U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN B. CYCHOSZ and U.S. POSTAL SERVICE,
POST OFFICE, Palatine, IL

Docket No. 00-2687; Submitted on the Record;
Issued June 25, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128.

The Board has reviewed the case record in this appeal and finds that the Office abused its discretion in refusing to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On October 24, 1995 appellant, then a 38-year-old tractor trailer operator, filed a claim for an occupational disease alleging that on June 12, 1995 he injured his back when he backed under a trailer with his tractor.

By decision dated January 25, 1996, the Office found the evidence of record insufficient to establish that appellant sustained an injury in the performance of duty. On February 16, 1996 appellant requested an oral hearing.

In a February 10, 1997 decision, the hearing representative affirmed the Office's January 25, 1996 decision. Appellant requested reconsideration of the hearing representative's decision.

By decision dated March 31, 1998, the Office denied appellant's request for modification based on a merit review of the claim. On January 21 and October 14, 1999 appellant requested reconsideration of the Office's decision.

In a February 11, 1999 decision, the Office denied appellant's request for a merit review of his claim on the grounds that the evidence submitted was irrelevant. On March 5, 1999 appellant requested reconsideration of the Office's decision.

By decision dated July 15, 1999, the Office denied appellant's request for modification based on a merit review. On September 30, 1999 appellant requested reconsideration.

In a May 17, 2000 decision, the Office denied appellant's request for a merit review of his claim on the grounds that the evidence submitted was of a duplicative nature.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed his request for appeal on August 23, 2000, the only decision before the Board is the May 17, 2000 decision denying appellant's request for reconsideration on the merits.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[2]

In support of his September 30, 1999 request for reconsideration, appellant submitted a September 16, 1999 report of Dr. Alan R. Barthen, a chiropractor, who indicated that appellant presented himself at his office on November 10, 1993 with symptoms of low back pain. Dr. Barthen stated that x-rays results revealed "a narrowing of the L5/S1 disc space, spinal misalignment of L2, L4 and sacrum as well as some misalignment of both sacroiliac joints." He noted that appellant discontinued care on November 30, 1993. Dr. Barthen also noted that he did not treat appellant again until August 18, 1999 for low back pain. He stated:

> "Upon x-ray examination misalignment of the same vertebrae were found, however, there is a significant series of radiolucent spaces through the lower lumbar spine. There now appears to be radiolucency of the posterior aspect of the inferior vertebral plate of L5 and through the pars interarticularis also of L5. There is also a radiolucency at what appears to be L6 along its posterior aspect of the vertebral body."

These radiolucencies were not of the November 10, 1993 x-rays. They appear to be vertebral fractures probably related to the trauma from the truck accident [appellant] experienced on June 12, 1995. [Appellant] relates no other traumas to his spine before or after the June 12, 1995 accident. It is my conclusion that the pain [appellant] is experiencing is from the truck accident of June 12, 1995."

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[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

[2] 20 C.F.R. § 10.606(b)(2) (1999).

Under section 8101(2) of the Act,[3] "[t]he 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 of the spine as demonstrated by x-ray to exist and subject to regulation by the Secretary."[4] If a chiropractor's reports are not based on a diagnosis of subluxation as demonstrated by x-ray to exist, they do not constitute competent medical evidence to support a claim for compensation.[5]

Subluxation is an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically, which must be demonstrable on x-ray film to individuals trained in the reading of x-rays.[6] The Office has regulations, which specify, "A chiropractor may interpret his or her x-rays to the same extent as any other physician."[7]

The Board finds that Dr. Barthen diagnosed subluxation of the spine as demonstrated by x-ray, and thus, he is a physician under the Act. Further, Dr. Barthen opined that appellant's condition was caused by the June 12, 1995 injury. Hence, his report constitutes relevant and pertinent new evidence not previously considered by the Office such that review of the evidence and the case on its merits is warranted. Therefore, the Board finds that the Office abused its discretion by denying appellant's request for reconsideration under section 8128(a) of the Act.

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[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8101(2); *see also* 20 C.F.R. § 10.400(a); *Robert J. McLennan*, 41 ECAB 599 (1990); *Robert F. Hamilton*, 41 ECAB 431 (1990).

[5] *Loras C. Dignann*, 34 ECAB 1049 (1983).

[6] *Mary J. Briggs* 37 ECAB 578 (1986).

[7] 20 C.F.R. § 10.311(c); *Roddy D. Riggs*, 34 ECAB 1664 (1983).

The May 17, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further consideration on its merits.

Dated, Washington, DC
June 25, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member