U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RHONDA W. BARBER and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 00-633; Submitted on the Record;
Issued April 25, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained multiple recurrences of disability between February 12, 1998 and March 13, 1999 causally related to her accepted employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely.

On October 11, 1996 appellant, then a 34-year-old mailhandler, filed an occupational disease claim alleging that she sustained severe lower back pain causally related to factors of her federal employment. The Office accepted her claim for cervical and lumbar subluxations based on the reports of her attending physician, Dr. Ellen Coyne, a chiropractor. Following the injury, appellant worked limited duty until January 10, 1997. On December 12, 1997 she returned to limited-duty employment for four hours per day.[1] The Office accepted that appellant sustained periodic recurrences of disability.

By decision dated March 26, 1998, the Office denied appellant's claim for a recurrence of disability on January 24, 1998 on the grounds that the medical evidence did not establish a causal relationship between the disability and the accepted employment injury. In a decision dated July 24, 1998, the Office denied her claim for recurrences of disability on February 12, April 3, April 13 and May 2, 1998. The Office noted that the medical evidence did not establish that she sustained a change in the nature or extent of her injury-related condition.

By letter dated August 4, 1998, appellant requested reconsideration.

In a decision dated September 2, 1998, the Office denied appellant's claims for recurrences of disability on May 31 and June 1, 1998. By decision dated November 18, 1998, the Office denied modification of its July 24, 1998 decision. In decisions dated February 25 and March 17, 1999, the Office found that appellant had not established that she sustained

[1] Appellant took maternity leave from January 21 through March 14, 1997.

recurrences of disability on July 23, September 1, October 7, December 7 and December 31, 1998 and January 8, 1999.

In letters dated April 23, 1999, appellant requested a hearing before an Office hearing representative.

By decision dated June 15, 1999, the Office denied appellant's claim for a recurrence of disability on February 1 and 25 and March 13, 1999 on the grounds that the medical evidence was insufficient to establish a causal relationship between her current condition and her employment injury.

In a decision dated August 9, 1999, the Office denied appellant's request for a hearing as untimely.[2]

The Board finds that appellant has not established that she sustained recurrences of disability causally related to her accepted employment injury.

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[3]

In support of her claims for recurrences of disability, appellant submitted disability certificates from Dr. Coyne, a chiropractor. In the disability certificates, she found that appellant was disabled for various periods due to severe low back pain. Dr. Coyne, however, did not address causation and thus her reports are of little relevance to the issue in this case.

Appellant further submitted form reports from Dr. Coyne who diagnosed lumbar sprain/strain and lumbalgia, listed periods of disability and checked "yes" that the conditions were caused or aggravated by employment. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.[4]

[2] On November 1, 1999 appellant appealed to the Board. By decision dated November 15, 1999, the Office denied modification of its February 25 and March 17, 1999 decisions. The Office's November 15, 1999 decision is null and void as both the Board and the Office cannot have jurisdiction over the same issue in the same case. 20 C.F.R. § 501.2(c); *Douglas E. Billings*, 41 ECAB 880 (1990).

[3] *Terry R. Hedman*, 38 ECAB 222 (1986).

[4] *Lee R. Haywood*, 48 ECAB 145 (1996).

In undated medical reports and in medical reports dated August 12 and September 14, 1998, Dr. Coyne listed the dates that she treated appellant and dates that she was disabled from employment. She related:

> "[Appellant] has complained about severe pain. It seems as though the spontaneous recurrence of symptoms are worsening. She does come for treatments/adjustments when she is able to make it to my office, at least two or three times per week.
>
> "My findings before and after recurrence are as follows: postural imbalances, restricted range of motion and tight musculature.
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> "My firm diagnosis of [appellant] is lumbalgia and cervicalgia.
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> "I do know that this present condition is definitely related to the incident on January 1, 1996 because [appellant] came in with a lot of pain and has continued to be in pain. Her pain is due to work. [Appellant] is not doing any hobbies, housework and sports of any kind that would aggravate her condition."

Dr. Coyne found that appellant's condition was causally related to her employment injury because she experienced continued pain since the time of injury. However, 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.[5] Further, the Board notes that Dr. Coyne diagnosed lumbalgia and cervicalgia rather than a subluxation of the spine. A chiropractor is not competent under the Federal Employees' Compensation Act to render an opinion on conditions other than subluxation of the spine. Section 8101(2) of the Act[6] provides that the term "physician," as used herein, "includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist." Chiropractors are considered physicians under the Act only under the limited circumstances described in section 8101(2).[7] A chiropractor's opinion on conditions other than subluxaton of the spine, as demonstrated by x-ray to exist, is of no probative value.[8]

In a report dated March 2, 1999, Dr. Coyne diagnosed lumbalgia and cervicalgia and noted that appellant "tends to suffer from spontaneous recurrence of symptoms" due to her employment injury. She listed dates that appellant missed work due to pain. Dr. Coyne,

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[5] *Thomas R. Horsfall*, 48 ECAB 180 (1996).

[6] 5 U.S.C. § 8101(2).

[7] *See Theresa K. McKenna*, 30 ECAB 702, 705 (1979) (holding that a chiropractor's opinion on the claimant's condition of chronic lumbosacral radiculitis with sciatica did not constitute competent medical evidence to support a claim for compensation).

[8] The term "subluxation" means "an incomplete dislocation, off-centering, misalignmnet, fixation or abnormal spacing of the vertebrae which must be demonstratable on any x-ray film to an individual trained in the reading of x-rays." *See* 20 C.F.R. § 10.5(b)(b) (1999).

however, did not provide any rationale for her opinion and thus it is of little probative value.[9] Additionally, as discussed above, a chiropractor's opinion on conditions other than a subluxation of the spine are of no probative value.[10]

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between her claimed condition and her employment.[11] To establish causal relationship, appellant must submit a physician's report in which the physician reviews the employment factors identified by appellant as causing her condition and, taking these factors into consideration as well as findings upon examination of appellant, state whether the employment injury caused or aggravated appellant's diagnosed conditions and present medical rationale in support of his or her opinion. Appellant failed to submit such evidence in this case and, therefore, has failed to discharge her burden of proof.

The Board further finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[13]

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,[14] when the request is made after the 30-day period established for requesting a hearing[15] or when the request is for a second hearing on the same issue.[16] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after

[9] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[10] *See Theresa K. McKenna*, *supra* note 7.

[11] *Donald W. Long*, 41 ECAB 142 (1989).

[12] 5 U.S.C. § 8124(b)(1).

[13] *Frederick D. Richardson*, 45 ECAB 454 (1994).

[14] *Rudolph Bermann*, 26 ECAB 354 (1975).

[15] *Herbert C. Holley*, 33 ECAB 140 (1981).

[16] *Johnny S. Henderson*, 34 ECAB 216 (1982).

reconsideration under section 8128(a), are a proper interpretation of the Act and Boards precedent.[17]

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated March 17, 1999 and, thus, appellant was not entitled to a hearing as a matter of right. He requested a hearing in letters dated April 23, 1999. Hence, the Office was correct in stating in its August 9, 1999 decision that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's March 17, 1999 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its August 9, 1999 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by appellant requesting reconsideration and submitting additional evidence to establish that she sustained employment-related recurrences of disability. The Board has held that 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 deduction from established facts.[18] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

[17] *Sandra F. Powell*, 45 ECAB 877 (1994).

[18] *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs dated August 9, June 15, March 17, February 25, 1999 and November 18, 1998 are hereby affirmed.

Dated, Washington, DC
April 25, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member