U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUCIA REYNOLDS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Portland, OR

Docket No. 97-138; Oral Argument Held September 13, 2000; Issued October 27, 2000

Appearances: *Lucia Reynolds, pro se*; *Sheldon G. Turley, Jr., Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained a medical condition causally related to her September 22, 1994 employment injury; (2) whether appellant has established that she sustained a back condition causally related to her April 27, 1995 employment injury; (3) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128; (4) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124; and (5) whether appellant has established that she sustained an emotional condition in the performance of duty.

On September 22, 1994 appellant, then a 42-year-old revenue agent, filed a traumatic injury claim alleging that she injured her back, left shoulder and elbow on that date when she fell while trying to sit on a chair. The Office assigned the case File Number A14-200493. By decision dated December 8, 1995, the Office denied appellant's claim on the grounds that she did not establish fact of injury. In a decision dated March 11, 1996, the Office modified its prior decision and accepted that appellant established fact of injury but found that she did not establish a medical condition causally related to the September 22, 1994 injury.

On May 21, 1995 appellant filed a traumatic injury claim alleging that on April 27, 1995 she injured her left foot and lower back when she fell while carrying equipment. The Office assigned the case File Number A14-305458 and accepted the claim for left wrist and left ankle strain. In a decision dated March 7, 1996, the Office found that appellant had not established that she sustained a back condition causally related to the April 27, 1995 employment injury.

By letter dated March 5, 1996, appellant, through her congressional representative, requested reconsideration. In an internal memorandum dated March 14, 1996, the Office

doubled the case files for appellant's September 22, 1994 and April 27, 1995 traumatic injuries into File Number A14-305458.

By decision dated May 23, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was immaterial and thus insufficient to warrant merit review of her claim. In a letter dated July 18, 1996 and postmarked July 24, 1996, appellant requested a hearing before an Office hearing representative. In a decision dated July 18, 1996, the Office denied appellant's request for a hearing.

The Board finds that appellant has not established that she sustained a medical condition causally related to her September 22, 1994 employment injury or a back condition causally related to her April 27, 1995 employment injury.

An employee seeking benefits under the Federal Employee's Compensation Act[1] has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of the Act and that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[2]

The medical evidence required to establish causal relationship, generally, is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical 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 a physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty 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.[3]

In support of her claim, appellant submitted reports from her chiroproactors, Dr. Jack D. Daugherty and Dr. Roger H. Bell.[4] However, as neither physician diagnosed a subluxation demonstrated to exist by x-ray, they are not considered physicians within the meaning of the Act and therefore their reports do not constitute probative medical evidence.[5]

In a report dated May 31, 1995, Dr. Clyde A. Farris, a Board-certified orthopedic surgeon, noted that appellant sustained a work-related injury in September 1994 and a

[1] 5 U.S.C. §§ 8101-8193.

[2] *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[3] *Gary L. Fowler*, 45 ECAB 365 (1994); *Ern Reynolds*, 45 ECAB 690 (1994).

[4] Appellant also submitted physical therapist reports; however, the reports of a physical therapist are not medical evidence as a physical therapist is not a physician under the Act. *Thomas R. Horsfall*, 48 ECAB 180 (1996).

[5] *See Carolyn M. Leek*, 47 ECAB 374 (1996).

subsequent injury four weeks later "walking out of a taxpayer's house." Dr. Farris discussed her complaints of pain in her low back, sacroiliac, shoulders, neck, wrist, left elbow and left ankle. He diagnosed cervical and lumbosacral strain by history and left ankle and left wrist sprain. In an office visit note dated June 6, 1995, Dr. Farris noted that x-rays showed "no evidence of serious injury." In an office visit note dated August 15, 1995, he listed findings on examination and diagnosed cervical strain, lumbar strain, and possible mild adhesive capsulitis and tendinitis of the right shoulder. In an office visit note dated September 28, 1995, Dr. Farris discussed appellant's complaints of "persistent discomfort over the neck and low back" with radiation down the legs. He indicated that he could "find no objective evidence of any neurologic compromise" and recommended a magnetic resonance imaging (MRI) scan. Dr. Farris' report and office visit notes are of little relevance to the pertinent issue at hand as he did not address the cause of the diagnosed conditions or relate any condition to appellant's accepted employment injuries. Further, he noted an incorrect history of injury, that of appellant sustaining a second work-related injury four weeks after the September 22, 1994 employment injury.[6] Thus, his reports are insufficient to meet appellant's burden of proof.

