U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANICE M. McCARTNEY and U.S. POSTAL SERVICE,
POST OFFICE, Indianapolis, IN

Docket Nos. 00-606 and 00-1560; Submitted on the Record;
Issued April 13, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration of its June 24, 1998 decision under 5 U.S.C. § 8128; and (2) whether appellant has established that her fibromyalgia was causally related to factors of her federal employment.

On December 3, 1990 appellant, then a 36-year-old city carrier, filed an occupational disease claim for damage to the medial nerves of her hands, which she attributed to factors of her federal employment. The Office assigned the case File Number A09-0351137 and accepted the claim for aggravation of bilateral carpal tunnel syndrome. Appellant underwent a right carpal tunnel release on April 27, 1995 and a left carpal tunnel release on January 23, 1996.

By decision dated April 3, 1998, the Office found that appellant had no loss of wage-earning capacity based on its finding that her actual wages in her full-time modified position fairly and reasonably represented her wage-earning capacity. In a decision dated May 7, 1998, the Office denied modification of its wage-earning capacity determination.

By decision dated June 24, 1998, the Office granted appellant a schedule award for a 10 percent permanent impairment of the left arm and a 10 percent permanent impairment of the right arm. The period of the award ran for 62.40 weeks from January 20, 1997 to April 1, 1998, based on a weekly pay rate of $584.00.

In a decision dated October 2, 1998, the Office again denied modification of its April 3, 1998 wage-earning capacity determination. On October 19, 1998 appellant filed a notice of recurrence of disability alleging that on February 5, 1997 she sustained a recurrence of disability causally related to her accepted employment injury. By decision dated February 2, 1999, the

Office denied appellant's claim on the grounds that the evidence was insufficient to establish that she sustained an employment-related recurrence of disability.[1]

By letter dated June 21, 1999, appellant requested reconsideration of the Office's June 24, 1998 schedule award determination. In a decision dated July 9, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and thus insufficient to warrant merit review of the prior decision.

The Board finds that the Office abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128.

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[2] Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[3]

In support of her request for reconsideration, appellant submitted an independent living assessment and functional assessment inventory from Julie Morey, a licensed clinical social worker. However, this evidence is not relevant to the issue in the present case, which is whether appellant has more than a 10 percent permanent impairment of both the right and left upper extremities. The Board has held that the submission of evidence which does not address the particular issue involved is of little probative value.[4]

Appellant argued that she was entitled to a greater schedule award due to the impact of her injury on her life. However, the extent of appellant's permanent impairment is medical in nature and must be resolved by the submission of relevant medical evidence. Consequently, appellant has not raised a legal argument sufficient to require reopening of the case for merit review.[5]

Appellant questioned the Office's determination of her weekly pay rate in the schedule award decision. The Board finds that this constitutes a relevant legal argument not previously

[1] In her request for reconsideration of her schedule award claim by the Office, appellant indicated that she would be requesting reconsideration of the denial of her recurrence of disability claim at a later date. Appellant has appealed to the Board only the Office's denial of her request for modification of its schedule award decision in Office File Number A09-0351137. Appellant's claim for a recurrence of disability is not currently before the Board.

[2] 20 C.F.R. § 10.606(b)(2).

[3] 20 C.F.R. § 10.608(b).

[4] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[5] Appellant further argues that her case should not be closed; however, it appears that appellant's case is open for payment of medical expenses.

considered and is sufficient to warrant a reopening of the claim for merit review. In its denial of appellant's request for reconsideration, the Office indicated that appellant's schedule award equaled "62.40 weeks at the claimant's pay rate when disability began on January 20, 1997 which was $584.00." However, the Board notes that $584.00 was appellant's pay rate on January 14, 1992, a day she claimed compensation for lost time from work due to a medical appointment, rather than her pay rate on January 20, 1997.

Appellant underwent a medical evaluation on January 20, 1997 by Dr. Robert M. Baltra, who opined that she had permanent medical restrictions due to her employment injury, found that she had reached maximum medical improvement and provided an impairment determination. The Office based its schedule award on the findings of Dr. Baltra as interpreted by an Office medical adviser. It is not clear whether the Office based its determination of appellant's pay rate on the date of injury, the date disability began, or the date that a compensable disability recurred.[6] The Board thus finds that appellant has raised a legal argument sufficient to require the Office to reopen the case for merit review.

The Board further finds that appellant has not established that she sustained fibromyalgia causally related to factors of her federal employment.

On May 17, 1998 appellant, then a 44-year-old city carrier, filed a claim for "chronic pain, fatigue, muscle stiffness and biochemical disorders, dizziness, [and] irritable bowel syndrome" which she attributed to factors of her federal employment. Appellant noted that she had been diagnosed with fibromyalgia.[7]

The Office assigned the case File Number A09-0441862 and, in a decision dated August 10, 1998, denied the claim on the grounds that the evidence did not establish that the claimed condition of fibromyalgia arose in the performance of duty.[8]

By letter dated August 1, 1999, appellant requested reconsideration. By decision dated November 24, 1999, the Office denied modification of its August 10, 1998 decision.

An employee seeking benefits under the Federal Employees' Compensation Act[9] has the burden of establishing the essential elements of her claim, including the fact that an injury was

[6] Under section 8017 of the Act, a schedule award is based on an employee's "monthly pay" which under section 8181(4) is defined as the greatest of the following: the pay at the time of injury, the pay at the time disability begins, or the pay at the time compensable disability recurs if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the federal government. 5 U.S.C. §§ 8101(4) and 8107. In schedule award claims wherein injury is sustained over a period of time, the "date of injury" is the last exposure to employment factors, and where such exposure continues to occur, the date of the medical evaluation which substantiates the degree of permanent impairment; *Sherron A. Roberts*, 47 ECAB 617 (1996).

