

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUZANNE M. JOY and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Fort Collins, Colo.

*Docket No. 95-2922; Submitted on the Record;
Issued April 1, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of disability on or after October 9, 1991 due her July 14, 1989 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

The Board has duly reviewed the case record in the present appeal and finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she sustained a recurrence of disability on or after October 9, 1991 due her July 14, 1989 employment injury.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.¹ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.² Where no such rationale is present, medical evidence is of diminished probative value.³

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee,

¹ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

² *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

³ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

the Secretary shall appoint a third physician who shall make an examination.”⁴ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁵

In the present case, the Office accepted that appellant sustained an employment-related lumbosacral strain and hip contusion on July 14, 1989. Appellant stopped work for a brief period after her July 14, 1989 injury and then returned to her regular job as a wildlife research assistant. She filed a claim alleging that she sustained a recurrence of disability on October 9, 1991 due to her July 14, 1989 employment injury.⁶ By decision dated March 10, 1994, the Office denied appellant’s claim that she sustained an employment-related recurrence of disability; by decision dated and finalized June 22, 1994, an Office hearing representative set aside the Office’s March 10, 1994 decision and remanded the case for further development based on a May 13, 1994 report of Dr. Jack H. Akmakjian, an attending Board-certified orthopedic surgeon. By decision dated October 25, 1994, the Office denied appellant’s claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of disability on or after October 9, 1991 due her July 14, 1989 employment injury.⁷

The Board notes that there is a conflict in the medical evidence between Dr. Akmakjian, appellant’s attending physician, and Dr. Paul E. Ruttle, a Board-certified orthopedic surgeon who served as an Office referral physician, regarding whether appellant sustained a recurrence of disability on or after October 9, 1991 due her July 14, 1989 employment injury.

In a report dated May 13, 1994, Dr. Akmakjian determined that appellant’s condition beginning October 9, 1991 constituted a recurrence of her July 14, 1989 employment injury. He explained that the examination findings relating to appellant’s back and hip supported such a finding. In contrast Dr. Ruttle determined in a September 24, 1994 report that appellant did not sustain a recurrence of disability due to her July 14, 1989 employment injury. He noted that appellant had underlying degenerative disc disease at L5-S1 but that this condition was not related to her July 14, 1989 employment injury.⁸

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between appellant’s physician, Dr. Akmakjian, and the

⁴ 5 U.S.C. § 8123(a).

⁵ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

⁶ Appellant also sustained an employment-related lumbosacral strain on September 26, 1991, but she did not allege that this injury contributed to her recurrence of disability. She also filed another claim alleging that she sustained a recurrence of disability on September 9, 1993 due her July 14, 1989 employment injury.

⁷ By decision dated February 7, 1995, the Office denied appellant’s request for a hearing in connection with its October 25, 1994 decision.

⁸ Dr. Ruttle indicated that appellant’s condition had worsened due to “continuous trauma” caused by her work duties, but he did not provide any further explanation for this assertion. Appellant has not filed a claim alleging that she sustained a new occupational injury.

government physician, Dr. Ruttle, regarding whether appellant sustained a recurrence of disability on or after October 9, 1991 due her July 14, 1989 employment injury. On remand the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation and report including a rationalized opinion on whether appellant sustained an employment-related recurrence of disability. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁹ 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 with in the requisite 30 days.¹⁰

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹¹ 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,¹² when the request is made after the 30-day period for requesting a hearing,¹³ and when the request is for a second hearing on the same issue.¹⁴

In the present case, appellant's January 23, 1995 hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated October 25, 1994 and, thus, appellant was not entitled to a hearing as a matter of right. Hence, the Office was correct in stating in its February 7, 1995 decision that appellant was not entitled to a hearing as a matter of right because her January 23, 1995 hearing request was not made within 30 days of the Office's October 25, 1994 decision.

⁹ 5 U.S.C. § 8124(b)(1).

¹⁰ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

¹¹ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹² *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹³ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹⁴ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

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 February 7, 1995 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 issue in the case was medical and could be resolved by submitting additional medical evidence to establish that appellant sustained an employment-related recurrence 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.¹⁵ 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.¹⁶

For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decision of the Office of Workers' Compensation Programs dated October 25, 1994 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board. The decision of the Office dated February 7, 1995 is affirmed.

Dated, Washington, D.C.
April 1, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

¹⁵ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹⁶ On appeal appellant alleged that her participation in an investigation of a coworker prevented her from filing her hearing request in a timely manner. Appellant did not present this allegation prior to the February 7, 1995 denial of her hearing request and, for the reasons noted above, the Office properly exercised its discretion in denying her hearing request.