

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of A. RUTH STUCKEY and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, Ohio

*Docket No. 96-1261; Submitted on the Record;
Issued July 28, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant sustained recurrences of disability on or after April 1, 1994 causally related to her November 17, 1992 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

Appellant sustained an employment injury to her low back on July 14, 1980 by lifting trays of mail. The Office accepted this injury as a low back strain and paid compensation for an initial period of disability and for recurrences of disability in August, September and October 1981. The Office accepted that appellant sustained a musculoskeletal pain syndrome of the low back in her November 17, 1982 lifting injury. Appellant received continuation of pay until her return to limited-duty work on December 1, 1982. Thereafter the Office paid appellant compensation for temporary total disability for numerous periodic recurrences of disability of short duration related to this injury from December 30, 1982 to June 16, 1990. Appellant's claim for a recurrence of disability from October 22 to November 10, 1993 was accepted by the Office, based on a November 12, 1993 report from her attending physician, Dr. Michael G. Lawley, an osteopath. The Office also approved a leave buy-back for 192 hours of leave appellant used between February 9 and March 12, 1994, based on a March 9, 1994 report from Dr. Lawley.

Appellant next stopped work on April 1, 1994, returning on April 2, 1994. She again stopped work from May 2 to 5, 1994, from May 11 to 16, 1994, from October 12 to 17, 1994, from November 11 to 21, 1994, from December 20 to 27, 1994, and from January 5 to 11, 1995. For each of these periods, she filed a claim for a recurrence of disability due to her November 17, 1982 and July 14, 1980 employment injuries.

By decision dated November 6, 1995, the Office found that appellant did not have any disability after April 1, 1994 as a result of her employment injuries. By this decision, the Office also terminated appellant's entitlement to medical benefits under the Federal Employees' Compensation Act on the basis that she had no remaining residuals of her employment injuries.

The Board finds that there is a conflict of medical opinion regarding appellant's claims for recurrences of disability from May 11 to 16 and December 20 to 27, 1994 and from January 5 to 11, 1995. This conflict necessitates referral to an impartial medical specialist, pursuant to section 8123(a) of the Act.¹

The conflict of medical opinion is between Dr. Robert T. Sheridan, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, and Dr. Lawley, appellant's attending physician. In a report dated September 18, 1995, Dr. Sheridan concluded that appellant sustained employment-related incidents of acute lumbar strain in 1980 and 1982, but that these lumbar strains had resolved. Dr. Sheridan also concluded that appellant had not been disabled as a result of her employment injuries since April 1, 1994, and that she did not require any treatment for her low back complaints. However, Dr. Lawley, in a report dated February 28, 1995 stated, "I do believe the facet arthrosis that [appellant] has between L3-4 and L4-5 with bilateral sacroiliitis is a result from her injury sustained in 1982. I do believe the arthritis in these joints are a direct relationship to her injury sustained on November 17, 1982. I believe [appellant] will always have some pain and discomfort in the lower back area and I do not believe she will ever obtain 100 [percent] relief of her low back." Dr. Lawley indicated that appellant was to be off work from May 11 to 16, 1994 for severe back pain, and that she was unable to work on December 22 and 26, 1994 because of her back condition. Dr. Lawley's associate, Dr. Jonathan W. Bell, a Board-certified orthopedic surgeon, stated that appellant was unable to work from January 5 through 11, 1995 because of her back condition.

There is therefore a conflict of medical opinion on the issue of whether appellant's disability from May 11 to 16, and December 20 to 27, 1994 and from January 5 to 11, 1995 was causally related to her employment injuries. Dr. Sheridan is of the opinion that appellant sustained only acute lumbar strains, which resolved. Dr. Lawley is of the opinion that the employment injuries caused facet arthrosis and sacroiliitis. The reports of Drs. Lawley and Sheridan are of roughly equivalent probative value. For this reason the case will be returned to the Office for further development on this aspect of appellant's claim.

With regard to appellant's other claims for recurrence of disability, the Board finds that appellant has not met her burden of proof.

Where appellant claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the subsequent disability for which she claims compensation is causally related to the accepted injury.² This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes

¹ 5 U.S.C. § 8123(a) states in pertinent part "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

² *John E. Blount*, 30 ECAB 1374 (1974).

that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.³

Although Dr. Lawley attributed appellant's continuing back complaints to conditions he considered causally related to her employment injuries, neither Dr. Lawley nor any other physician indicated that appellant was totally disabled for her light-duty position from April 1 to 2, May 2 to 5, October 12 to 17, and November 11 to 21, 1994. In a March 9, 1994 report, Dr. Lawley indicated appellant was partially disabled from March 14 to April 11, 1994. In a report dated May 5, 1994, Dr. Lawley stated that appellant was "to continue on limited duty." In a report dated October 28, 1994, Dr. Lawley noted that compensation was claimed from October 12 to 15, 1994, but answered "no" to the question whether appellant was totally disabled for her usual work. In a report dated October 17, 1994, Dr. Lawley stated that he would "continue her on light duty at this time." In a report dated November 29, 1994, Dr. Lawley noted that compensation was claimed from November 11 to 21, 1994, but answered "no" to the question whether appellant was totally disabled for her usual work. Without medical evidence indicating she was disabled for her light-duty position, appellant has not met her burden of proof.

The Board further finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act,⁴ concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.⁵ The Office's regulations provide that the date of the request is determined by the postmark of the request.⁶

In the present case, the Office issued its decision on November 6, 1995. Appellant's letter requesting reconsideration was dated December 6, 1995, but the postmark on the envelope was December 8, 1995. The request was untimely. In its January 25, 1996 decision denying appellant's request for a hearing, the Office properly exercised its discretion with regard to this untimely request, and advised appellant that "additional evidence on the issue of recurrent or continued employment-related disability may be full considered through a reconsideration application."⁷

³ *Frances B. Evans*, 31 ECAB 60 (1980).

⁴ 5 U.S.C. § 8124(b)(1).

⁵ *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

⁶ 20 C.F.R. § 10.131.

⁷ See *Jeff Micono*, 39 ECAB 617 (1988).

The decision of the Office of Workers' Compensation Programs dated November 6, 1995 is affirmed in part and set aside in part as noted in the body of this decision. The decision of the Office dated January 25, 1996 is affirmed.

Dated, Washington, D.C.
July 28, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member