[7] Appellant was working in a limited-duty capacity due to another employment injury at the time she filed her claim.

[8] The Office subsequently consolidated this claim and appellant's other claims into A09-0351137 for administrative purposes.

[9] 5 U.S.C. §§ 8101-8193.

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.[10]

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 the claimant.[11]

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.[12] 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,[13] must be one of reasonable medical certainty,[14] 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.[15]

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.[16]

In this case, appellant alleged that her fibromyalgia resulted from previous work injuries and the physical trauma of performing her duties. However, appellant did not submit sufficient medical evidence to establish that she sustained an occupational injury due to these factors.

In support of her claim, appellant submitted a form report dated June 30, 1998, in which a physician diagnosed fibromyalgia and found that she could work with restrictions. The

[10] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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

[12] 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). This case, however, is not one of obvious causal connection.

[13] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[14] *See Morris Scanlon*, 11 ECAB 384-85 (1960).

[15] *See William E. Enright*, 31 ECAB 426, 430 (1980).

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

physician did not address the cause of his diagnosis and thus his opinion is of little probative value.[17]

In a report dated May 14, 1998, Dr. Harry L. Staley, a Board-certified internist, discussed appellant's employment and medical history, noted her current complaints and listed findings on examination. He diagnosed multiple tender trigger points of fibromyalgia and a depressive reaction. Dr. Staley opined that appellant "clearly has signs and symptoms compatible with fibromyalgia. She also at times appeared quite agitated, an almost hysterical type of personality at times, and at times she was quite depressed." Dr. Staley stated:

> "[Appellant] asked if this could be construed as work related. This question is very difficult to answer, as there are articles in the literature that clearly suggest it does sometimes occur after trauma but because the cause and effect cannot be proven, there are also papers that clearly refute trauma as a precipitator of this condition. The best bet for [appellant] would be to remain at a position in the [employing establishment] with limited repetitive movement and to begin a good exercise program and treat the mixed anxiety and depression that she seemed to exhibit in this office."

A medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to any absolute medical certainty, but neither can the opinion be speculative or equivocal.[18] In this case, Dr. Staley was unable to determine whether appellant's fibromyalgia was employment related. Thus, his opinion does not support her claim.

In a report dated September 4, 1998, Dr. Steven T. Hugenberg, a Board-certified internist, discussed appellant's complaints, medical history and listed findings on examination. He stated:

> "[Appellant] has complaints and physical findings consistent with fibromyalgia syndrome. However, her numerous other somatic complaints raise a concern that there may be underlying psychological abnormalities that may be playing a role in her pain and her disability. There is no way to state that her job has caused fibromyalgia; however, it certainly does aggravate it. I think that she should adhere to the functional limitations set by the functional capacity evaluation and hopefully she can tolerate this without too much pain or diminishment in her job function."

[17] *Dennis M. Mascarenas*, 49 ECAB 215 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[18] *Roger Dingess*, 47 ECAB 123 (1995).

Dr. Hugenberg did not discuss how specific factors of appellant's federal employment aggravated her fibromyalgia or provide any rationale for his opinion; thus, his report is of diminished probative value.[19]

In a report dated October 27, 1998, Dr. James S. Cohen, a Board-certified internist, diagnosed fibromyalgia but did not address the cause of the condition. In a report dated May 7, 1999, Dr. Cohen related that appellant's "physical exam[ination] has always been compatible with fibromyalgia. There has been no evidence for joint inflammation or tenderness, but [she] has had trigger points in a distribution compatible with fibromyalgia." Dr. Cohen stated:

> "Fibromyalgia is a pain syndrome. We do not know what causes fibromyalgia. However, we do know that certain activities can definitely aggravate her fibromyalgia. Some of the physical work that is required of her at the [employing establishment] could potentially aggravate her fibromyalgia. In January of 1998, [appellant] had a functional capacities evaluation done. Recommendations were that she limit lifting, handling, and carrying to 20 [pounds] on an occasional basis, limit elevated work and prolonged forward bending to an occasional basis and allow for intermittent changes in posture with frequent sitting, standing and walking. I am in agreement with these recommendations."

Dr. Cohen's finding that appellant's work at the employing establishment "could potentially aggravate" her diagnosed condition of fibromyalgia is speculative in nature and therefore insufficient to meet appellant's burden of proof.[20]

An award of compensation may not be based upon surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between his/her condition and his/her employment.[21] To establish causal relationship, appellant must submit a physician's report in which the physician reviews that factors of employment identified by appellant as causing her condition and, taking these factors into consideration as well as findings upon examination of appellant and appellant's medical history, state whether these employment factors caused or aggravated appellant's diagnosed condition.[22] Appellant failed to submit such evidence and therefore failed to discharge her burden of proof.

The November 24, 1999 decision of the Office of Workers' Compensation Programs is affirmed and the July 9, 1999 decision is set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
April 13, 2001

[19] *Carolyn F. Allen*, 47 ECAB 240 (1995) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[20] *Jennifer L. Sharp*, 48 ECAB 209 (1996).

[21] *Willliam S. Wright*, 45 ECAB 498 (1993).

[22] *Id.*

David S. Gerson
Member

Bradley T. Knott
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