U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GABRIEL A. WAGNER and DEPARTMENT OF TRANSPORTATION, TRANSPORTATION SECURITY ADMINISTRATION, KAHULUI AIRPORT, Kahului, HI

Docket No. 03-1488; Submitted on the Record;
Issued September 25, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained an injury on December 28, 2002 in the performance of duty causally related to factors of his federal employment.

On January 2, 2003 appellant, then a 26-year-old transportation security screener, filed a claim for an injury on December 28, 2002 when he lifted a bag weighing 100 pounds and felt a pull in his back and shoulder.

In a January 14, 2003 report, Dr. Brendan Krause, a chiropractor indicated that x-rays of appellant's cervical and lumbar spine, taken at the request of appellant's attending physician, a Dr. Wruck, revealed subluxations at C2, C3, L1 and L5.[1] In treatment records dated February 26 to March 14, 2003, Dr. Krause diagnosed strains and sprains of the cervical, thoracic and lumbar spine, left wrist and right shoulder and also indicated that corrective vertebral subluxation was a treatment objective.

Appellant also submitted reports and notes from physical therapists. However, physical therapists are not physicians under the Federal Employees' Compensation Act and are not qualified to provide the necessary medical evidence to meet appellant's burden of proof.[2]

[1] Effective February 12, 2003 appellant changed his attending physician from Dr. Wruck to Dr. Krause.

[2] *Jane A. White*, 34 ECAB 515 (1983).

By decision dated April 30, 2003, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the evidence of record did not establish that he sustained a medical condition causally related to factors of his employment.[3]

The Board finds that this case is not in posture for decision.

An employee seeking benefits under the Act[4] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the "fact of injury" has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[6] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[7] An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or medical condition relate to the employment incident. As the Office did not dispute that the December 28, 2002 employment incident occurred at the time, place and in the manner alleged, the remaining issue is whether the alleged injury was caused by the employment incident.

In order to satisfy his or her burden of proof, an employee must submit a physician's rationalized medical opinion on the issue of whether the alleged injury was caused by the employment incident.[8]

In this case, appellant submitted evidence from a chiropractor who diagnosed strains and sprains of the cervical, thoracic and lumbar spine, left wrist and right shoulder and cervical and lumbar subluxations as demonstrated by x-rays. Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[9] In this case, the evidence

[3] The record contains additional evidence submitted subsequent to the Office decision of April 30, 2003. However, the jurisdiction of the Board is limited to the evidence that was before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

[4] 5 U.S.C. §§ 8101-8193.

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

[6] *Shirley A. Temple*, 48 ECAB 404 (1997); *Louise F. Garnett*, 47 ECAB 639 (1996).

[7] *Id.*

[8] *Gary L. Fowler*, 45 ECAB 365 (1994).

[9] 5 U.S.C. § 8101(2). *See Jack B. Wood*, 40 ECAB 95 (1988).

establishes that Dr. Krause diagnosed cervical and lumbar subluxations as demonstrated by x-ray and indicated that corrective vertebral subluxation was one of his treatment objectives. The Board finds that Dr. Krause is a physician under the Act and his reports constitute probative medical evidence in this case. On remand, the Office should further develop the evidence to determine whether the subluxations diagnosed by Dr. Krause were causally related to the work incident on December 28, 2002. After such further development as the Office deems necessary, the Office should issue an appropriate decision.

The April 30, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
September 25, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member