U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS W. JOHNSON and DEPARTMENT OF AGRICULTURE, STABILIZATION & CONSERVATION SERVICE, Fargo, ND

Docket No. 99-1808; Submitted on the Record;
Issued August 22, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reimbursement for travel to Moorhead, Minnesota to receive specialized chiropractic care.

This is appellant's fifth appeal before the Board in connection with his March 2, 1983 employment injury. Previously, the Board set aside the December 11, 1989 decision of the Office and remanded the case for further development and clarification of the impartial medical examiner's report.[1] In the second appeal, the Board set aside the Office's April 29, 1991 decision and remanded the case for referral to another impartial medical examiner.[2] In the third appeal, the Board set aside the Office's April 6, 1993 decision and remanded the case for clarification of whether appellant's condition on and after May 2, 1983 was caused or aggravated by his March 2, 1983 injury.[3] In the fourth appeal, the Board reversed the Office's May 9, 1995 decision and remanded the case to determine the nature and extent of any disability causally related to the March 2, 1983 employment injury.[4]

On remand, the Office accepted that on March 2, 1983 appellant, then a 41-year-old farmer and agricultural inspector, sustained subluxations at C2 and T2, and chronic thoracic myofascitis and strain when he slipped on a storage bin ladder and fell while in the performance of duty.

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[1] Docket No. 90-1028 (issued October 31, 1990).

[2] Docket No. 91-1622 (issued March 27, 1992).

[3] Docket No. 93-1655 (issued October 28, 1994).

[4] Docket No. 95-2530 (issued January 6, 1998).

By letter dated January 30, 1998, the Office accepted that appellant's medical condition subsequent to May 2, 1983 was causally related to his March 2, 1983 employment injury. The Office requested that appellant submit current medical evidence from his treating physician describing the nature of his injury-related residuals and discussing the need for future care.

By decision dated July 6, 1998, the Office denied appellant's claim for wage-loss compensation from March 2, 1983 to the present, finding that the medical evidence of record did not establish that appellant was restricted from performing the duties of his date-of-injury job.[5]

By letters dated June 26 and July 8, 1998, appellant, through his representative, submitted travel voucher forms verifying chiropractor visits, requesting reimbursement of $7,965.04 and annotating the mileage appellant incurred in obtaining this treatment from the date of injury through January 1998.[6]

By letter dated July 15, 1998, the Office advised appellant that it needed the name of a physician he would be seeing for any further care for his March 2, 1983 injuries, that the physician should be within 25 miles of his residence or business, or otherwise be the nearest available physician and that it could not approve chiropractic care beyond January 1998 unless such care was managed by a medical doctor.

The Office explained that the Federal Employees' Compensation Act[7] recognizes chiropractors as physicians 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. Thus, the only treatment for which chiropractors could be reimbursed for was manual manipulation of the spine and recognition of a chiropractor as a "physician" for the purposes of treatment for thoracic strain or myofascitis was precluded by the Act.

A July 17, 1998 letter list three orthopedic surgeons, Drs. Dahl, Gruby and Godfread, and three chiropractors, Drs. Lester, Chuppe and Askew, as currently practicing in Bismarck, ND. The record showed that appellant had been treated in 1983 by Dr. C.H. Winkler, a chiropractor in Bismarck, in 1983 by Dr. Paul Rasmussen, a chiropractor in Minot, in 1998 by Dr. Dennis D. Sailer, a chiropractor in Bismarck, and also in 1998 by Dr. Scott C. Senne, a chiropractor in Bismarck.

By letter decision dated July 27, 1998, the Office stated that it would only reimburse mileage for a 25-mile round trip to Harvey, North Dakota. The Office found that chiropractic treatment was available there, and authorized $598.12 in travel expenses.

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[5] Appellant's representative notes that appellant is seeking reimbursement for travel expenses pursuant to 20 C.F.R. § 10.401 and not compensation for wage loss.

[6] Appellant initially lived on a rural farm outside of Heimdal, North Dakota and traveled to Moorhead, MN to receive specialized chiropractic care, a distance of 396 miles per treatment. However, on February 14, 1995 the Office was notified that appellant's permanent new address had been changed to 1848 Kennedy Avenue, Bismarck, ND.

[7] 5 U.S.C. §§ 8101-8193.

In an August 18, 1998 affidavit, appellant stated that his initial treatment was with Dr. Genevieve E. Weber, a chiropractor in Harvey, ND,[8] and that "she did not think that she could help [him] but she encouraged [him] to look elsewhere, including visiting Dr. Torson in Moorhead, MN."[9] On February 1, 1984 Dr. Weber diagnosed severe sprain and strain in appellant's mid-thoracic area, with residual scar tissue in the muscles of that area. No spinal subluxation was diagnosed.[10] Appellant also indicated that some of his initial treatment was with Dr. Charles Nyhus, a Board-certified family practitioner in Harvey, ND, but no evidence of a chiropractic referral from Dr. Nyhus was submitted.

