U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAUL E. RICKARDS and DEPARTMENT OF THE ARMY, U.S. ARMY RESERVE, St. Louis, MO

Docket No. 98-785; Submitted on the Record;
Issued October 18, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, A. PETER KANJORSKI:

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing.

On May 10, 1996 appellant, then a 55-year-old bindery worker, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that, on February 27, 1996, he sustained an injury to his back while in the performance of duty. Appellant explained that he injured himself when he lifted two full mail tubs and placed them on a cart. He described the nature of his injury as lower back spasms. Appellant ceased working on February 27, 1996 and returned to work on May 10, 1996. In support of his claim, appellant submitted a September 12, 1995 chest x-ray and a November 6, 1995 x-ray of the lumbar spine.[1] He also submitted what appear to be treatment notes covering the period August 4, 1995 through April 8, 1996.[2] Additionally, appellant submitted a "certificate of illness" from the Southwest Medical Center indicating that he was incapacitated due to back pains during the period March 4 through 15, 1996. Lastly, appellant submitted a May 23, 1996 report from Dr. Anthony Calandro, a chiropractor, as well as several absence authorization certificates and a May 30, 1996 return to work certificate, each signed by Dr. Calandro. In his May 23, 1996 report, Dr. Calandro indicated that he had been treating appellant since March 18, 1996 for "multiple lumbar vertebral subluxations associated with spinal nerve impinchments [sic]." Dr. Calandro advised that appellant was restricted from working because his condition was "caused by repetitive stress, such as lifting or bending." He released appellant to return to light duty as of May 31, 1996, with the restriction of no lifting over 15 pounds.

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[1] The x-ray of the lumbar spine was interpreted as revealing mild degenerative changes, most prominent at L5-S1.

[2] The source of the treatment notes is unclear and the information contained therein is largely illegible.

By letter dated December 12, 1996, the Office advised appellant of the need for additional factual and medical information in order to make a determination regarding his claim. Additionally, the Office specifically informed appellant of the limitations under the Federal Employees' Compensation Act with respect to chiropractic treatment. Appellant was advised that he had 30 days within which to submit the requested information.

On January 22, 1997 the Office denied appellant's claim on the basis that the evidence failed to establish that an injury was sustained as alleged. In an accompanying memorandum, the Office explained that while the record established that the incident of February 27, 1996, occurred as alleged, a medical condition diagnosed in connection with the accepted incident was not demonstrated. The Office further explained that the evidence submitted by appellant's chiropractor was inadmissible because it was not supported by x-ray evidence demonstrating the presence of a subluxation. In light of the absence of any medical evidence demonstrating the existence of a condition, for which compensation was being claimed, the Office concluded that appellant failed to establish that he sustained an injury as alleged.

Subsequent to the issuance of its January 22, 1997 decision, the Office received additional medical evidence. By letter dated March 4, 1997, the Office acknowledged receipt of this evidence and advised appellant that he must follow the appeal rights that accompanied the January 22, 1997 decision, if he wished to dispute the Office's denial of compensation. Appellant subsequently filed a request for an oral hearing, dated October 6, 1997 and received by the Office on October 10, 1997.

In a decision dated December 3, 1997, the Office found that appellant did not submit his request for a hearing within 30 days of the Office's January 22, 1997 decision and, therefore, he was not entitled to an oral hearing as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of fact of injury could equally well be addressed through the reconsideration process. Appellant subsequently filed an appeal with the Board on January 9, 1998.[3]

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty.

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred.[4] In the instant case, the Office accepted the fact that the employment incident of February 27, 1996 occurred as alleged. The second component in a fact of injury analysis is whether the employment incident

[3] As previously noted, the record includes additional evidence received by the Office after it issued its January 22, 1997 decision denying compensation. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989).

caused a personal injury. This latter component generally can be established only by medical evidence.[5] Here, the Office denied appellant's claim based on his failure to satisfy this second component.

As previously noted, Dr. Calandro's May 23, 1996 opinion was the only narrative report of record at the time the Office issued its decision on January 22, 1997. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under the Act. Section 8101(2) of the Act 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…."[6] Therefore, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence.[7] In the instant case, based upon the evidence that was properly before the Office, there is no indication that Dr. Calandro relied upon an x-ray interpretation in the diagnosis or treatment of appellant's condition. Although the record includes an x-ray of appellant's lumbar spine, this film was taken on November 6, 1995; more than three months prior to the accepted employment incident of February 27, 1996. Moreover, there is no indication that Dr. Calandro reviewed this x-ray at the time he offered his opinion on May 23, 1996. Consequently, Dr. Calandro's opinion is of no probative value as he is not considered a physician under the Act.[8] Additionally, the treatment notes submitted by appellant covering the relevant period March 6 through April 8, 1996 are primarily illegible and they do not disclose the author of the information contained therein. As such, this evidence similarly lacks probative value. In conclusion, the record is devoid of any rationalized medical opinion evidence diagnosing a condition related to the accepted employment incident of February 27, 1996. Therefore, the Board finds appellant has not met his burden of proof.

The Board also finds that the Office properly denied appellant's request for an oral hearing.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for an oral hearing must be submitted, in writing, within 30 days of the date of issuance of the decision. A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision, as determined by the postmark of the request.[9] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[10] In such a

[5] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[6] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

[7] *Kathryn Haggerty*, 45 ECAB 383 (1994).

[8] *Id.*

[9] 20 C.F.R. § 10.131(a).

[10] *Herbert C. Holley*, 33 ECAB 140 (1981).

case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[11]

The Office initially rejected appellant's claim for compensation in a decision dated January 22, 1997. Because appellant made his request for an oral hearing on October 6, 1997; more than 30 days after the Office's January 22, 1997 decision, he is not entitled to a hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether appellant sustained a work-related injury on February 27, 1996 could equally well be addressed by requesting reconsideration. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for an oral hearing.[12]

The decisions of the Office of Workers' Compensation Programs dated December 3 and January 22, 1997 are hereby affirmed.

Dated, Washington, D.C.
October 18, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

A. Peter Kanjorski
Alternate Member

[11] *Rudolph Bermann*, 26 ECAB 354 (1975).

[12] The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).