

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARL H. DREW and U.S. POSTAL SERVICE,
POST OFFICE, Fayetteville, NC

*Docket No. 00-509; Submitted on the Record;
Issued March 26, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has established that he sustained a back condition in the performance of duty causally related to factors of his employment; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

On March 22, 1999 appellant, then a 60-year-old maintenance mechanic, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he sustained low back and rectal injuries causally related to his employment. He indicated that he first became aware of his disease or illness on June 23, 1969. Appellant noted that he was last exposed to conditions alleged to have caused his disease or illness on January 13, 1999 and first received medical attention on January 19, 1999 from Dr. Sampath V. Charya, Board-certified at Cape Fear Neurology Associates. In explaining appellant's history of disease or illness and why he believed that his condition was related to his employment he stated that, during physiological training, in June 1969, he was "jammed into a box to see if I could handle claustrophobia [and when] removed.... I could n[o]t walk. I had severe pain in my rectal area and low back." Appellant also stated that on February 9, 1997 he "injured my lower back while pulling a pallet jacket out of the way of a forklift" and went to Bragg Family Practice for treatment two days later. He further stated that on January 13, 1999 he "injured my back loading an LD 4000 hamper on a tractor trailer" but continued working because he did not feel that the injury required medical attention but that after completing work that day he called Dr. Charya and was seen on January 19, 1999.

Along with appellant's CA-2 claim form he submitted a medical note from the employing establishment dispensary dated June 23, 1969 in which he was noted as complaining of a sleep or numb feeling of his right leg which he contributed to being "in a black box last week and has noticed this since then" and slight tingling of his right great toe. Appellant indicated that sitting for prolonged periods caused tingling in his leg that could be relieved by shifting positions. He submitted a letter dated September 15, 1994 noting that he injured his right knee while cleaning and lubing a chain and sprocket when he lost his balance and hit his knee on the edge of the

chain guard. He stated "I do n[o]t feel that this is very serious." Also attached was a medical report dated March 24, 1995 noting that appellant underwent levator aponeurosis advancement surgery on March 17, 1995 and could return to work with no straining or heavy lifting.

In a letter dated March 19, 1999, received by the Office of Workers' Compensation Programs on March 22, 1999, Josie Moretti of the employing establishment stated that appellant's claim for injuries was being challenged. Ms. Moretti noted that "[appellant] has always taken care of his degenerative condition through his private insurance until January [1999] when according to his supervisor he is wanting to retire." She also noted that concerning the February 9, 1997 injury appellant stated, "I do n[o]t think I need medical attention" and that he was basing his claim on the January 13, 1999 injury but chose to file an occupational disease CA-2 form. Ms. Moretti further noted that the employing establishment challenged appellant's claim because he was diagnosed with chronic polyneuropathy and low back pain and that appellant submitted medical evidence which supports the fact that he suffers from degenerative disease and not an employment-related illness.

In February 9, 1997 memorandum, appellant notified the employing establishment that he "pulled a muscle in my lower back Friday, February 7, 1997 while pulling PJ 3 out of the way of the forklift. This occurred while I was replacing the [b]attery [c]able. I do n[o]t think I need medical attention." However, two days later, in a February 11, 1997 medical report, Dr. Godfrey E. Ohadugha, a Board-certified family physician, diagnosed appellant with chronic low back pain and radiculopathy and restricted him from prolonged bending or walking for two weeks. In a February 25, 1997 follow-up report, he reiterated his diagnosis of appellant's chronic low back pain.

In February 21, March 31 and May 28, 1997 office medical notes, Dr. Bruce P. Jauffman, a Board-certified neurological surgeon, stated that appellant's electromyogram (EMG) and nerve conduction studies performed by Dr. Walsh showed evidence of sensorimotor polyneuropathy. He further noted that appellant's lumbar magnetic resonance imaging (MRI) scan showed mild disc desiccation at L5-S1. Dr. Jauffman gave his impression of appellant as having "no evidence of disc herniation on his lumbar MRI [scan]."

