U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONETTE M. BIRKHOLZ-SEXTON and DEPARTMENT OF ENERGY, BONNEVILLE POWER ADMINISTRATION, Redmond, OR

Docket No. 01-1502; Submitted on the Record;
Issued June 17, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence of disability on September 13, 1999 causally related to her accepted July 1, 1999 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of her claim under 5 U.S.C. § 8128(a).

On July 1, 1999 appellant, then a 38-year-old heavy mobile equipment mechanic, filed a traumatic injury claim alleging on that date she tore her back and shoulder muscles and possibly dislocated her back and ribs while using a pry bar to align a driveling. Appellant stopped work on the date of injury and she returned to regular-duty work on July 20, 1999.

On November 15 and 23, 1999 appellant filed claims alleging that she sustained a recurrence of disability on September 13, 1999.

In a February 29, 2000 letter, the Office advised appellant to submit factual and medical evidence supportive of her recurrence claim.

By letter of the same date, the Office accepted appellant's claim for a right rhomboid strain for July 1 and 20, 1999.

In response to the Office's request, appellant submitted medical evidence.

By decision dated April 5, 2000, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on September 13, 1999 causally related to her July 1, 1999 employment injury. On June 20, 2000 appellant requested reconsideration of the Office's decision.

In a September 13, 2000 decision, the Office denied appellant's request for modification based on a merit review of the claim. Appellant, through her counsel, requested reconsideration of the Office's decision by letter dated September 29, 2000.

By decision dated October 18, 2000, the Office denied appellant's request for a merit review of her claim on the grounds that it neither raised substantive legal questions nor included new and relevant evidence. In a June 20, 2001 letter, appellant, through her counsel, requested reconsideration of the Office's decision.

In a July 2, 2001 decision, the Office again denied appellant's request for a merit review of her claim on the same grounds as its previous decision.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to establish that she sustained a recurrence of disability on September 13, 1999 causally related to her accepted July 1, 1999 employment injury.

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.[1]

The medical evidence of record fails to establish that appellant sustained a recurrence of disability on September 13, 1999 causally related to her July 1, 1999 employment injury. The treatment notes of Dr. Kenneth V. Miller, a chiropractor, covering the period September 24 through November 4, 1999 and his April 27, 2000 report indicated that appellant probably had a strained thoracic and cervical spine. In his April 27, 2000 report, Dr. Miller opined that appellant's objective signs and symptoms remained essentially the same from the onset of her July 1, 1999 injury to the present. He concluded that it was apparent that the cervical disc injury had been the cause of appellant's symptoms and continuing disability. Under section 8101(2) of the Federal Employees' Compensation Act,[2] "[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."[3] 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.[4] Dr. Miller did not diagnose subluxation as demonstrated by x-ray. Therefore, he is not a "physician" under the Act and his treatment notes and reports are of no probative value to appellant's claim.

A November 4, 1999 report of Dr. Emily A. Moser, a Board-certified neurologist, noted that appellant had a history of chronic low back pain and some history of neck pain and stiffness

[1] *Louise G. Malloy*, 45 ECAB 613 (1994); *Lourdes Davila*, 45 ECAB 139 (1993); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

[2] 5 U.S.C. §§ 8101-8193.

[3] 5 U.S.C. § 8101(2); *see also Robert J. McLennan*, 41 ECAB 599 (1990); *Robert F. Hamilton*, 41 ECAB 431 (1990).

[4] *Cheryl L. Veale*, 47 ECAB 607 (1996).

that was not due to any specific injury, but was a result of chronic wear and tear. She provided a description of appellant's July 1, 1999 employment injury and medical treatment and her findings on physical and objective examination. Dr. Moser opined that appellant had neck pain and bilateral arm dysesthesias of uncertain etiology. She stated that appellant's examination and nerve conduction studies were unremarkable. Dr. Moser further stated that appellant may have a disc that needed to be ruled out by a magnetic resonance imaging (MRI) scan.

