United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
	)	**Docket No. 10-1442**
and	)	**Issued: February 10, 2011**
	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Milwaukee, WI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 30, 2010 appellant filed a timely appeal from a February 17, 2010 decision of the Office of Workers' Compensation Programs denying her request for reconsideration without a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision. Because more than 180 days elapsed between the most recent Office merit decision of July 24, 2009 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without a merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 8, 2009 appellant, then a 38-year-old transportation security officer, filed a traumatic injury claim alleging that she sustained a low back injury on May 1, 2009 when she

tripped over a floor mat and landed forcefully on her left foot. An eyewitness corroborated her account. Appellant stopped working on May 1, 2009 and returned four days later. The employing establishment noted that she had a prior injury on February 22, 2009.

The Office informed appellant on May 15, 2009 that additional evidence was needed to establish her claim. It requested that she submit reports that included a history of injury, detailed description of findings, test results, diagnosis and a physician's opinion supported by a medical explanation pertaining to how the reported work incident caused the injury.

In a May 5, 2009 attending physician's report, Dr. David P. Zumstein, a chiropractor, noted that appellant presented with spinal pain, left leg numbness and weakness as a result of the May 1, 2009 incident. Appellant denied any history of a preexisting injury. Dr. Zumstein examined appellant's lumbar spine and observed limited ranges of motion (ROMs) as well as abnormal biomechanical dysfunction on x-rays. He also noted significant motor and sensory deficits of the left leg. Dr. Zumstein diagnosed lumbar subluxation and checked the "yes" box in response to a form question asking whether appellant's injury was employment related. He recommended that appellant remain off work until June 22, 2009 at the earliest.[1]

In a May 6, 2009 report, Dr. Dan S. Heffez, a Board-certified neurosurgeon, advised that appellant apparently had tripped and then had difficulty with her left leg. He commented that he dealt with appellant's past lumbar complaints and was "always" confused as to the degree of her complaints. Dr. Heffez noted that a previous magnetic resonance imaging (MRI) scan of the lumbar region showed a tear in the annulus of the disc without any evidence of nerve root compression. He opined that her current findings could not be explained by lumbar pathology.

A May 7, 2009 MRI scan report from Dr. Lawrence M. Dubin, a Board-certified diagnostic radiologist, revealed a straightening of normal cervical lordosis and slight reversal of the curvature, most likely related to a muscle spasm, and mild degenerative changes at the C3-C4 disc and T11 inferior endplate and Schmorl's node.

In a May 8, 2009 report, Dr. Heffez noted that appellant complained of left leg pain and weakness. On physical examination, he observed some weakness in the proximal musculature but was able to elicit appellant's dorsiflexion of her hallux. Dr. Heffez stated that he could not explain her neurological abnormalities in view of benign cervical, thoracic and lumbar MRI scan studies and suggested the possibility of a nonphysiological condition.

A May 19, 2009 electromyography (EMG) report from Dr. Ajaz M. Qhavi, a Board-certified neurologist, did not detect any irregularities of the left lower extremity. Dr. Heffez's May 20, 2009 report referred to the negative EMG and opined that appellant's complaints were nonphysiological.

In a June 3, 2009 progress note, Dr. Arthur Turner, a Board-certified neurologist, diagnosed a nonorganic disturbance of movement of the left lower extremity following a minor

[1] Dr. Zumstein advised in a June 9, 2009 work capacity evaluation form that appellant's low back and leg pain prevented her from returning to either regular or limited duty. He later advised in a June 26, 2009 evaluation that she was restricted to sedentary duties for the period June 27 to July 24, 2009.

injury on May 1, 2009. He reported appellant's lack of perception of pinpricks below the left inguinal region anteriorly and the mid-buttock posteriorly. Dr. Turner stated that her symptoms were due to a psychosomatic disorder.

By decision dated June 17, 2009, the Office denied appellant's claim, finding that Dr. Zumstein's May 5, 2009 chiropractic report did not include an accompanying x-ray report in support of his lumbar subluxation diagnosis or sufficiently explain the causal relationship between the diagnosed condition and the May 1, 2009 tripping incident.

Appellant requested reconsideration on July 7, 2009 and submitted several medical records. In a June 4, 2009 radiographic report, Dr. Zumstein noted that full spine sectional x-rays taken on the same day exhibited multiple vertebral subluxation complexes at the C2-C4, C7-T2, T6-T7, L2 and L4-L5 regions, moderate-to-severe cervical spine kyphosis, mild thoracic spine scoliotic curvatures and biomechanical dysfunction on lateral bending of the lower lumbar spine.

In a June 23, 2009 attending physician's report, Dr. Zumstein diagnosed vertebral subluxation complexes of the lumbar, thoracic and cervical spine regions based on appellant's injury history and the June 4, 2009 x-rays. He opined that her condition was directly caused by the May 1, 2009 tripping incident in light of "the nature of the mechanism of injury" and "the fact the patient was asymptomatic prior to injury." Dr. Zumstein added in a June 26, 2009 report that appellant sustained a prior, work-related low back injury in or around February 2009 and experienced pain from that injury at the time of the May 1, 2009 incident. He assessed that appellant's diagnosed lumbar subluxation exacerbated her preexisting lumbar pain.[2]

By decision dated July 24, 2009, the Office denied modification of its June 17, 2009 decision, finding that Dr. Zumstein's lumbar subluxation diagnosis was not demonstrated by x-rays taken within a reasonable time following the injury.

