U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KATHERINE K. FISHER and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Dallas, Tex.

*Docket No. 96-601; Submitted on the Record;*
*Issued July 24, 1998*

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DECISION and ORDER

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

The issues are: (1) whether appellant has established that her recurrence of disability was causally related to her 1972 accepted injury; (2) whether she is entitled to a schedule award for her hip condition; and (3) whether the Office of Workers' Compensation Programs properly denied appellant's July 28, 1995 request for reconsideration of the Office decision dated June 7, 1985.

On July 21, 1972 appellant, then a 19-year-old student clerical aide, filed a notice of traumatic injury, claiming that she hurt her back and shoulder when a heavy blackboard fell on her. The Office accepted a cervical, thoracic and lumbosacral strain as well as subsequent cervical fusion, and paid appropriate compensation.

On November 2, 1994 appellant filed a CA-7 form, claiming a schedule award for her shoulder. On January 24, 1995 appellant filed a notice of recurrence of disability, claiming that the bone graft taken from her right hip for her cervical fusion surgery had caused inflammation, swelling, and pain, making her unable to work.

On February 7, 1995 the Office requested that appellant submit a factual statement and medical records of her treatment as well as a medical opinion showing the causal relationship between her hip condition and the accepted employment injury. Appellant submitted a December 5, 1994 report from Dr. Andrew P. Kant, a Board-certified orthopedic surgeon, Houston, who recommended an electromyogram and nerve conduction studies of appellant's extremities based on her complaints of pain, numbness and tingling.

On March 14, 1995 the Office denied the claim on the grounds that the medical evidence failed to establish that appellant's hip condition was causally related to the accepted work injuries. The Office noted that Dr. Kant provided no medical rationale on how appellant's current hip pain was related to the bone graft that occurred more than 14 years earlier. On May 18, 1995 the Office denied appellant's claim for a schedule award, noting that none of the

medical reports referred to any impairment of a scheduled member or function of the body as set forth in the Federal Employees' Compensation Act.[1]

Appellant requested reconsideration of the March 14, 1995 decision and submitted medical reports from Drs. Kant and Samuel J. Alianell, Board-certified in physical medicine and rehabilitation. On August 25, 1995 the Office denied appellant's request on the grounds that the medical evidence was insufficient to warrant modification of its prior decision.

The Office also denied appellant's request for reconsideration of an Office decision dated June 7, 1985, which found that appellant had forfeited compensation from July 27, 1981 through July 9, 1984, and a Board decision dated September 30, 1987, which affirmed the October 9, 1986 Office decision terminating appellant's compensation effective October 28, 1994 on the grounds that she had no loss of wage-earning capacity. The Office stated that appellant's reconsideration request was not timely filed and that she had failed to present clear evidence of error.

On November 30, 1995 the Office informed appellant that it had reviewed her file as she had requested and that her claim remained open for medical care for the accepted cervical condition. The Office advised appellant to exercise her appeal rights if she wished to pursue her entitlement.[2]

The Board finds that appellant has failed to establish that her current hip condition was causally related to the accepted 1972 work injury.

Under the Act, an employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the recurrence of the disabling condition for which compensation is sought is causally related to the accepted employment injury.[3] As part of this burden the employee must submit rationalized medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the current disabling condition is causally related to the accepted employment-related condition,[4] and supports that conclusion with sound medical reasoning.[5]

Section 10.121(b) provides that when an employee has received medical care as a result of the recurrence, he or she should arrange for the attending physician to submit a medical report covering the dates of examination and treatment, the history given by the employee, the clinical findings, the results of x-ray and laboratory tests, the diagnosis, the course of treatment, the

[1] 5 U.S.C. §§ 8101-8193 (1974).

[2] The November 30, 1995 letter to appellant contains a concise history of this case from the time of the initial claim filed in 1972.

[3] *Dennis J. Lasanen*, 43 ECAB 549, 550 (1992).

[4] *Kevin J. McGrath*, 42 ECAB 109, 116 (1990).

[5] *Lourdes Davila*, 45 ECAB 139, 142 (1993).

physician's opinion with medical reasons regarding the causal relationship between the employee's condition and the original injury, any work limitations or restrictions and the prognosis.[6]

Thus, the medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[7] In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.[8]

In this case, the record contains no evidence of bridging symptoms between appellant's current hip condition and the accepted cervical fusion surgery.[9] In fact, Dr. George W. Wharton, a Board-certified orthopedic surgeon who examined appellant on February 20, 1995, reported that appellant had experienced no problems with the donor site in her hip from the 1980 cervical fusion until mid 1994.

