

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALICE FAYE CANNON and DEPARTMENT OF VETERANS AFFAIRS,
PORTLAND VETERANS HOSPITAL, Oreg.

*Docket No. 97-2691; Submitted on the Record;
Issued June 4, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied the claim on January 29, 1997; and (2) whether the Office abused its discretion by denying merit review on June 11, 1997.

This is the second appeal of this case. In the decision dated November 15, 1996,¹ the Board noted the pertinent facts of this case as follows: the Office has accepted that appellant sustained cervical and lumbar strain on January 18, 1991 in the performance of her federal employment as a surgical nurse. On March 15, 1992 appellant filed a notice of occupational disease alleging that she had worked for a year following her 1991 injury, performing daily lifting and that as a result she sustained a ruptured disc at L3 on or about March 4, 1992. On January 12, 1993 the Office accepted appellant's claim for aggravation of preexisting far-lateral disc protrusion right L3-4. By decisions dated June 18, 1993 and April 15, 1994, the Office denied appellant's claim that she had sustained herniated disc at L3-4, back surgery of March 10, 1992, physical therapy for post laminectomy syndrome, right knee condition and disability for work beginning March 6, 1992, due to factors of her federal employment; the Office denied merit review of the claim on August 24, 1994.

In the decision dated November 15, 1996, the Board remanded the case to the Office on the grounds that the Office had abused its discretion in denying merit review on August 24, 1994. The Board found that appellant's treating physician, Dr. Sabo, submitted a report dated July 1, 1994, which was the first detailed narrative report in which he explained his medical opinion regarding the cause of appellant's ruptured L3-4 disc and right knee conditions. The Board found that this report did constitute new and relevant evidence, which required merit review of the claim.

¹ Docket No. 95-66, issued November 15, 1996.

On remand of the case to the Office, the Office wrote to Dr. Sabo on December 18, 1996 requesting a supplemental report, based upon a statement of accepted facts. The Office did not receive a report from Dr. Sabo prior to January 29, 1997. On January 29, 1997 the Office again denied appellant's claim, after merit review.

The Board finds that the Office properly denied appellant's claim on January 29, 1997.

In assessing medical opinion evidence, the weight to be accorded such medical evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are factors which enter into this evaluation.²

In the present case, the Office has denied appellant's claim for herniated disc and associated sequelae essentially because the medical reports from appellant's treating physicians relied upon a history of injury which was incompatible with contemporaneous evidence of record. The contemporaneous evidence of record establishes that on March 15, 1992, appellant filed an occupational injury claim, in which she indicated that on March 4, 1992 she became aware of a condition and that on March 5, 1992 she first realized this condition was caused or aggravated by her employment. Appellant further explained on this claim form that daily lifting for the past year had caused a ruptured disc. In a supplemental statement received by the Office on March 27, 1992 appellant stated as follows:

"On Wednesday evening March 4, 1992 I experienced sudden sharp pain in right hip, which radiated down through entire right leg. Thursday March 5, 1992 I worked usual eight hours as O.H. charge in O.R. Pain was so severe Thursday eve I did not sleep well. Friday a.m. 0745 March 6, 1992 called doctors office asking to be seen for right leg pain. Although leg was very achy and painful especially knee area, I scrubbed O.H. case as that was my assignment on March 6, 1992. I tend to be a stoic person, having worked with back discomfort most of my life. I did not tell management of my discomfort on Friday a.m., although I had shared with my car pool rider Janet Love. Around 1015 a.m. as I was acting as the scrub nurse on the O.H. case I experienced such a severe pain in my right hip, down my leg, and around my knee and down my shin that I asked circulator to find another O.H. team member to scrub as I was unable to continue."

The Board had previously held that the factual background provided in a medical report must be compatible with the contemporaneous history of injury.³ The Board has explained that a medical opinion based on a history which does not accurately reflect the basic facts is of little value to appellant in proving her case.⁴

² *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

³ *John B. Montoya*, 43 ECAB 1148 (1992).

