

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARON T. CIRCLE and DEPARTMENT OF THE ARMY,
HEALTH SERVICES COMMAND, Fort Knox, Ky.

*Docket No. 96-1565; Submitted on the Record;
Issued August 26, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of proof to establish that she developed a back condition due to factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs properly found that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record and finds that appellant has not met her burden of proof to establish that she developed a back condition due to factors of her federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of her claim, including that fact 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 is causally related to the employment injury.²

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant.³ The

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Jerry D. Osterman*, 46 ECAB 500 (1995); *see also Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.⁴ Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,⁵ must be one of reasonable medical certainty⁶ and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁷ The mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the condition became apparent during a period of employment, nor the belief of appellant that the condition was caused by or aggravated by employment conditions is sufficient to establish causal relation.⁸

On May 16, 1994 appellant filed a claim alleging that she experienced back pain when she began working for a right-handed dentist after having worked with a left-handed dentist. Appellant stated that she first realized that her back pain was due to her employment in October 1987.⁹ Appellant related that in August 1991 she had a stiff neck, which extended down her back to her hips and worsened due to the physical requirements of her employment.

By decision dated September 1, 1994, the Office denied appellant's claim on the grounds that she did not establish fact of injury and, by decision dated January 27, 1995, an Office hearing representative affirmed the September 1, 1994 decision. By decision dated January 24, 1996, the Office denied modification of its prior decisions. The Board notes that, although the Office accepted the occurrence of the above-noted work incidents and conditions, it found that appellant did not submit sufficient medical evidence to establish that she sustained a back injury due to employment factors.

Appellant submitted a report dated April 15, 1993 from Dr. Paul D. Schneider, a Board-certified internist, who related that it was not possible to state whether an injury had caused her orthopedic problems.

In form reports dated June 8 and 11, 1993, Dr. George H. Raque, a Board-certified neurosurgeon, diagnosed a herniated disc and checked "yes" that the condition was caused or

⁴ The Board has held that in certain cases, where the causal connection is so obvious, expert medical testimony may be dispensed with to establish a claim; see *Naomi A. Lilly*, 10 ECAB 560, 572-73 (1959). The instant case, however, is not a case of obvious causal connection.

⁵ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁶ See *Morris Scanlon*, 11 ECAB 384-85 (1960).

⁷ See *William E. Enright*, 31 ECAB 426, 430 (1980).

⁸ *Manuel Garcia*, 37 ECAB 767, 773 (1986); *Juanita C. Rogers*, 34 ECAB 544, 546 (1983).

⁹ Appellant also filed a claim for a traumatic injury occurring on August 20, 1987 which was assigned Office File Number A6-582898 and accepted for a contusion to the back. The Office assigned appellant's occupational disease claim Office File Number A6-596915.

aggravated by her employment. However, a physician's opinion on causal relationship that consists only of checking "yes" to a form's question, without any explanation or rationale, has little probative value.¹⁰

The record indicates that appellant underwent a bilateral L4-5 laminotomy, foraminotomy and discectomy, which was performed by Dr. Raque on July 29, 1993. By letter dated June 9, 1994, the Office prepared a statement of accepted facts and requested that Dr. Raque provide a rationalized discussion regarding the cause of appellant's back condition.

In a report dated September 9, 1994, Dr. Raque related that he found appellant's herniated nucleus pulposus was due to employment activities and stated:

"As this is the history which was given to me by [appellant], I can only assume that it is accurate. Therefore, I do feel that the herniated nucleus was due to her employment and that the current residual problems she has are related to the injury she suffered in August of 1987."

Dr. Raque further provided:

"While it is probable that [appellant] had some preexisting degenerative lumbar disc disease the disc herniated is probably secondary to her work injury and at least by her history, she had no problem with back pain prior to being hurt at work and subsequent to her injury developed progressively more severe back pain. As this appears to be the case, according to her history, I can only assume that her complaints, which subsequently led to her surgery, were, in fact, secondary to her work[-]related injury."

Dr. Raque's finding that appellant's complaints are "probably" the result of an employment injury is, without further medical explanation, speculative in nature and thus insufficient to establish causal relationship.¹¹ Additionally, Dr. Raque relates appellant's back condition to a traumatic injury rather than factors of her employment and does not explain how and why appellant's back condition would not have been solely due to her progressive degenerative disc disease. Further, while Dr. Raque notes that appellant had no back problems prior to her work injury, the Board has previously held that the opinion of a physician that a condition is causally related to an employment injury because the employee was asymptomatic before the employment injury is insufficient, without supporting rationale, to establish causal relationship.¹² As Dr. Raque's report contains insufficient explanation or rationale supporting his opinion, it does not support a finding of causation.¹³

¹⁰ *Robert J. Krysten*, 44 ECAB 227 (1992).

¹¹ *William S. Wright*, 45 ECAB 498 (1994).

¹² *Thomas D. Petrylak*, 39 ECAB 276 (1987).

