U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARDELIA WALDEN and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Houston, Tex.

Docket No. 96-87; Submitted on the Record;
Issued January 7, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an injury on August 23, 1994 causally related to factors of her federal employment; (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; and (3) whether the Office properly denied appellant's request for reconsideration under section 8128 of the Act.

On August 23, 1994 appellant filed a claim for a traumatic injury to her back when elevator doors closed on her. Appellant stopped work on that date.

In an accompanying statement, the employing establishment controverted the claim. The employing establishment noted that appellant currently received payments from the Office for degenerative disc disease, assigned Office File No. A16-0172018.

In an authorization for examination and/or treatment (Form CA-16) dated August 25, 1994, Dr. R. Craig Ponder, a Board-certified orthopedic surgeon, noted the history of injury as appellant being hit by an elevator door, and indicated that she had a history of "previous lumbar degenerative disc disease." Dr. Ponder diagnosed degenerative disc disease and checked "yes" that the condition was caused or aggravated by employment. Dr. Ponder found that appellant was totally disabled from August 23, 1994 to the present.

In a narrative report dated August 25, 1994, Dr. Ponder noted that, following her March 30, 1990 employment injury, appellant returned to light-duty employment on August 22, 1994 and that on August 23, 1994 elevator doors closed on her and caused lower back pain. Dr. Ponder diagnosed "[d]egenerative disc disease about the lumbar spine with a superimposed traumatic event as the precipitating episode." Dr. Ponder further found that appellant had complaints of back pain and degenerative changes of "long-standing duration" and had "no evidence of having sustained a pronounced injury." Dr. Ponder recommended that appellant avoid bending, lifting and prolonged sitting.

By letter dated October 26, 1994, the Office requested additional factual and medical information from appellant.

Appellant submitted chart notes dated September 9 and October 11, 1994 from Dr. Ponder, who discussed her complaints of pain and his recommendations for lessening her symptoms.

In a form report dated October 21, 1994, Dr. Ponder diagnosed lumbar degenerative disc disease and checked "yes" that the condition was caused or related to employment, providing as a rationale that she had a "[c]ontusion about back by elevator doors." Dr. Ponder found that appellant was totally disabled from August 25, 1994 to the present.

By decision dated November 17, 1994, the Office denied appellant's claim on the grounds that she did not establish fact of injury. In the accompanying memorandum to the Director, incorporated by reference, the Office accepted the occurrence of the described employment incident but found that the evidence did not establish a medical condition resulting from the incident.

In a letter dated December 20, 1994 and postmarked December 27, 1994, appellant requested a hearing before an Office hearing representative.

By decision dated January 28, 1995, the Office denied appellant's request for a hearing as untimely.

By letter dated March 28, 1995, appellant requested reconsideration of her claim and resubmitted Dr. Ponder's August 25, 1994 report.

By decision dated September 21, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and thus insufficient to warrant review of the prior decision.

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury on August 23, 1994 causally related to factors of her federal employment.

An employee seeking benefits under the Act[1] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act[2] and that an injury was sustained in the performance of duty.[3] These are essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989).

[3] *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[4] *Delores C. Ellyet*, 41 ECAB 992 (1990).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.[5] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[6]

By decision dated November 17, 1994, the Office denied appellant's claim on the grounds that she did not establish fact of injury. The Office accepted that appellant was a federal employee, that she timely filed her claim for compensation benefits, and that the workplace incidents or exposures occurred as alleged. The question therefore becomes whether this incident or exposure caused an injury.

In support of her claim, appellant submitted several medical reports from Dr. Ponder, a Board-certified orthopedic surgeon and her attending physician; however, none of these reports adequately addressed the causal relationship between the August 23, 1994 employment incident and her diagnosed condition of lumbar degenerative disc disease. In a report dated August 25, 1994, Dr. Ponder noted the history of the elevator closing on appellant and diagnosed "[d]egenerative disc disease about the lumbar spine with a superimposed traumatic event as the precipitating episode." Dr. Ponder further found, however, that appellant had complaints of back pain and degenerative changes of "long-standing duration" and had "no evidence of having sustained a pronounced injury." Dr. Ponder is equivocal on the issue of causal relationship and thus his opinion is insufficient to meet appellant's burden of proof.[7] Dr. Ponder further does not specifically relate any change in appellant's preexisting condition of lumbar degenerative disc disease to the August 23, 1994 employment incident or provide any medical rationale explaining how the incident caused or aggravated her degenerative disc disease. To be of probative value a physician must address the specific facts and medical condition applicable to appellant's case and support his or her findings with sound medical reasoning.[8]

Appellant further submitted form reports from Dr. Ponder dated August 25 and October 21, 1994 in which he checks "yes" that appellant's lumbar degenerative disease is causally related to her employment. The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a form question regarding whether appellant's condition is related to the history of injury given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[9] While in the report dated October 21, 1994, Dr. Ponder states, in addition to his checkmark response, that appellant had a contusion from the elevator doors, he does not explain how such a contusion would cause or aggravate the diagnosed condition of lumbar

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Id.*

[7] *Ern Reynolds*, 45 ECAB 690 (1994).

[8] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[9] *Lucrecia M. Nielson*, 41 ECAB 583 (1991).

degenerative disc disease, and thus his opinion is insufficient to meet appellant's burden of proof.

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

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."[10] 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.[11]

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,[12] when the request is made after the 30-day period established for requesting a hearing,[13] or when the request is for a second hearing on the same issue.[14] 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.[15]

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 November 17, 1994 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated December 20, 1994 and postmarked December 27, 1994. Hence, the Office was correct in stating in its January 28, 1995 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's November 17, 1994 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 January 28, 1995 decision, properly

[10] 5 U.S.C. § 8124(b)(1).

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

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

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

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

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

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 submitting additional evidence to establish that she sustained an injury in the performance of duty on August 23, 1994. 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.[16] In the present case, the evidence of record does not indicate that the Office acted unreasonably 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.

The Board further finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C.§ 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

"(ii) Advancing a point of law or fact not previously considered by the Office, or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[17]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[18] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[19] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[20]

In the present case, the Office denied appellant's claim on the grounds that the medical evidence failed to establish that she sustained an injury causally related to the August 23, 1994 employment incident. In support of her request for reconsideration, appellant resubmitted Dr. Ponder's August 25, 1994 report, the Office's October 26, 1994 request for information, a

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

[17] 20 C.F.R. § 10.138(b)(1).

[18] *See* 20 C.F.R. § 10.138(b)(2).

[19] *Daniel Deparini*, 44 ECAB 657 (1993).

[20] *Id.*

copy of the Office's January 28, 1995 decision and a November 17, 1994 memorandum to the Director. As this evidence duplicated evidence already in the record, it is insufficient to warrant reopening appellant's claim.[21]

In her statement requesting reconsideration, appellant argued that Dr. Ponder's opinion was sufficient to establish that she sustained an injury on August 23, 1994. However, lay persons are not competent to render a medical opinion.[22] The issue of whether appellant sustained an injury on August 23, 1994 is a medical question which can only be resolved by the submission of medical evidence.[23]

As appellant has not established that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office, she has not established that the Office abused its discretion in denying her request for review under section 8128 of the Act.

[21] *Id.*

[22] *See James A. Long*, 40 ECAB 538, 542 (1989).

[23] *Ronald M. Cokes*, 46 ECAB ___ (Docket No. 94-570, issued August 7, 1995).

The decisions of the Office of Workers' Compensation Programs dated September 21 and January 28, 1995 and November 17, 1994 are hereby affirmed.

Dated, Washington, D.C.
January 7, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member