⁴ *Vernon R. Stewart*, 5 ECAB 276 (1953).

Appellant has submitted medical reports from two physicians who discuss the issue of causal relationship, Dr. Hummel and Dr. Sabo. In a report dated August 25, 1992, Dr. Errett E. Hummel Jr., a Board-certified neurosurgeon, noted that appellant had undergone a magnetic resonance imaging scan on March 10, 1992 which revealed a large far-lateral disc protrusion on the right at 3-4. He opined that appellant's constant standing, lifting, bending and twisting required in her position as an operating room nurse certainly would contribute to her long term back problems. The Board finds that as Dr. Hummel did not indicate an awareness of the events of March 4 to 6, 1992, his general opinion supporting causal relationship is speculative and of limited probative value in establishing that appellant's herniated disc was causally related to her employment.

In a January 19, 1994 report, Dr. Sabo stated that on Wednesday, March 6, 1992 appellant was getting out of her car and felt a pain in her right knee which seemed to subside. The following Friday at work, she was prepping a patient and twisted her back and felt instant pain going down her hip and into her right knee. Dr. Sabo concluded that "the injury that occurred on Friday while at the VA Hospital while prepping the patient was the major contributing cause of her ruptured disc which led to surgery on March 10, 1992." This report from Dr. Sabo is also not based upon a proper factual background. This report relates that appellant had right knee pain on Wednesday which seemed to subside, and that on Friday appellant twisted her back while prepping a patient and felt instant pain going down her hip and into her right knee. Such factual background is not supported by the contemporaneous statements of record from appellant. This report does not note that appellant continued with leg pain on Thursday, such that she found it difficult to sleep Thursday night and that the pain continued Friday morning, before appellant scrubbed for surgery. Lacking a proper factual background, this report is of limited probative value.

In a report dated July 1, 1994, Dr. Sabo added further explanation of his opinion that the incident on March 4, 1992 when appellant was getting out of her car, was a sign that she was having an impingement of the nerve, but the incident that occurred on March 6, 1992 was the direct cause of complete rupture of the disc. He also noted that appellant's work activity as a nurse over many years was the major contributing cause for the weakening of the disc that eventually ruptured. However, as Dr. Sabo still referred to the incorrect factual history that appellant had pain radiating into her right knee on March 4, 1992 which dissipated the following day, and that on March 6, 1992 while prepping a patient, she twisted and felt extreme pain from the right hip down to her right knee, his opinion regarding causal relationship was again of limited probative value. As appellant had not submitted any probative medical evidence that her ruptured disc was caused by her employment activities, the Office properly denied her claim on January 29, 1997.

The Board also finds that the Office did not abuse its discretion in denying merit review on June 11, 1997.

On February 7, 1997 the Office received a report dated January 17, 1997, from Dr. Sabo. On March 17, 1997 Dr. Sabo prepared another report for the Office. On June 11, 1997 the Office denied merit review, on the grounds that the evidence submitted in support of the request for review was cumulative in nature and not sufficient to warrant merit review.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵

In his reports dated January 17 and March 17, 1997, Dr. Sabo referred again to essentially the same incorrect history he had previously noted, that appellant experienced leg pain on March 4, 1992 which subsided, that appellant did not continue to have severe pain, but that severe pain occurred on March 6, 1992 while appellant was in the operating room. His medical reports of January 17 and March 17, 1997 are, therefore, cumulative of his previous reports and do not constitute new and relevant evidence. As appellant did not show that the Office erroneously applied or interpreted a point of law; did not advance a point of law or fact not previously considered by the Office; or did not submit relevant and pertinent evidence not previously considered by the Office, merit review was not required in this case. The Office did not abuse its discretion by denying merit review on June 11, 1997.

The decisions of the Office of Workers' Compensation Programs dated June 11 and January 29, 1997 are hereby affirmed.

Dated, Washington, D.C.
June 4, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁵ 20 C.F.R. § 10.138(b)(1)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).