Appellant requested reconsideration on November 9, 2009, asserting that the Office erred in finding that Dr. Zumstein was not a physician and contending that his June 4, 2009 x-ray report sufficiently demonstrated the existence of subluxation. She further contended that the Office received but failed to discuss Dr. Zumstein's June 26, 2009 report.[3] Appellant also submitted duplicates of Dr. Zumstein's June 4 and 26, 2009 reports and a May 1, 2009 emergency room physician's note, which commented that appellant's chronic low back and leg pain was due to a disc problem and acknowledged a "falling" incident.[4]

By decision dated February 17, 2010, the Office denied appellant's request for reconsideration. It found that Dr. Zumstein's June 4, 2009 x-ray report, which substantiated

[2] Appellant also submitted copies of Dr. Heffez's May 8 and 20, 2009 reports and a May 20, 2009 injury report containing an illegible signature.

[3] Appellant pointed out that the Office improperly reviewed a February 22, 2009 medical report that belonged to another claimant's file and requested its removal from the record. The Board notes that the record presently does not contain this report.

[4] The physician's signature is illegible.

appellant's diagnosed lumbar subluxation, was of no probative value as it was not taken within a reasonable time following the date of injury. It also found that the medical evidence submitted was repetitious and therefore not sufficient to warrant review of the July 24, 2009 decision.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[5] the Office's regulations provide that the evidence or argument submitted by a claimant must either: (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) constitute relevant and pertinent new evidence not previously considered by the Office.[6] Where the request for reconsideration fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[7]

ANALYSIS

Appellant requested reconsideration after the Office found that Dr. Zumstein, a chiropractor, was not a physician because he did not diagnose a spinal subluxation based on x-ray. On reconsideration and on appeal, appellant contended that Dr. Zumstein's June 4, 2009 x-ray report demonstrated the existence of subluxation such that he was a physician under the Act.[8] The Office denied appellant's reconsideration request finding that, while Dr. Zumstein's June 4, 2009 x-ray report found spinal subluxation, it was of no value as the x-ray was not taken within a reasonable time following the date of injury. The Board finds that appellant has shown that the Office erroneously applied or interpreted a specific point of law.

Consistent with appellant's assertions on reconsideration, Dr. Zumstein's June 4, 2009 report noted reviewing x-rays of the cervical, thoracic and lumber spine that showed vertebral subluxation complexes at the C2-C4, C7-T2, T6-T7, L2 and L4-L5. As Dr. Zumstein diagnosed a spinal subluxation based on a review of x-rays, he is a physician under the Act.[9] Since the Office erroneously asserted that Dr. Zumstein was not a physician under section 8101(2) of the Act, appellant has established that the Office erroneously applied or interpreted a specific point of law.

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[5] 5 U.S.C. § 8128(a). *See generally* 5 U.S.C. §§ 8101-8193.

[6] *E.K.*, 61 ECAB ___ (Docket No. 09-1827, issued April 21, 2010). *See* 20 C.F.R. § 10.606(b)(2).

[7] *L.D.*, 59 ECAB 648 (2008). *See* 20 C.F.R. § 10.608(b).

[8] 5 U.S.C. § 8101(2) 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] Office regulations provide that a chiropractor may interpret his own x-rays to the same extent as any other physician and do not require that an x-ray film or x-ray report be submitted. Instead, the regulations provide that the x-ray or a report of the x-ray be made available for submittal upon request. *See* 20 C.F.R. § 10.311(c).

The Board also finds that the Office applied an incorrect standard in determining that appellant's legal contention was not sufficient to warrant further merit review. Although the Office acknowledged that Dr. Zumstein's June 4, 2009 radiographic report found a lumbar subluxation, it denied reconsideration on the grounds that the x-rays were not taken within a reasonable time following appellant's injury and were therefore not of any probative value.[10] The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge her burden of proof.[11] If the Office should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[12] The standard to reopen a case for merit review under section 8128(a) of the Act does not consider probative weight. In this case, appellant showed that the Office erred in interpreting a point of law. The Office was obligated to conduct a merit review of the claim.

For these reasons, the case shall be remanded to the Office for further merit review. After such further development as is deemed necessary, the Office shall issue an appropriate merit decision.

CONCLUSION

The Board finds that the Office improperly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

[10] In *Linda L. Mendenhall*, 41 ECAB 532, 538-40 (1990), the Board found that a delay in diagnostic testing may diminish the probative value of the opinion offered but it rejected the idea that tests not performed within a short period of time following an injury were *per se* entitled to little probative value.

[11] *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[12] *See Dennis J. Lasanen*, 41 ECAB 933 (1990).

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded for a review of the merits.

Issued: February 10, 2011
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board