In her November 11, 1999 treatment note, Dr. Moser noted that the MRI results revealed a broad-based disc bulge at C4-5, which caused some spinal stenosis. She stated that perhaps this was the lesion that was causing appellant's symptoms. Dr. Moser's December 13, 1999 treatment notes indicated that appellant had resolving cervical radiculopathy and that her ultimate prognosis was good. Dr. Moser's report and treatment notes failed to address whether appellant's conditions were caused by her July 1, 1999 employment injury.

The treatment notes of Richard Miller, a physical therapist, are of no probative value inasmuch as a physical therapist is not a "physician" under the Act and, therefore, he is not competent to give a medical opinion.[5]

The treatment notes of Dr. Robert J. Alaimo, Jr, an osteopath and appellant's treating physician, covering the period October 19, 1999 through January 13, 2000 indicated an initial diagnosis of thoracic strain/sprain and ulnar neuropathy trapezius and subsequent diagnoses of trapezius/rhomboid strain and herniated nucleus pulposus. Dr. Alaimo recommended that appellant perform light-duty work. His treatment notes failed to address whether appellant's conditions were causally related to her July 1, 1999 employment injury.

In his March 20, 2000 report, Dr. Alaimo provided a history of appellant's July 1, 1999 employment injury and medical treatment. He noted the impression of Dr. Staver, a surgeon, that appellant had post C-spine strain with broad bulging disc at the C4-5 level with intermittent referred paresthesias to the upper extremities. Dr. Alaimo did not address whether the diagnosed condition was caused by appellant's July 1, 1999 employment injury.

Dr. Alaimo's July 25, 2000 duty status report revealed that appellant had a cervical herniated nucleus pulposus, thoracic herniated nucleus pulposus and neck and back pain due to her July 1, 1999 employment injury. Dr. Alaimo, however, failed to provide any medical rationale explaining how or why appellant's conditions were caused by the July 1, 1999 employment injury.

In a January 11, 2000 report, Dr. Edmund H. Frank, a Board-certified neurosurgeon, noted appellant's July 1999 employment injury, medical treatment and social history. He further noted his findings on physical examination and opined that appellant had a history of something that suggested she may have had some cervical radiculopathy in the past. Dr. Frank concluded that at that point appellant had no evidence of cervical radiculopathy or myelopathy. He did not opine that appellant had any current condition causally related to her July 1, 1999 employment injury.

[5] 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).

Because appellant has failed to submit any rationalized medical evidence establishing that she sustained a recurrence of disability on September 13, 1999 causally related to her accepted July 1, 1999 employment injury, the Board finds that appellant has not met her burden of proof.

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

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[6] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.[7] 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.[8] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.[9]

In this case, the Office denied appellant's September 29, 2000 request for reconsideration, which was denied by the Office in an October 18, 2000 decision. The Office also denied appellant's June 20, 2001 request for reconsideration by decision dated July 2, 2001.

In her September 29, 2000 letter, appellant merely requested reconsideration and indicated that "we will be submitting evidence in the very near future." She did not submit any additional evidence in support of her claim that she sustained a recurrence of disability on September 13, 1999 causally related to her July 1, 1999 employment injury prior to the Office's October 18, 2000 decision.

In support of her June 20, 2001 request for reconsideration, appellant submitted Dr. Miller's April 27, 2000 report, Dr. Alaimo's March 20, 2000 report and a partial description of her heavy mobile equipment mechanic position. The reports of Drs. Miller and Alaimo and appellant's job description are repetitious of those previously submitted and reviewed by the Office. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[10] Thus, the evidence submitted by appellant cannot serve as a basis for reopening the claim.[11]

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[6] 5 U.S.C. §§ 8101-8193. 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 her own motion or on application." 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b)(1)(2).

[8] *Id*. at § 10.607(a).

[9] *Id.* at § 10.608(b).

[10] *Roseanne S. Allexenberg*, 47 ECAB 498 (1996); *James A. England*, 47 ECAB 115 (1995).

[11] *Richard L. Ballard*, 44 ECAB 146 (1992).

The Board finds that appellant did not raise any substantive legal questions and failed to submit any new relevant and pertinent evidence not previously reviewed by the Office. Therefore, the Office did not abuse its discretion in its October 18, 2000 and July 2, 2001 decisions by refusing to reopen appellant's claim for review of the merits.

The July 2, 2001 and October 18 and September 13, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 17, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member