U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of JACK L. SNIDER and DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, Portland, OR

*Docket No. 99-185; Submitted on the Record;*
*Issued February 5, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for authorization of chiropractic care; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that the Office properly denied appellant's request for authorization of chiropractic care.

In April 1963, appellant, then a 27-year-old surveying technician, claimed that he sustained a low back injury when he fell on his tailbone at work on April 12, 1963. In October 1963, appellant claimed that he sustained a low back injury while riding in a jeep at work on October 11, 1963.[1] The Office initially denied appellant's claims on the grounds that he did not submit sufficient medical evidence in support thereof. Appellant worked for the employing establishment until September 2, 1966 and then worked for private employers between October 1966 and March 1980.[2] In January 1977, appellant requested that his federal compensation claim be reopened. In March 1981, the Office accepted that appellant sustained an employment-related chronic low back strain.[3] Appellant received medical treatment of his back condition for a number of years.[4] After his attending physician was not longer available, appellant requested authorization from the Office for treatment from Dr. Scott E. Abrahamson, a chiropractor. By

[1] Appellant did not stop work after the April 12, 1963 incident and stopped work briefly after the October 11, 1963 incident.

[2] In 1980 appellant sustained a knee injury in connection with his private employment.

[3] The Office terminated appellant's compensation in May 1988 but in October 1990 the Board issued a decision which reversed the Office's termination of compensation.

[4] Several attending physicians diagnosed somatic dysfunction in the cervical, thoracic and lumbar regions of appellant's spine.

decision dated April 6, 1998, the Office denied appellant's claim on the grounds that the medical evidence did not support authorization from the Office for chiropractic treatment. By decision dated July 9, 1998, the Office denied appellant's request for merit review.

Section 8103 of the Federal Employees' Compensation Act states in pertinent part, "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 or the period of disability, or aid in lessening the amount of monthly compensation."[5] Section 8101(3) of the Act, defining services and supplies, states: "Reimbursable chiropractic services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary."[6]

The Board notes that it has created exceptions to the general rule that services rendered by a chiropractor are not payable when they do not consist of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. These exceptions are for physical therapy rendered by a chiropractor under the direction of a qualified physician and for chiropractic treatment authorized without limitations by the Office or the employing establishment.[7]

The Board finds that the medical evidence does not support authorization from the Office for chiropractic treatment and the Office properly exercised its discretion in denying such authorization. In a report dated September 26, 1997, Dr. Brett M. Rath, an attending Board-certified family practitioner, indicated that appellant had decided on his own to visit a chiropractor.[8] He noted that "the chiropractor has recommended multiple treatments and the patient seems to be helped by this." Dr. Rath noted that he expected the treatment was "palliative and not curative."

The Office properly determined that Dr. Rath did not provide a clear recommendation for chiropractic care to treat appellant's back condition, but rather merely reported details of appellant's independently obtained chiropractic care.[9] The Office then appropriately referred the case to Dr. Robert A. Berselli, a Board-certified orthopedic surgeon, for an opinion on the matter. In a report dated December 15, 1997, Dr. Berselli provided an opinion that chiropractic care was not necessary for treatment of appellant's condition. He indicated that appellant had cervical and lumbar degenerative disc disease, which could not be linked to his employment injuries. Dr. Berselli stated, "As far as treatment is concerned, I do not think that chiropractic manipulation is the proper course of treatment. I believe, rather, that the patient should be seen

[5] 5 U.S.C. § 8103(a).

[6] 5 U.S.C. § 8101(3).

[7] *See Edward Schoening*, 41 ECAB 977, 984-85 (1990).

[8] Dr. Rath was authorized by the Office to provide care to appellant.

[9] In the present case, the Office accepted that appellant sustained chronic low back strain; it has not been accepted that appellant sustained a subluxation as demonstrated by x-ray to exist. However, chiropractic care would be authorized if recommended by a qualified treating physician; *see supra* note 7 and accompanying text.

by a physical therapist periodically for muscle relaxation, range of motion exercises and truncal muscle strengthening exercises."[10]

For these reasons, the Office properly determined that the weight of the medical evidence showed that chiropractic care was not appropriate for treatment of appellant's condition and it properly exercised its discretion to deny such authorization.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[11] 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.[12] 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.[13] 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.[14]

In support of his reconsideration request, appellant submitted reports of Dr. Stephen J. Chaffee and Dr. William E. Winans, both of whom were osteopaths. In a report dated June 2, 1991, Dr. Chaffee stated that osteopathic manipulation had been effective for maintaining appellant's comfort and ability to function, but that it was not convenient for appellant to visit him or Dr. Winans. Dr. Chaffee stated, "I would encourage consideration to be given to a local manipulator such as Dr. Abrahamson." In a report dated June 23, 1998, Dr. Winans stated that appellant's osteopathic manipulation treatment had been palliative rather than curative and recommended that appellant "have the ability to make arrangements for continued care with Dr. Abrahamson in order to minimize his syptomatology and provide greater convenience of care."

The Board finds that these reports constitute new and relevant evidence which require reopening of appellant's case for review of the merits of his claim. Therefore, the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim constituted

[10] Dr. Rath was provided with a copy of Dr. Berselli's report and was asked to respond to Dr. Berselli's findings. He did not provide any comment regarding appellant's need for chiropractic care but noted that physical therapy had not been helpful in the past.

[11] 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).

[12] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[13] 20 C.F.R. § 10.138(b)(2).

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

an abuse of discretion. The case shall be remanded to the Office for a merit review of appellant's claim to be followed by an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated April 6, 1998 is affirmed. The decision of the Office dated July 9, 1998 is reversed and the case remanded to the Office for proceedings consistent with this decision of the Board.

Dated, Washington, DC
February 5, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member