By letters dated August 18 and September 29, 1998, appellant requested reconsideration,[11] arguing that the chiropractor in Harvey was unable to provide the specialized treatment that had been recommended, and that the nearest chiropractor who could provide such treatment was Dr. Jane Torson, whose practice was located in Moorhead, MN.

By decision dated October 15, 1998, the Office denied modification of the July 27, 1998 decision finding that appellant could receive adequate chiropractic care in Harvey.

In a December 28, 1998 affidavit, Dr. Weber indicated that she first treated appellant on September 6, 1983 and noted that appellant needed to seek help from someone who would do soft tissue work such as deep massage, acupuncture or acupressure therapy. He indicated that she was "not proficient" in these techniques, and that, to her knowledge, no one in Harvey was providing this type of treatment at that time.

By letter dated December 30, 1998, appellant requested reconsideration of the July 27 and October 15, 1998 decisions.

By decision dated January 20, 1999, the Office denied appellant's request for further merit review under 5 U.S.C. § 8128(a) regarding the July 6, 1998 determination that he was not entitled to wage-loss compensation.

By decision dated February 16, 1999, the Office found that the evidence submitted in support of reconsideration of the July 27, 1998 decision was insufficient to warrant modification. The Office found that treatment by Dr. Torson, which began on February 6, 1984, was never authorized by a treating physician.[12]

The Board finds that the Office acted within its discretion in denying appellant's request for reimbursement for travel to Moorhead, MN to receive specialized chiropractic care.

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[8] Harvey, ND, was the town with a chiropractor nearest to appellant's farm outside of Heimdal, ND.

[9] Dr. Jane Torson, a chiropractor, indicated that she first treated appellant on February 6, 1984 and that her regular treatment of him consisted of an activator chiropractic treatment with conjunctive acupressure for 10 to 15 minutes, followed by acupuncture for 20 minutes.

[10] Therefore Dr. Weber cannot be considered to be a physician under the Act. *See* 5 U.S.C. § 8101(2).

[11] Reconsideration of the July 6, 1998 denial of wage-loss compensation was also requested.

[12] However, reimbursement for chiropractic care was approved to January 1998.

Medical expenses, along with transportation and other expenses incidental to securing medical care, are covered by section 8103 of the Act.[13] This section provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree of the period of any disability or aid in lessening the amount of any monthly compensation. These services, appliances and supplies shall be furnished by, or on the order of the United States medical officers and hospital or at the employee's option, by or on the order of physicians and hospitals designated or approved by the Secretary.

The employee may be furnished necessary and reasonable transportation and expenses incident to the securing of such services, appliances, and supplies.[14] However, the Office has the general objective of ensuring that an employee recovers from an injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing the means to achieve this goal. The only limitation on the Office's authority is it that of reasonableness.[15]

In this case, appellant chose to visit several chiropractors for treatment of his back injuries beginning in 1983. These chiropractors were located in Harvey, in Bismarck, and in Minot, ND, among other places. The closest chiropractor, geographically, to appellant's home in Heimdal was Dr. Weber. However, Dr. Weber did not diagnose a spinal subluxation as demonstrated by x-ray and therefore is not considered a physician under the Act. Because she is not a physician under the Act, she could not provide a valid referral of appellant to Dr. Torson or take charge of any follow-up medical monitoring. Further, Dr. Torson did not diagnose a spinal subluxation and thus also cannot be considered a physician under the Act. Moreover, because she performed services other than manual manipulation of the spine such as acupuncture, these services did not constitute reimbursable treatment.[16]

The Act states that an employee may be furnished with necessary and reasonable transportation costs and other expenses incident to the securing of medical services. However, the determination of what is reasonable rests within the sound discretion of the Office. Reimbursable chiropractic expenses are limited to manual manipulation of the spine to correct subluxations. Thus, only chiropractors providing those services qualify for reimbursement, and any person trained as a chiropractor can provide that service.[17] Therefore, the most reasonable chiropractic care could be obtained in the nearest town that has a chiropractor. In this case, that town would be Harvey, ND, up until February 1995 and after that the town would be Bismarck,

[13] 5 U.S.C. § 8103.

[14] *Linda Holbrook*, 38 ECAB 229 (1986); 5 U.S.C. § 8103(a); 20 C.F.R. § 10.401(a).

[15] *Lecil E. Stevens*, 49 ECAB 673 (1998); *James R. Bell*, 49 ECAB 647 (1998).

[16] The Office, in its broad discretion, paid appellant's chiropractic expenses up through January 1998. Such payments do not obligate the Office to pay travel expenses.

[17] Deep tissue massage, acupressure and acupuncture are not reimbursable services performed by a chiropractor. *See* 5 U.S.C. § 8101(2).

ND. Therefore, it was reasonable that the Office reimburse only the travel costs to Harvey, ND up through January 1998.

Abuse of discretion by the Office is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[18] No such abuse has been demonstrated in this case.

The decisions of the Office of Workers' Compensation Programs dated February 16, 1999 and October 15 and July 27, 1998 are hereby affirmed.

Dated, Washington, DC
August 22, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[18] *Daniel J. Perea*, 42 ECAB 214 (1990).