In a report dated December 8, 1995, Dr. Paul R. Ash, a Board-certified neurologist and psychiatrist, discussed appellant's history of employment injuries in September 1994 and April 1995. Dr. Ash diagnosed lumbosacral strain and a possible disc injury or epidural hematoma. However, he did not relate the diagnosed conditions to either employment injury and thus his report is of little probative value.[7]

In an office visit note dated August 17, 1995, Dr. James J. Biemer, Jr., a Board-certified internist, related appellant's history of injury as follows:

> "Over the past year or so, she has noted shoulder and neck discomfort, which increased significantly after falling on her tailbone in Sept[ember] 1994. At that time she also noted right greater than left 'sciatica' with sharp, shooting pains down the insides of both LE [lower extremities]. Apparently, she was also [diagnosed] with an ulnar nerve entrapment or injury by her chiropractor. A [w]orkers [compensation] claim was filed at that time. She fell again in April of 1995 and filed a second claim."

Dr. Biemer indicated that appellant had requested that he state that she could return to work for three days per week. In an office visit note dated December 15, 1995, he noted that he had requested that appellant obtain office notes from Dr. Farris prior to referring her for objective tests. However, Dr. Biemer did not reach a diagnosis, list findings on physical examination, or render any opinion regarding causation or disability. Therefore, his reports are of little relevance to the issue at hand.

[6] *Joseph M. Popp*, 48 ECAB 624 (1997) (a medical opinion must be based on a complete and accurate factual and medical history).

[7] *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

As appellant has not submitted rationalized medical opinion evidence supporting a causal relationship between a medical condition and her September 22, 1994 employment injury or a back condition and her April 27, 1995 employment injury, she has failed to meet her burden of proof.

The Board further finds that the Office properly denied appellant's request for reconsideration under section 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 or her 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."[8]

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.[9] Evidence that repeats or duplicates evidence already in the case record has no evidentiary values and does not constitute a basis for reopening a case.[10] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[11]

In support of her request for reconsideration, appellant submitted a report dated March 25, 1996 from Dr. Robert P. Doughton, a Board-certified gynecologist. Dr. Doughton related that he initially treated appellant on February 22, 1996. He included a transcript of his February 22, 1996 report, in which he noted appellant's history of a fall at work on September 22, 1994 which injured her tailbone and elbow. Dr. Doughton related that subsequent to her fall appellant began dragging her leg and experiencing pain in her hips and shoulders. He further noted that she injured her right ankle and wrist during a second fall in April 1995. Dr. Doughton stated that subsequently "[appellant's] hip and knee began to hurt from what sounds like a compensatory type of gait." He related, "The reason that I took the trouble to write down all of my chart notes that it is very clear to me that all this whole problem began with a fall that has never been adequately treated or worked up.… I am asking you to reopen the case and accept the original injury as never having been medically stationary." However, Dr. Doughton

[8] 20 C.F.R. § 10.138(b)(1).

[9] *See* 20 C.F.R. § 10.138(b)(2).

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

[11] *Id.*

did not attribute any specific diagnosed condition to either employment injury but instead merely described appellant's symptoms of pain. Thus, his report does not address the relevant issue of causation and is insufficient to warrant a reopening of appellant's case for merit review.

Appellant further submitted a report dated April 1, 1996 from Dr. Daugherty, a chiropractor. As discussed above, chiropractors are considered physicians, and their reports constitute medical evidence, only to the extent that they diagnose spinal subluxations as demonstrated by x-ray to exist. Dr. Daugherty did not diagnose a spinal subluxation by x-ray and thus his report is not that of a physician and does not constitute a basis for a reopening of the claim.

As appellant has failed to show that the Office erroneously applied or interpreted a point of law, advanced a point of law or a fact not previously considered by the Office, or submitted relevant and pertinent evidence not previously considered by the Office, she has not met her burden of proof to establish that the Office abused its discretion in denying her request for a review of her claim on the merits.

The Board finds that the Office did not abuse its discretion in refusing appellant's request for a hearing under section 8124.

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.[12] 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,[13] when the request is made after the 30-day period established for requesting a hearing,[14] or when the request is for a second hearing on the same issue.[15] In these instances, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[16]

In this case, appellant requested reconsideration on March 5, 1996. The Office issued a decision regarding the request for reconsideration on May 23, 1996. Appellant subsequently requested a hearing on July 18, 1996. Under the provisions of the Act, a claimant is entitled to a timely requested hearing under section 8124(b) only before the Office has reviewed her claim under section 8128.[17] Appellant, therefore, was not entitled to a hearing as a matter of right.

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

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

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

[15] *Johnny S. Henderson*, *supra* note 12.

[16] *Rudolph Bermann*, *supra* note 13.

[17] *Mary G. Allen*, 40 ECAB 190 (1988).

The Office further exercised its discretion in considering appellant's request, noting that it had considered the matter and determined that the issue in the case could be resolved through the reconsideration process. 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 deductions from known facts.[18] There is no evidence that the Office abused its discretion in appellant's case.

The Board further finds that the case is not in posture for decision on the issue of whether appellant has established that she sustained an emotional condition in the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[19] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[20]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[21] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[22]

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[23] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of

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

[19] 5 U.S.C. §§ 8101-8193.

