U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY A. ANDERSON and U.S. POSTAL SERVICE,
POST OFFICE, Phoenix, AZ

Docket No. 01-346; Submitted on the Record;
Issued January 2, 2003

DECISION and ORDER

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

The issues are: (1) whether appellant met her burden of proof in establishing her entitlement to continuing compensation for wage loss for intermittent periods between April 1990 and September 1994; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

On May 2, 1990 appellant, then a 39-year-old automated clerk, filed a notice of traumatic injury alleging that she experienced back pain on April 23, 1990 for approximately 10 minutes after having lifted a tray of mail in the performance of duty. She first sought treatment for back pain on April 26, 1990 with Dr. Lynn Alter and was told that she was having back spasms and should stay off work for three days. Appellant was off work from April 26 through 30, 1990, when she returned to limited duty.

Appellant later sought treatment for lumbar pain and hip pain with Dr. Douglas L. Cunningham, an osteopath, on May 3, 1990. Dr. Cunningham prescribed physical therapy but did not provide a definitive diagnosis for appellant's back complaints. He opined that appellant should only work four to six hours per day with restrictions on lifting, prolonged sitting and standing.

A computerized tomography (CT) scan of the lumbar spine performed on June 13, 1990 showed no disc herniation and minimal degenerative facet sclerosis of L5-S1 bilaterally.

Dr. Cunningham referred appellant to Dr. Michael A. Seivert, a Board-certified osteopath, for a consultation. In a June 28, 1990 report, Dr. Seivert noted that on April 23, 1990 appellant lifted a tray of mail and felt a sharp pain in her lower back and the left buttocks area, which lasted for about 10 minutes. He commented that appellant's June 13, 1900 CT scan showed spinal bifida occulta at S1. Physical findings were recorded and Dr. Seivert diagnosed: (1) lumbosacral sprain and strain; (2) lumbosacral somatic dysfunction; and (3) thoracolumbar rotoscoliosis. Dr. Seivert prescribed medication and recommended that appellant continue with physical therapy.

The Office subsequently accepted the claim for a back strain. Appellant continued to work light duty under the physical restrictions outlined by Dr. Cunningham.[1] The case was later closed by the Office.

On September 8, 1993 appellant filed a notice of occupational disease alleging that she sustained a back condition as a result of work factors.[2] The date appellant first realized the disease was caused or aggravated by her employment was listed as April 23, 1990.

In support of her claim, appellant submitted x-rays of the cervical, thoracic and lumbar spines on May 24, 1993 that showed degenerative findings at L5-S1, a degenerative disc at C2-3 and some degree of basilar invaigation, "settling of the skull upon the top of the cervical spine."

In a letter dated November 3, 1993, the Office informed appellant of the medical and factual evidence required to establish her claim.

Appellant submitted Form (CA-8) claims for continuing compensation based on intermittent periods of disability beginning July 23, 1994 that was charged to leave without pay.

On August 17, 1994 the Office assigned appellant to a nurse for rehabilitation services.

In a comprehensive consultation report dated August 22, 1994, Dr. Dale R. Schultz, a Board-certified psychiatrist evaluated appellant at the request of Dr. Santos Martinez, an osteopath. Dr. Schultz's impression was listed as: (1) Klippel-Feil syndrome, cervical, preexisting, lifelong; (2) scoliosis, preexisting and lifelong; (3) somatic dysfunction, spinal, secondary to previous diagnoses. He indicated that appellant's congenital spinal condition would have begun to cause discomfort no matter what activity or life course appellant had chosen. Dr. Schultz noted that appellant was angry and wanted to blame someone for her spine discomfort despite efforts to explain that it was no one's fault, just a matter of genetics. Neurological examination findings were reported.