In a July 15, 1997 medical condition report, Dr. Charya noted that according to appellant his back pains had been ongoing for four to five years. Dr. Charya stated:

"Sensory examination revealed intact perception of pain and vibration with slight diminution along the dorsal aspect on the left foot to pinprick. Motor strength was 5/5 in all 4 extremities with no drift. Reflexes were symmetric, 1+ to 2 in the upper extremities and 2 to 2+ in the lower extremities. Toes respond to plantar flexion. Coordination did not reveal any concerns. Gait, tandem and Romberg revealed no concerns. Neck was supple. There was no particular tenderness in the back except in the lower lateral aspect on deep percussion.

"Range of motion was limited on spine maneuvers 15 to 30 degrees laterally and 30 degrees and beyond possible in the anterior or posterior direction. Straight leg raising was tolerated without significant discomfort, even beyond 90 degrees.

Occasionally, on repeating left side was claimed to be uncomfortable, but no consistency was noted.

“IMPRESSION/PLAN: Chronic low back pain. EMG nerve conduction studies done in April showed axonal type of neuropathy, sensory and motor in nature. The main concern now is [appellant’s] elevated blood pressure for which he is asked to go to the [e]mergency [r]oom for control of the blood pressure and titrating his medications. His back pain will be followed, given no immediate concerns of neurological changes compared with the previous notes. However, given subtle concerns on the exam[ination] and continuing pain, he will be followed with a repeat nerve conduction study and EMG to compare with the previous one which was done approximately four months ago, to see if he is progressing or if he is stable.”

Dr. Charya referred appellant to Dr. Gordon R. McDevitt, Jr., a Board-certified nuclear medicine specialist, who performed lumbar spine and sacrum examinations of appellant and stated:

“Standard three views of the lumbar spine demonstrate five no-rib bearing vertebral bodies. Minimal vertebral wedging without evidence of cortical disruption is seen at the L1 level that may represent a minimal compression age unknown. Small anterior osteophytes are seen at the L3-4 level. The dis[c] spaces are maintained. I see no evidence of spondylolysis or spondylolisthesis. The visualized S1 joints are unremarkable. The bones are diffusely osteopenic. A tablet from prior ingestion is seen in the right upper quadrant. Numerous splenic granulomatous changes are seen in the left upper quadrant. Calcific changes are seen within the abdominal aorta.

“IMPRESSION: Minimal vertebral wedging, L1, age unknown. No acute lumbar pathology is seen.

“SACRUM: Multiple views of the sacrum demonstrate no acute bony fracture, lytic or blastic process. The visualized S1 joints are unremarkable. The bones are somewhat osteopenic.

“IMPRESSION: No acute bony abnormality is seen.”

By letter dated March 30, 1999, the Office advised appellant and the employing establishment that additional information was required in reference to appellant’s claim for an occupational illness and further advised appellant that episodes of pain due to an underlining condition may not be considered compensable under the Federal Employees’ Compensation Act.¹ Appellant was requested to submit a detailed description of employment factors he implicated in causing his condition.

¹ 5 U.S.C. §§ 8101-8193.

On April 28, 1999 appellant submitted a progress report from Dr. Charya. He stated:

“[Appellant] returns for follow up with continuing back discomfort worsening by bending and stooping, prolonged standing and sitting, and some discomfort ambulating on tiptoes or heels. He recalls a specific incident at work on January 13, 1999 when he was handling LD 4000 hamper or dumper on a tractor/trailer. When he was in a bending down position handling this, he noted acute discomfort in the low back. Since then, his back has been hurting with discomfort especially using the low back, as mentioned above. This incident was noted per review of a document provided by [appellant] and enclosed in the chart. This specified the incident to have occurred on January 13, 1999 at 10:00 a.m. He did not go to [the] Urgent Care or Emergency Room to get that looked at, per [appellant] but noted that his low back discomfort has flared up and possibly with reaggravation of his chronic back condition. Neurologically, he is without changes clinically with stable mental status, cranial nerves, sensory, motor coordination, and gait with continuing discomfort on bending, stooping, prolonged sitting, standing up and walking”

By decision dated June 1, 1999, the Office denied appellant’s claim finding that he failed to establish that his current medical condition is causally related to his work factors.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a low back condition in the performance of duty as alleged.