¹³ *Arlonia B. Taylor*, 44 ECAB 591 (1993).

In a report dated August 22, 1995, Dr. John R. Dimar, II, a Board-certified orthopedic surgeon, stated that while a back injury may have initiated appellant's back problems she did not mention an injury with him at the time of her initial visit on May 11, 1993. Dr. Dimar related that appellant's position as a dental assistance required standing and leaning and stated:

"It is well known that bending and standing for long period[s] of time do tend to increase back pain and it may lead to potentially more rapid back degenerative conditions. I can only say that if she noted that changing positions aggravated her back, then this certainly could have hastened her coming to surgery. However, again, this is an extremely difficult thing for me to comment on with any certainty."

Dr. Dimar's report is couched in equivocal and speculative terms and is of diminished probative value.¹⁴ Additionally, Dr. Dimar's comments are general in nature; to be of probative value, medical evidence provided by a physician must be specific to appellant.¹⁵

The remaining medical evidence submitted by appellant does not address the cause of her condition and thus does not constitute relevant and probative evidence sufficient to establish her claim.

As appellant has not submitted rationalized medical evidence to substantiate that she sustained a back condition due to factors of her federal employment, she has not met her burden of proof in the instant case.

The Board further finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

Appellant filed a claim alleging that she sustained a traumatic injury on August 20, 1987 when a dental chair fell on her back. The Office assigned the claim Office File Number A6-582-898 and accepted the claim for a contusion to the back. On June 23, 1993 appellant filed a notice of recurrence of disability alleging that on August 28, 1991 she experienced disability due to her August 20, 1987 employment injury. The Office denied appellant's claim by decision dated September 1, 1994 on the grounds that she failed to submit the necessary evidence to establish a causal relationship between her current condition and the accepted employment injury. By decision dated January 3, 1995, an Office hearing representative affirmed the Office's September 1, 1994 decision. Appellant requested reconsideration by letter postmarked January 9, 1996 and submitted additional evidence. By decision dated January 24, 1996, the Office found appellant's request for reconsideration untimely and that the request did not establish clear evidence of error.

The only decision before the Board relevant to appellant's claim for a recurrence of disability due to her August 20, 1987 employment injury is the Office's January 24, 1996 decision denying appellant's request for a review on the merits of its January 3, 1995 decision.

¹⁴ *William S. Wright, supra* note 11.

¹⁵ *Durwood H. Nolin*, 46 ECAB 818 (1995).

Because more than one year has elapsed between the issuance of the Office's January 3, 1995 decision and April 23, 1996, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the January 3, 1995 Office decision.¹⁶

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁷ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.¹⁸ 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.¹⁹ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.²⁰ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.²¹

In its January 24, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on January 3, 1995 and appellant's request for reconsideration was postmarked January 9, 1996, which was more than one year after January 3, 1995.

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."²² Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.²³

The Office's procedure manual discusses "clear evidence of error" as follows:

¹⁶ See 20 C.F.R. § 501.3(d)(2).

¹⁷ 5 U.S.C. §§ 8101-8193.

¹⁸ 20 C.F.R. § 10.138(b)(1), (2).

¹⁹ 20 C.F.R. § 10.138(b)(2).

²⁰ *Joseph W. Baxter*, 36 ECAB 228 (1984).

²¹ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

²² *Charles J. Prudencio*, 41 ECAB 499 (1990).

²³ *Anthony Lucszynski*, 43 ECAB 1129 (1992).

“The term ‘clear evidence of error’ is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made a mistake (for example, proof that a schedule awards was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director’s own motion.”²⁴

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.²⁵ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.²⁶ Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error.²⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.²⁸ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.²⁹ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.³⁰ The Board makes an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.³¹

In the present case, the Office properly conducted a limited review of the evidence submitted by appellant in support of her application for review. In support of her request for reconsideration, appellant submitted a report from Dr. Dimar dated August 22, 1995, in which he states that a back injury could have started her back problems but that appellant did not tell him about an injury at the time of her initial visit on May 11, 1993. As Dr. Dimar’s opinion is speculative and equivocal in nature, it is entitled to little probative value.³² Thus, his report is not sufficient to raise a substantial question as to the correctness of the Office’s merit decision.

²⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

²⁵ See *Dean D. Beets*, 43 ECAB 1153 (1992).

²⁶ See *Leona N. Travis*, 43 ECAB 227 (1991).

²⁷ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

²⁸ See *Leona N. Travis*, *supra* note 26.

²⁹ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

³⁰ See *Leon D. Faidley, Jr.*, *supra* note 21.

³¹ *Gregory Griffin*, 41 ECAB 186 (1989), *reaff’d on recon.*, 41 ECAB 458 (1990).

³² *William S. Wright*, *supra* note 11.

As appellant failed to submit evidence of clear error, the Office did not abuse its discretion in denying further review of the case.

The decisions of the Office of Workers' Compensation Programs dated January 24, 1996 are affirmed.

Dated, Washington, D.C.
August 26, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member