In an attending physician's report dated September 6, 1994, Dr. Martinez indicated that appellant was disabled from work until September 16, 1994 in order that she undergo physical therapy. The diagnoses listed were chronic back strain, cervical myofascial pain syndrome and congenital cervical spine fusion.[3]

In reports dated September 17 and October 17, 1994, Dr. Martinez approved appellant for sedentary work with restrictions. He indicated that she had myofascial pain in the thoracolumbar regions after the April 1990 work injury. Dr. Martinez further noted that appellant had multiple biomechanical disadvantages arising from her congenital spinal fusion that limited her capacity to work.

[1] Appellant received continuation of pay through July 24, 1990.

[2] The employing establishment noted that appellant filed an occupational disease claim after she had been requested by the employing establishment to submit medical evidence to support her continued limited duty.

[3] In subsequent reports Dr. Martinez elaborated that appellant's nonwork-related congenital spine condition was characterized by fused vertebrae in the cervical spine, resulting in a very short neck in appearance.

On November 16, 1994 Dr. Martinez prescribed a thoracolumbar corset to help support appellant's spine.

In a report dated January 10, 1995, Dr. Martinez noted that appellant was working full time but still wearing her corset. He noted that appellant continued to complain of pain more marked in the mid to lower thorocolumbar regions, with some milder myofascial-type complaints of the upper back. On physical examination there was markedly limited range of motion of the cervical spine and tenderness in the thoracic spine.

In an April 3, 1995 report, Dr. Martinez indicated that appellant was seen complaining of various work activities that she was required to perform, such as continuous typing at the computer for one hour three hours per day, which was causing her increased discomfort in the thoracoulumbar regions. He noted that appellant had initially worked after her work injury for years with a greater demand load than she was currently expected to perform; therefore, he was hesitant to further revise her medical restrictions to typing only 30 minutes at a time. Dr. Martinez recommended that she obtain a psychological evaluation and an independent evaluation by either a neurologist or a back surgeon. He subsequently prescribed a course of trigger point injections along the right thoracolumbar paraspinal muscles.

On April 11, 1995 the Office referred appellant for a group consultation with Dr. Michael Winer, a Board-certified orthopedic surgeon, and Dr. Eric Erlbaum, a Board-certified neurologist.

In a report dated April 27, 1995, which was signed by both physicians, Drs. Winer and Erlbaum discussed appellant's history of injury and her complaints of chronic back pain over a four-year period. They also discussed appellant's history of congential rebeola syndrome and vertebral body fusions throughout the cervical spine, pseudosclerosis of C2-3. They also reviewed the medical record, noting that appellant had degenerative facet sclerosis at L5-S1. Physical findings were recorded and a diagnosis was listed: (1) work-related lumbar strain, resolved; (2) congenital rubeola syndrome with multiple levels of congenital fusion; (3) thoracic scliosis with compensatory cervical thoracic lumbar scoliosis, possibly related to the second diagnosis; (4) Turner's syndrome as described in medical literature. The physicians were in agreement that part of appellant's preexisting congenital birth defects may have been the result of Turner's syndrome as opposed to rubeola syndrome.

Drs. Winer and Erlbaum stated in the April 27, 1995 report that there was no permanent partial impairment secondary to appellant's work injury. They also opined that appellant's preexisting congenital condition was not aggravated or accelerated by the work injury. They recommended that appellant only perform sedentary work due to her congenital cervical spine disorder.

The record indicates that appellant later came under the care of Dr. Richard C. Wright, an osteopath. In a November 7, 1997 report, Dr. Wright stated that appellant has "congenital skeletal musculature condition that permits her to function within the parameters that only she can tell from trial and error. She has done an excellent job of working in spite of this handicap and strain or sprain will aggravate her compensating biomechanics." He indicated that appellant should limit standing to 4 to 6 hours, walking 1 to 2 hours and lifting 5 to 10 pounds.