An employee seeking benefits under the Act 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, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.³

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; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; 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. The medical evidence required to establish a causal relationship 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

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

³ *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990).

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, 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.⁴

In the present case, appellant submitted medical reports from Drs. Charya, Jauffman, and McDevitt. Appellant's diagnoses have been stated as polyneuropathy, mild disc desiccation at L5-S1 and minimal vertebral wedging L1.

Appellant has described a series of incidents beginning in 1969 at work to which he ascribes his back conditions. In order for these conditions to be covered under the Act, the evidence must demonstrate that the essential element of causal relationship has been met. The question of causal relationship is a medical issue, which usually requires a reasoned medical opinion for resolution. Causal relationship may be established by means of direct causation, aggravation, acceleration or precipitation.

The only evidence bearing on causal relationship are Drs. Jauffman's and Charya's reports in which appellant was diagnosed with sensorimotor polyneuropathy and mild disc desiccation at L5-S1. In his 1997 reports, Dr. Jauffman noted that appellant had mild degenerative disc disease at L5-S1 and sensorimotor polyneuropathy but that there was no evidence of herniation evidenced on appellant's lumbar MRI scan. Regarding the cause of appellant's condition, Dr. Jauffman only noted that appellant had related that exposure to Agent Orange may have contributed to his polyneuropathy. Dr. Jauffman offered no medical explanation as to how appellant's diagnosed conditions were caused by his federal employment. Rather his report inferred nonemployment-related origins to appellant's conditions.

Dr. Charya noted on April 19, 1999 that appellant had recalled a specific incident on January 13, 1999 when he bent over and experienced back pain, although he did not seek medical attention at that time. Dr. Charya stated that appellant was to avoid stressful situations, lifting weights, bending, stooping, immobilization and aggravating back maneuvers.

The Board has long held that an award of compensation may not be made on the basis of surmise, conjecture, or speculation or on appellant's unsupported belief of causal relation.⁵ Dr. Charya's report offered no medical explanation regarding the cause of appellant's condition, but merely reiterated appellant's allegations.

Furthermore, the fact that a condition manifests itself or worsens during a period of employment or that work activities produce symptoms revelatory of an underlying condition, does not create an inference of causal relationship between the claimed condition and employment factors.⁶ While appellant experienced back pain at work Dr. Charya did not explain why appellant's long-standing back condition was aggravated by his employment. As neither

⁴ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

⁵ *See Alfredo Rodriquez*, 47 ECAB 437 (1996).

⁶ *See Thomas L. Hogan*, 47 ECAB 323 (1996).

physician offered any medical opinions substantiating causal relationship appellant did not submit sufficient medical evidence to establish that he sustained a low back condition in the performance of duty causally related to factors of his employment.

The Board further finds that the Branch of Hearings and Review did not abuse its discretion by denying appellant's request for an oral hearing as untimely.

Appellant requested an oral hearing of the Office's June 1, 1999 decision on July 8, 1999.

By decision dated September 2, 1999, the Branch of Hearings and Review denied this request as untimely and stated that the issue of appellant's low back condition could be addressed by submitting relevant new evidence in the reconsideration process.

Section 8124(b) of the Act provides⁷ that "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."⁸ 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.⁹

In the present case, the Office issued its decision on June 1, 1999. As noted above, the Act is unequivocal in setting forth the time limitation for a hearing request. Appellant's request for a hearing was postmarked July 8, 1999, and thus is outside the 30-day statutory limitation. Since appellant did not request a hearing within 30 days, he was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has the discretion to grant the hearing request and must exercise that discretion.¹⁰ In the present case, the Branch exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical evidence. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

¹⁰ *Herbert C. Holley*, 33 ECAB 140 (1981).

The decisions of the Office of Workers' Compensation Programs dated September 2 and June 1, 1999 are affirmed.

Dated, Washington, DC
March 26, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member