Appellant submitted the October 23, 1995 report of Dr. Alianell, who noted that appellant had "a long history of cervical, thoracic and lumbar strain" as well as cervical fusion, and concluded that "her initial injuries have directly related to her development of chronic pain syndrome." However, Dr. Alianell provided no medical rationale for this statement, and his narrative reports dated August 9, June 14 and May 10, 1995 diagnosing chronic pain syndrome omitted any mention of a causal relationship between appellant's complaints of hip pain and the accepted work injuries.[10]

Further, the form reports completed by Dr. Alianell, which diagnosed cervical radiculopathy, myalgia, myositus and cervicalgia related to employment activity, offered no explanation for this conclusion.[11] Therefore, the Board finds that Dr. Alianell's opinion is insufficient to establish the requisite causal relationship.

Dr. Kant stated in a March 20, 1995 report that appellant's laboratory screening did not reveal any metabolic cause for her persistent pain. Dr. Kant noted that appellant's bone scan was normal and concluded that he did not know the cause of her hip pain. Thus, Dr. Kant's reports are insufficient to establish a causal relationship between appellant's hip condition and the accepted work injury.

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[6] 20 C.F.R. § 10.121(b).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

[8] *Leslie S. Pope*, 37 ECAB 798, 802 (1986); *cf. Richard McBride*, 37 ECAB 748, 753 (1986).

[9] *Cf. Robert H. St. Onge*, 43 ECAB 1169, 1175 (1992) (finding that documented evidence of bridging symptoms supports a causal relationship of recurrence to original injury).

[10] *See Margarette B. Rogler*, 43 ECAB 1034, 1039 (1992) (finding that a physician's opinion that provides no medical rationale for its conclusion on causation is of diminished probative value).

[11] *See Ruth S. Johnson*, 46 ECAB 237, 242 (1994) (finding that a causation opinion that consists only of checking "yes" to a form question has little probative value and is thus insufficient to establish causal relationship).

Appellant was informed by the Office that she was responsible for submitting a factual statement describing the work-related incidents that resulted in the claimed recurrence of disability and for obtaining records of her medical treatment and a rationalized medical report showing that the July 1994 hip pain was causally related to the cervical fusion surgery. Inasmuch as appellant has failed to submit probative medical evidence establishing a connection between her current hip condition and the 1980 surgery, the Office properly denied her claim for disability compensation.

The Board also finds that appellant is not entitled to a schedule award for permanent partial impairment of her extremities.

Under section 8107 of the Act[12] and section 10.304 of the implementing federal regulations,[13] schedule awards are payable for the permanent impairment of specified bodily members, functions, and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[14]

Neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.[15] The method used in making such determinations rests in the sound discretion of the Office.[16] For consistent results and to ensure equal justice for all claimants, the Office has adopted and the Board has approved, the use of the appropriate edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.[17]

However, no schedule award is payable for a member, function or organ of the body not specified in the Act or in the regulations.[18] This principle applies to body members that are not enumerated in the schedule award provision before the 1974 amendment[19] as well as to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment.[20]

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[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.304.

[14] 5 U.S.C. § 8107(c)(19).

[15] *A. George Lampo*, 45 ECAB 441, 443 (1994).

[16] *George E. Williams*, 44 ECAB 530, 532 (1993).

[17] *James J. Hjort*, 45 ECAB 595, 599 (1994).

[18] *William Edwin Muir*, 27 ECAB 579, 581 (1976); *see Terry E. Mills*, 47 ECAB ___ (Docket No. 94-837, issued January 30, 1996) (listing the members and organs of the body for which the loss or loss of use is compensable under the schedule award provisions).

[19] The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

[20] *John F. Critz*, 44 ECAB 788, 792-93 (1993) (brain disorder); *Ted W. Dietderich*, 40 ECAB 963, 965 (1989)(gallbladder); *Thomas E. Stubbs*, 40 ECAB 647, 649 (1989) (spleen).