The record indicates that appellant came under the care of Bradley Meek sometime in 1999. In an attending physician's report dated July 16, 1999, Dr. Meeks indicated that appellant suffered from Turner's syndrome, with chronic thoracic pain and spasm. He check marked a box indicating that the diagnosed condition was caused or aggravated by an employment activity. The date of injury was listed as April 23, 1990. Dr. Meeks noted permanent physical restrictions of no bending, stooping or kneeling, and no lifting over 45 pounds.[4]

In a decision dated December 13, 1999, the Office denied appellant's claim for continuing compensation beginning after July 24, 1990 when her continuation of pay ended, through September 1994.

In a letter dated February 29, 2000, appellant requested an oral hearing.

In an August 10, 2000 decision, the Office denied appellant's request for a hearing, noting that it was untimely filed. The Office nonetheless considered appellant's request and determined that the issue of the case could be equally well addressed through the reconsideration process.

The Board finds that appellant failed to meet her burden of proof in establishing her entitlement to continuing compensation for wage loss for intermittent periods between April 1990 and September 1994.

The Office accepted that appellant sustained an employment-related injury and a back strain. Appellant submitted CA-8 forms claiming intermittent disability for work. She retains the burden of proof to establish continuing disability with supporting medical evidence.[5]

In this regard, the implementing regulation[6] of the Federal Employees' Compensation Act[7] provide as follows:

> "Form CA-8 is provided to claim compensation for additional periods of time after Form CA-7 is submitted to the Office. It is the responsibility of the employee to submit Form CA-8. Without receipt of such claim, the Office has no knowledge of continuing wage loss.... The employee is responsible for submitting, or arranging for this submission of, medical evidence in support of the claim. Form CA-20a is attached to Form CA-8 for this purpose...."

[4] The record also includes an attending physician's report prepared by Dr. Wright on June 25, 1999, stating that appellant suffered from chronic lumbar, thoracic and cervical pain due to a work-related strain she sustained on April 23, 1990. The diagnosis was listed as somatic dysfunction. Dr. Wright recommended modified work with minimal lifting.

[5] *See Donald L. Ballard*, 43 ECAB 876 (1992).

[6] 20 C.F.R. § 10.122.

[7] 5 U.S.C. §§ 8101-8193.

In this case, the Office accepted that appellant sustained a back sprain on April 23, 1990 and appellant received continuation of pay for approximately four days of missed time from work. Beginning April 30, 1990, appellant began working limited duty and claimed intermittent disability due to back pain. Appellant submitted Form CA-8 claims for continuing compensation for wage loss she attributed to her work injury. The Board has reviewed the medical evidence of record and finds insufficient rationalized medical opinion to support her claimed disability for the periods in question.

The Board notes that the specific deficiency in the reports by her attending physician's is that they do not discuss appellant's disability for the specific period claimed. Appellant's medical history is significant in that she suffers from a congenital spinal fusion condition affecting multiple levels of her cervical spine. Although Dr. Martinez indicated that appellant was off work for some physical therapy during 1994, he did not provide a rationalized medical opinion addressing whether or not appellant's disability for work was due to her preexisting medical condition or the work injury.

The Office referred appellant for examination during 1995 and the physicians were in agreement that appellant's continuing work restrictions and intermittent disability from work was due to her nonwork-related spinal condition. Because the April 27, 1995 report from Drs. Dohring and Erlban is sufficiently reasoned and based on a proper medical and factual background, it is given controlling weight. Appellant has failed to carry her burden of establishing that she was disabled from work due to her accepted low back strain between 1990 and 1994.

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

Section 8124(b)(1) of the Act provides:

> "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."[8]

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[9] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[10] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[11]

[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. § 10.616 (1999).

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

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

Appellant's request for an oral hearing dated February 29, 2000 is more than 30 days after the Office's December 13, 1999 decision. For this reason, appellant is not entitled to a hearing as a matter of right. The Office properly found appellant's request to be untimely, but nonetheless considered the matter in relation to the issue involved, and correctly advised appellant that he could pursue the issue involved through the reconsideration process. As appellant may in fact pursue her claim by submitting to the appropriate regional Office new and relevant medical evidence with a request for reconsideration, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing.[12]

The August 10, 2000 and December 13, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 2, 2003

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).