[20] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[21] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[22] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[23] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[24]

In the present case, appellant alleged that she sustained an emotional condition as a result of a number of employment incidents and conditions. By decision dated August 13, 1996, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegations that the employing establishment engaged in improper procedural changes, wrongly denied her request for training, inappropriately delayed her request for a transfer, refused her request for mentoring, issued unfair performance appraisals, failed to provide experienced managers and unreasonably monitored her activities at work, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[25] Although the handling of evaluations, training, transfers, procedures and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[26] The Board has found, however, that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[27] In the instant case, appellant has not submitted any evidence in support of her contention of error or abuse by the employing establishment in its administration of these matters. Further, appellant's supervisor, Dennis Strieff, submitted a statement indicating that the supervision of appellant was proper, that he was available for assistance, that her request for a transfer was not unreasonably denied or delayed, and that she had the appropriate training for her position. Consequently, appellant has not established a compensable employment factor under the Act with respect to administrative matters.[28]

Appellant also attributed her emotional condition to carrying heavy equipment, the poor quality of her computer screen, exposure to chemical fumes at a taxpayer's home, dealing with threatening taxpayers' pets, and meeting with threatening tax protestors. However, he has not established a factual basis for her allegations. Appellant's supervisor, Mr. Strieff, indicated that the employing establishment provided her with a cart in which to transport her equipment and

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[24] *Id.*

[25] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[26] *Id.*

[27] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[28] Appellant further maintained that pain from her employment injuries contributed to her emotional condition. However, as discussed above, appellant has not established a continuing medical condition causally related to her employment injuries and thus has not established a factual basis for her contention.

noted that she had not complained about climbing excessive flights of stairs. He further disputed that she had a poor quality computer screen or dealt with tax protestors as defined by the statute. Mr. Strieff further indicated that he was unaware that appellant was exposed to either chemical fumes or threatening pets. As appellant has not established a factual basis for her allegations, they do not constitute compensable factors of employment.

Appellant further alleged that she experienced stress due to the following: working with uncooperative accountants; having taxpayers complain and insult her because they did not agree with her tax adjustments; taxpayers either canceling or not showing up for appointments; and remarks by taxpayers, accountants and attorneys about her integrity as an auditing agent. Mr. Strieff responded that these experiences were common for a revenue agent and that "[t]here is probably not one agent who has not experienced one or more of these occurrences." Appellant additionally stated that she experienced stress due to "pressure to close nonfiler cases." Mr. Strieff indicated that closing nonfiler cases was "part of [appellant's] assigned duties along with most other revenue agents." In *Lillian Cutler*,[29] the Board explained that, where an employee experiences emotional stress in carrying out the employment duties, or has fear and anxiety regarding his or her ability to carry out such duties, and the medical evidence establishes that the disability resulted from his or her reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of the employment, and would therefore come within the coverage of the Act. The Board stated in *Pauline Phillips*,[30] that this is true where the employee's disability resulted from his or her emotional reaction to the regular day-to-day to specially assigned work duties or to a requirement imposed by the employment.[31]

The Board finds that appellant's contact with taxpayers during the course of her employment and her work closing nonfiler cases constitute the performance of her regularly or specially assigned duties and therefore any stress arising from these activities would be compensable.

As appellant has alleged compensable factors of employment the issue thus becomes whether she has submitted sufficient medical evidence to establish that identified compensable factors resulted in her emotional condition. In support of her claim, appellant submitted a report based on evaluations dated September 27 and October 4, 1995 from Dr. Angela M. Andrich, a psychiatrist, who noted that appellant related work stressors which included working with complaining and insulting taxpayers. Dr. Andrich found that appellant's symptoms of depression and anxiety "appear to have been precipitated by a lot of stress at work."

The Board finds that, although Dr. Andrich did not provide sufficient medical rationale explaining how these accepted factors caused or contributed to appellant's emotional condition, her report is generally supportive of appellant's claim and sufficient to require further development by the Office. The case, therefore, must be remanded to the Office for preparation of a statement of accepted facts and further development of the medical evidence. After such

[29] 28 ECAB 125 (1976).

[30] 36 ECAB 377 (1984).

[31] *Larry J. Thomas*, 44 ECAB 291 (1992).

further development as the Office deems necessary, it shall issue an appropriate decision on appellant's entitlement to benefits.[32]

The decision of the Office of Workers' Compensation Programs dated August 13, 1996 is hereby set aside and the case is remanded for further proceedings consistent with this opinion of the Board. The decisions of the Office dated July 18, May 23, March 11 and March 7, 1996 are hereby affirmed.

Dated, Washington, DC
October 27, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[32] The Board docketed appellant's appeal on September 19, 1996. On January 8, 1997 the Office issued a decision denying appellant's request for a hearing. This decision is null and void because it was issued while the case was on appeal before the Board on the same issue; *see Douglas Billings*, 41 ECAB 880 (1990).