In 1960 amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Thus, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine.[21]

There is no medical evidence in this case, however, to support a conclusion that appellant has sustained a permanent impairment of either her upper or lower extremities as a result of the cervical and lumbar strain in 1972 or the fusion surgery in 1980.[22] Dr. Kant assessed a whole body impairment of 19 percent secondary to appellant's cervical spine injury, based on the combined value tables of the 4th edition of the A.M.A., *Guides*, but reported no impairment of appellant's upper or lower extremities, based on her normal electromyogram.

In response to an Office request, Dr. Mark A. Doyne, a Board-certified orthopedic surgeon, concluded that appellant had reached maximum medical improvement in 1980 and that she had no neurological defect of the cervical spine. He assessed a whole body impairment of 17 percent, including a 1 percent impairment of the left upper extremity due to loss of shoulder extension. The Office medical adviser reviewed these reports and concluded that appellant had zero percent loss of use of her upper extremities.

Thus, the Board finds that appellant has failed to meet her burden of proof in establishing entitlement to a schedule award.[23] Inasmuch as the Act does not provide schedule awards for the whole body, and there is no other medical evidence addressing whether appellant has a work-related permanent impairment of a schedule member, the Office properly found that appellant was not entitled to a schedule award for impairment of her upper extremities.

Finally, the Board finds that the Office abused its discretion in denying appellant's request for reconsideration as untimely filed because the one-year time limitation had not get begun to run pursuant to FECA Bulletin No. 87-40.[24]

Section 8128(a) of the Act[25] does not entitle a claimant to a review of an Office decision as a matter of right.[26] Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b)(2) which provides that the Office will not review

[21] *Rozella L. Skinner*, 37 ECAB 398, 402 (1986).

[22] *See James E. Jenkins*, 39 ECAB 860, 867 (1988) (finding that the medical evidence failed to describe impairment to appellant's upper extremity based on his cervical injury).

[23] *See George E. Williams*, 44 ECAB 530, 533 (1993) (finding that the medical evidence was insufficient to support permanent impairment of appellant's lower extremities as a result of his spinal condition).

[24] FECA Bulletin 87-40 (issued June 26, 1987).

[25] 5 U.S.C. § 8128(a).

[26] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989) .

a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[27]

However, FECA Bulletin 87-40, entitled "notification of one-year time limitation for reconsideration," provides that where the decision in dispute was issued prior to June 1, 1987 and the claimant's application for reconsideration was being denied on the basis that the claimant failed to meet the requirements of section 10.138(b), the Office must attach to the denial of reconsideration a notice of the one-year time limitation, which advises the claimant of his or her right to appeal the denial to the Board and sets the new one-year limitation for obtaining merit review. The Bulletin adds that a copy of the notice must be placed in the case file along with the decision denying reconsideration and that the date of the notice is the date of the decision denying review.

In this case, the Office issued decisions on June 7, 1985 and October 9, 1986, finding a forfeiture of compensation and terminating appellant's benefits effective October 28, 1994 based on a zero loss of wage-earning capacity. Appellant requested reconsideration of these decisions on July 28, 1995. The Office denied appellant's request on August 25, 1995 on the grounds of untimely filing pursuant to section 10.138.(b)(2).

The Board notes that the case record does not contain a copy of the notice required by FECA Bulletin 87-40 as a prerequisite for applying the one-year time limitation on a request for reconsideration. Because the notice is not in the case record, the one-year time requirement for requesting reconsideration does not apply. Thus, appellant's request cannot be found untimely.

The decisions in question are dated prior to June 1987, and the Office has set forth specific procedures to be followed for claims adjudicated prior to June 1987 where a claimant subsequently fails to satisfy the requirements of section 10.138(b)(1)(i)-(iii). The Office did not follow its procedures in adjudicating appellant's request for reconsideration. Therefore, the case will be remanded for the Office to act upon appellant's request in accord with FECA Bulletin 87-40.[28]

The May 18 and March 14, 1995 decisions of the Office of Workers' Compensation Programs are affirmed, the August 25, 1995 decision is set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
July 24, 1998

[27] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[28] *See Charles E. Puff*, 48 ECAB ___ (Docket No. 95-1242, issued March 28, 1997) (finding that the Office erred in denying appellant's request for reconsideration as untimely filed when the initial decision was issued prior to June 1987, when the one-year time limitation was imposed).

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member