



but with no herniation. Appellant also indicated that she had bilateral plantar fasciitis and weak muscle strength. She submitted an August 28, 2003 report from Dr. Alan Levinstone, a Board-certified internist and neurologist, who noted that a magnetic resonance imaging (MRI) scan showed a posterior L4-5 disc bulge. He also diagnosed bilateral plantar fasciitis and poor muscle strength with a weak toe extensor. In a separate note of the same date, Dr. Levinstone indicated that, in April 2001, appellant developed pain in her legs and feet. He noted that it had recently been discovered that she had a bulging disc. Dr. Levinstone commented that appellant attributed her back condition to pushing all-purpose carts to the loading docks six days a week.

In a November 13, 2003 letter, the Office requested that appellant submit additional evidence in support of her claim, including medical evidence which related her condition to her employment. Appellant submitted a September 30, 2003 report from Dr. Levinstone who indicated that he had examined appellant for a complaint of pain in the hamstring area. He initially diagnosed sciatica of the left leg. Dr. Levinstone noted that an MRI scan showed a mild posterior bulge of the L4-5 without stenosis or herniation. He saw appellant again on May 14 and August 28, 2003 for complaints of back pain. Dr. Levinstone indicated that appellant was undergoing physical therapy. He concluded that she had chronic low back pain without neurological findings but an abnormal disc on the MRI scan.

In a December 3, 2003 report, Dr. Seung W. Paik, a Board-certified orthopedic surgeon, stated that appellant still had sciatica symptoms on the right side but noted that straight leg raising test was negative. He commented that motor function was intact which meant that appellant's neurological condition was intact. Dr. Paik indicated that appellant only had to perform daily back stretching exercises and required occasional anti-inflammatory medication. He recommended that, as appellant had a bulging disc, she should remain on light duty to prevent a ruptured disc, particularly avoiding bending over and repetitive heavy lifting more than 20 pounds. Dr. Paik stated that the restrictions were probably permanent.

In a December 7, 2003 statement, appellant indicated that she had worked as a part-time flexible clerk since October 24, 1998. She worked six days a week and was assigned to letter sorting machines or flat sorter machines. Appellant lifted letter trays or flat tubs weighing 20 to 25 pounds during her entire 8-hour shift and pushed or pulled mail containers that weighed from 600 to 800 pounds 4 or 5 times a night for dispatch. She experienced low back pain, hamstring pain and pain in both feet beginning in April 2001. Appellant was assigned light duty beginning October 24, 2001. She reported that her pain persisted in her low back and hamstrings. Appellant felt tingling and weakness in both extremities. She stated that she had no previous orthopedic injuries, no previous surgery, no arthritis, no meniscal tears nor any other leg condition.

In a February 10, 2004 decision, the Office denied appellant's claim for compensation on the grounds that the evidence did not establish that appellant had an injury that was caused or aggravated as a result of her employment duties.

On March 12, 2004 appellant requested a hearing before an Office hearing representative. In an August 10, 2004 decision, the Office found that appellant was not entitled a hearing because she had not requested the hearing within 30 days of the Office's February 10, 2004 decision. The Office considered appellant's request for a hearing and denied the request on the

grounds that it could be equally well addressed by requesting reconsideration and submitting evidence not previously considered to establish that the claimed low back condition was causally related to her employment activities.

### **LEGAL PRECEDENT -- ISSUE 1**

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;<sup>1</sup> (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;<sup>2</sup> 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.<sup>3</sup> The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. 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,<sup>4</sup> must be one of reasonable medical certainty,<sup>5</sup> 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.<sup>6</sup>

### **ANALYSIS**

Appellant submitted only two medical reports in support of her claim. In a September 30, 2003 report, Dr. Levinstone initially diagnosed sciatica and reported that an MRI scan showed a mild posterior bulge of L4-5 without stenosis and or herniation. He noted that in a May 14, 2003 examination, appellant wanted to claim her back condition was employment related but could not recall a specific injury. Dr. Levinstone stated that appellant had a negative straight leg raising test, tight hamstrings, normal reflexes and normal sensory examination. He reported that in the August 28, 2003 examination, appellant had a negative straight leg raising test, and normal sensory, motor, and reflexes examination. Dr. Levinstone concluded that appellant had low back pain with no neurological symptoms but with a bulging lumbar disc. However, the physician provided no opinion on whether appellant's back condition was causally related in any way to her work. Dr. Levinstone only noted that appellant believed that her

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<sup>1</sup> See *Ronald K. White*, 37 ECAB 176, 178 (1985).

<sup>2</sup> *Jerry D. Osterman*, 46 ECAB 500, 507 (1995); *Walter D. Morehead*, 31 ECAB 188, 194 (1979).

<sup>3</sup> *George V. Lambert*, 44 ECAB 870, 876-877 (1993); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

<sup>4</sup> *Durwood H. Nolin*, 46 ECAB 818, 821-22 (1995); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

<sup>5</sup> *Dennis M. Mascarenas*, 49 ECAB 215, 217-18 (1997); *Morris Scanlon*, 11 ECAB 384, 385 (1960).

<sup>6</sup> *Arturo A. Adams*, 49 ECAB 421, 425-26 (1998).

condition was causally related to her employment but could not remember any specific incident. His report, therefore, offers no support for appellant's claim that her back condition is causally related to her employment activities.

Dr. Paik, in a December 3, 2003 report, stated that appellant had sciatica on the right side but a negative straight leg raising test. He noted that motor function was intact which meant that appellant's condition was neurologically intact. Dr. Paik recommended that appellant remain on light duty to prevent a ruptured disc. He did not provide any medical opinion on whether appellant's back condition was causally related to her employment or any explanation on how appellant's work would cause or contribute to her diagnosed condition. Dr. Paik's opinion, therefore, is of diminished probative value and does not establish that her back condition is causally related to her employment. The medical evidence submitted by appellant does not establish that her back condition was caused or aggravated by those factors of her work she implicated in her statement to the Office.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b) (1) of the Federal Employees' Compensation Act<sup>7</sup> 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 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 noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings ..."<sup>8</sup>

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 to 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.<sup>9</sup> 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 established facts.<sup>10</sup>

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<sup>7</sup> 5 U.S.C. § 8124(b)(1).

<sup>8</sup> *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

<sup>10</sup> *Cleo R. Hatch*, 49 ECAB 636 (1998).

**ANALYSIS -- ISSUE 2**

The Office issued its final decision on February 10, 2004. In a leap year, March 11, 2004 would be the last day in which appellant had to submit a timely request for a hearing. Her March 12, 2004 request for a hearing was therefore untimely and the Office properly denied a hearing as a matter of right. The Office, however, considered appellant's request for a hearing and concluded that appellant's claim could be equally addressed if she requested reconsideration and submitted new medical evidence in support of her request. There is no evidence that the Office abused its discretion in denying appellant's request for a hearing.

**CONCLUSION**

Appellant did not meet her burden of establishing that she sustained an occupational injury to her back that was causally related to her employment. Appellant did not make a timely request for a hearing before an Office hearing representative. The Office did not abuse its discretion in denying appellant's request for a hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs, dated August 10 and February 10, 2004, are hereby affirmed.

Issued: December 15, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board