

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELVIN E. ROSS, SR., widower of SHIRLEY DAY and DEPARTMENT OF
THE ARMY, DEFENSE GENERAL SUPPLY CENTER, Richmond, Va.

*Docket No. 97-2411; Submitted on the Record;
Issued October 26, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the employee met her burden of proof in establishing that she was disabled from September 5 through September 22, 1995 due to her July 18, 1995 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied the employee's request for a hearing before an Office hearing representative.

On July 18, 1995 the employee, then a 34-year-old packer and forklift operator, stated that after packing several cartons and moving them to a pallet, she felt a twitch in her back that caused severe back pain. She stopped working that day. On September 25, 1995 she filed a claim for compensation for the period September 5 through September 22, 1995. The employing establishment indicated that the employee used sick leave from July 19 through July 29, 1995 and from August 27 through August 29, 1995. She received continuation of pay for the periods July 30 through August 26, 1995 and August 30 through September 1, 1995. The Office accepted the employee's claim for back strain. In a March 10, 1997 decision, the Office rejected the employee's claim for compensation for the period September 5 through September 22, 1995 on the grounds that the medical evidence submitted in support of appellant's claim was insufficient to show that her disability during the period in question was causally related to her July 18, 1995 employment injury. In a May 12, 1997 letter, the employee requested a hearing before an Office hearing representative. In a June 11, 1997 decision, the Office rejected the employee's request for a hearing as untimely and, after further consideration, found that the issue could equally well be addressed by requesting reconsideration.

The Board finds that the employee did not meet her burden of proof in establishing that her disability from September 5 through September 22, 1995 was causally related to her July 18, 1995 employment injury.

A person who claims benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his claim. Appellant has the burden of establishing by reliable, probative and substantial evidence that his medical condition was causally related to a specific employment incident or to specific conditions of employment.² As part of such burden of proof, rationalized medical opinion evidence showing causal relation must be submitted.³ The mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between the condition and the employment.⁴ Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated a disability.⁵

In a July 18, 1995 report, Dr. C. Lambert stated that the employee complained of thoracic back pain at work after lifting heavy boxes. He diagnosed thoracic spine strain and back pain. In a September 15, 1995 report, Dr. G.W. Chirkinian, a chiropractor, diagnosed acute thoracic sprain, T6 rib displacement, intercostal neuritis and lumbar strain. He checked a mark on the form to indicate that he related the employee's condition to her employment injury. In a September 26, 1995 duty status report, Dr. E. Forrest Jessee, Jr., a Board-certified rheumatologist, noted that appellant was totally disabled from September 8 through September 26, 1995. He stated that he was treating appellant for arthritis which was not injury related. Therefore the only report of record that related the employee's disability to her employment injury was that of Dr. Chirkinian, a chiropractor. However, Dr. Chirkinian did not specifically diagnose a subluxation and did not state that he had taken x-rays which demonstrated that a subluxation existed. A chiropractor is recognized as a physician only to the extent that he diagnoses a subluxation of the spine that is shown by x-ray to exist.⁶ Dr. Chirkinian's report, therefore, cannot be considered medical evidence from a competent physician as defined by the Act.⁷ The employee therefore did not submit any medical evidence that showed her disability from September 5 through September 22, 1995 was causally related to the employment injury.

The Board further finds that the Office did not abuse its discretion in denying the employee's request for a hearing before an Office hearing representative.

¹ 5 U.S.C. §§ 8101-8193.

² *Margaret A. Donnelly*, 15 ECAB 40, 43 (1963).

³ *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983).

⁴ *Juanita Rogers*, 34 ECAB 544, 546 (1983).

⁵ *Edgar L. Colley*, 34 ECAB 1691, 1696 (1983).

⁶ *Kathryn Haggerty*, 45 ECAB 586 (1995).

⁷ 5 U.S.C. § 8101(2).

Section 8124(b)(1) of the Act⁸ dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request 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 noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings...."⁹ The Office issued its decision on the employee's claim on March 10, 1997. The employee did not request a hearing until her May 12, 1997 letter which was more than 30 days after the Office's decision. She therefore was not entitled to a hearing as a matter of right. The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹⁰ In this case, the Office considered the matter and concluded that the employee could submit evidence and seek reconsideration. As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.¹¹ There is no evidence that the Office abused its discretion in denying the employee's request for a hearing before an Office hearing representative.¹²

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

¹⁰ *Henry Moreno*, 39 ECAB 475 (1988).

¹¹ *Daniel J. Perea*, 42 ECAB 214 (1990).

¹² Subsequent to the Office's March 10, 1997 decision the employee submitted additional medical reports and notes. The scope of review of the Board is limited to the evidence that was before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c). The Board therefore cannot review the evidence submitted after the March 10, 1997 decision.

The decisions of the Office of Workers' Compensation Programs dated June 11 and March 10, 1997 are hereby affirmed.

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

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member