U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. WIGGINTON and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, FAIRCHILD AIR FORCE BASE, WA

Docket No. 01-133; Submitted on the Record;
Issued April 1, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review.

On May 15, 1996 appellant, then a 42-year-old equipment handler, filed a traumatic injury claim after his car was rear-ended by another vehicle while he was returning to the office from a work assignment. The Office accepted appellant's claim for cervical, thoracic, and lumbar subluxations, aggravation of spondylolisthesis, and subsequently for depression and pain disorder. Appellant received appropriate wage-loss compensation and medical benefits.

By decision dated September 1, 1998, the Office processed appellant's various requests for reimbursement for travel, telephone, and per diem expenses. The Office noted that its decision on these requests was final and informed appellant of his appeal rights. On September 10, 1998 appellant requested a hearing, noting that the Office had also denied him reimbursement for anti-inflammatory medicine recommended by his chiropractor, Dr. David Jones.

At the hearing on April 15, 1999, appellant submitted an April 13, 1999 report from Dr. Jones suggesting that appellant try natural anti-inflammatory products, vitamins, and sleeping aids. Appellant argued that a chiropractor is considered a physician and that his chiropractor recommended the medication as part of his treatment for his back injuries. Appellant added that the Office approved reimbursement of $21.57 for a book recommended by his psychologist and therefore should have approved the medication recommended by his chiropractor.

On June 15, 1999 the hearing representative found that appellant was not entitled to reimbursement for medication recommended by Dr. Jones. The hearing representative explained that, pursuant to section 8101(2)[1] and section 10.311[2] of the implementing regulation, chiropractors may be paid only for x-rays to diagnose a subluxation, for manual manipulation to correct a subluxation, and for physical therapy as directed by a qualified physician.

By letter dated July 19, 1999, appellant requested reconsideration. He argued that section 8103 provides for medication that is "recommended" and that "gives relief." Because the Office approved reimbursement for the book recommended by his counselor, Dr. Paul Domitor, to help with his psychological condition, the Office should also reimburse him for the natural anti-inflammatory medicine recommended by his chiropractor. He added that the Office was "not applying the regulation fairly."

On August 8, 2000 the Office denied appellant's request for reconsideration on the grounds that appellant submitted no new evidence or legal argument sufficient to require the Office to reopen his case.[3]

The Board finds that the Office acted within its discretion in refusing to reopen appellant's case for merit review.

The only Office decision before the Board on appeal is dated August 8, 2000, denying appellant's request for reconsideration. Because more than one year has elapsed between the Office's last merit decision dated June 15, 1999 and the filing of this appeal on September 6, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.[4]

Section 8128(a) of the Federal Employees' Compensation Act[5] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[7] The application for reconsideration must be submitted in writing and set forth

[1] 5 U.S.C. § 8101(2).

[2] 20 C.F.R. § 10.311(a-d) (special rules for services of chiropractors).

[3] The Office noted that appellant's letter requesting reconsideration was dated July 1, 1999 but was not received by the Office until May 24, 2000. The Office stated in its decision that appellant's arguments were insufficient to establish clear evidence of error, but based its denial of merit review on appellant's failure to submit any evidence or legal argument not previously considered.

[4] 20 C.F.R. §§ 501.2(c); 501.3(d)(2). *See John Reese*, 49 ECAB 397, 399 (1998).

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8128(a) ("[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

[7] 20 C.F.R. § 10.606 (1999).

arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[8] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[9]

With his request for reconsideration, appellant submitted no new pertinent evidence. Therefore, he failed to meet subsection iii of section 10.606(b). Rather, appellant reiterated the arguments he had made at the oral hearing. He also noted that on April 9, 1997 he had told his rehabilitation nurse about the natural medication suggested by his chiropractor and that she had supported his recommendation.

In his decision, the hearing representative fully explained why the reimbursable services rendered by chiropractors were limited by statute, noting that chiropractors were expressly prohibited from prescribing medication. On reconsideration appellant offered no argument pertinent to the statutory provisions obligating the government to provide "services, appliances, and supplies prescribed or recommended by a qualified physician."[10] Nor did appellant demonstrate that the Office erroneously applied or interpreted a point of law. Inasmuch as appellant failed to meet any of the three requirements for reopening his claim for merit review, the Office properly denied his reconsideration request.[11]

[8] 20 C.F.R. § 10.606(b)(1)-(2) (1999).

[9] 20 C.F.R. § 10.606(b) (1999).

[10] 5 U.S.C. § 8103; 5 U.S.C. § 8101(2)-(3).

[11] *See Cleopatra McDougal-Saddler*, 50 ECAB 367, 369 (1999) (Office properly denied merit review on the grounds that appellant's legal contention was previously raised and decided).

The August 8, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
April 1, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member