 9, 2000, appellant requested reconsideration of the claim. By decision dated April 14, 2000, the Office denied his application for a merit review on the grounds that the evidence submitted was found to be of an immaterial nature and insufficient to warrant review of its prior decision.

The Board finds that appellant failed to establish that he sustained a back condition causally related to factors of his federal employment.

An employee seeking benefits under the Act[2] has the burden of establishing the essential elements of his claim, including the fact 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]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant.[4] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.[5]

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[1] The Board notes that appellant's narrative statement received on September 27, 1999 was the only evidence received within 30 days allotted by the Office in its August 31, 1999 request for additional information.

[2] 5 U.S.C. §§ 8101-8193.

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

[4] *Jerry D. Osterman*, 46 ECAB 500 (1995); *see also Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[5] The Board has held that in certain cases, where the causal connection is so obvious, expert medical testimony may be dispensed with to establish a claim; *see Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959). The instant case, however, is not a case of obvious causal connection.

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,[6] must be one of reasonable medical certainty[7] 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.[8]

In the present case, appellant alleged that carrying heavy sacks of mail at work for over 13 years caused his back condition. The Office accepted the occurrence of the described employment factors but found that appellant had not submitted sufficient medical evidence to establish that he sustained an occupational injury due to this factor. The Office further noted that the medical evidence submitted in support of his claim did not contain a physician's rationalized opinion causally relating a diagnosed medical condition to the employment factor claimed by appellant. Appellant submitted a report from his chiropractor, Dr. Olson, dated October 4, 1999 in which he diagnosed back strain due to appellant's work duties of carrying heavy mail. 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 is considered a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray evidence.[10] Appellant has not submitted any x-ray evidence demonstrating the presence of subluxations; therefore, Dr. Olson is not considered a physician under the Act and his opinion does not constitute probative medical evidence. As the record is devoid of any probative medical evidence establishing that appellant sustained a medical condition related to the claimed employment factors, the Office properly determined that appellant failed to establish that he sustained a back condition causally related to his federal employment.

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

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[11] Section 10.608(b) provides that when an

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[6] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[7] *See Morris Scanlon*, 11 ECAB 384-85 (1960).

[8] *See William E. Enright*, 31 ECAB 426, 430 (1980).

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

[10] 20 C.F.R. § 10.311; *see Kathryn Haggerty*, 45 ECAB 383 (1994).

[11] 20 C.F.R. §§ 10.606(b)(2) (1999).

application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[12]

In the present case, appellant did not show that the Office erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by the Office. Neither did appellant submit relevant and pertinent new evidence not previously considered by the Office.

Appellant requested reconsideration of the November 4, 1999 decision in a letter received February 9, 2000. In the request letter, appellant reported that he had also received treatment from Dr. James McNeary, an osteopath and his family physician, regarding the claimed condition. In a letter dated February 11, 2000, the Office advised him to provide a medical report providing the history of injury, findings upon examination, diagnosis and opinion regarding causation. In response, appellant submitted typed treatment notes dated January 25 and February 3, 2000 apparently from Dr. McNeary, which did not contain the physician's signature. Although the notes discussed a history and provided examination findings, the treatment notes cannot be considered relevant and pertinent evidence in support of appellant's request, as the notes are not on letterhead and do not contain the physician's signature or signature stamp as required in section 10.331(a).[13]

As appellant's reconsideration request did not meet at least one of the three requirements for obtaining a merit review under section 10.606(b)(2), the Board finds that the Office did not abuse its discretion in denying the request.[14]

[12] 20 C.F.R. § 10.608(b) (1999).

[13] 20 C.F.R. § 10.331(a) (1999).

[14] With appellant's request for an appeal, appellant submitted additional medical evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated April 14, 2000 and November 4, 1999 are affirmed.

Dated, Washington, DC
August 13, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member