

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE K. HILBERT and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, Mechanicsburg, PA

*Docket No. 00-1294; Submitted on the Record;
Issued March 15, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant established that she sustained a recurrence of disability on or after December 4, 1995 that was causally related to her July 6, 1994 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On July 6, 1994 appellant, then a 33-year-old material handler, sustained a back injury while lifting a 40-pound box in the performance of duty. The Office accepted the claim for a lower back strain and a subluxation, for which chiropractic treatment was authorized. Appellant was off work from July 7 until July 27, 1994, when she returned to work for four hours per day. On August 22, 1994 appellant was approved for an eight-hour duty shift. She received compensation for intermittent periods of disability between September 1, 1994 and January 1, 1995, when she was approved for regular duty.

In a CA-20 attending physician's report dated July 25, 1994, Dr. Jack D. Herd, a chiropractor, diagnosed that appellant sustained subluxation at L5 with sciatica due to the July 6, 1994 work injury. He opined that appellant could return to light duty effective July 26, 1994.

On August 1, 1994 a magnetic resonance imaging (MRI) was performed to rule out a herniated disc. The MRI was interpreted as showing L4-5 degenerative disc disease and diffuses disc bulge; focal central disc protrusion and moderate central canal stenosis.

On August 26, 1996 appellant filed a claim for a recurrence of disability beginning December 4, 1995. The date of the original injury was listed as July 6, 1994.

In a September 17, 1996 report, Dr. DeMuth noted that he first saw appellant on December 4, 1995 for evaluation of lower back and left leg pain. He outlined appellant's history of medical treatment for her lifting injury in the "[s]pring of 1994" and noted that an MRI report obtained from appellant's chiropractor demonstrated degenerative disc disease at L4-5 level with moderate spinal stenosis. Dr. DeMuth indicated that he had kept appellant off work intermittently due to her lower back and right buttock pain symptoms. He suggested that

appellant be considered for disability retirement. Dr DeMuth concluded his report by stating: "It is my understanding ... that the symptoms she is currently challenged with in her back and legs resulted from lifting in the spring of 1994 at her place of employment."

In a CA-20 attending physician's report dated September 18, 1996, Dr. DeMuth diagnosed low back pain with right buttock pain and right leg sciatica related to a L4-5 disc protrusion. He reported the date of injury as July 6, 1994 and indicated that the diagnosed condition was due to the work injury. In this regard he stated: "overexertion movements can put much strain on low back causing injury. Dr. DeMuth noted that appellant was totally disabled from December 4, 1995 until June 30, 1996 and that she had disability after July 1, 1996.

On October 7, 1996 the Office advised appellant of the nature of the medical evidence required to establish her recurrence of disability claim.

In an October 18, 1996 report, Dr. Herd noted that there was no permanent resolution for appellant's work-related injury and recommended that appellant not return to her previous duties.

On January 23, 1997 the Office referred appellant for a second opinion evaluation with Dr. Bruce Goodman, a Board-certified orthopedist. In a report dated February 12, 1997, he noted that, on or about July 6, 1994, appellant was lifting a 40-pound box at work when she felt a pull in the low back area. Dr. Goodman noted that appellant had been receiving chiropractic care for intermittent low back pain for many years prior to the work incident, but that as of July 6, 1994 she had not been to a chiropractor for at least two years. He discussed appellant's history of medical treatment and noted physical findings. Dr. Goodman stated:

"I suspect that a sedentary activity which she is presently doing should be tolerable and would not anticipate any further increase in her work potential. I do believe that every effort should be made to increase her workday, however, it is possible that four hours would represent the ultimate toleration relative to low back. Symptomology. I do not believe, however, that any of her present work restrictions bear a direct and causal relationship to a single strain pattern dating back to July 1994. I do not believe that the alleged exacerbations bear a direct and causal relationship with her present clinical condition."

In a February 10, 1997 treatment note, Dr. DeMuth indicated that appellant was seen for lower back and sacroiliac joint pain with occasional right leg sciatica. He diagnosed chronic low back pain and stated that "this all apparently stemmed from a lifting episode at work in 1994."

In a March 7, 1997 decision, the Office denied appellant's claim on the grounds that the evidence was insufficient to establish that appellant's disability on or after December 4, 1995 was causally related to her July 6, 1994 employment injury.

On April 4, 1997 appellant requested an oral hearing.

In a decision dated October 9, 1997, an Office hearing representative set aside the Office's March 7, 1997 decision and remanded the claim for further medical development.¹

In an October 27, 1997 letter, the Office requested that Dr. Goodman provide a supplemental report addressing the issue of causal relationship in greater detail.

In a report dated November 3, 1997, Dr. Goodman stated that he believed appellant sustained a lumbar strain due to her July 6, 1994 work injury and that the strain should have resolved within a period of two months. He indicated that appellant's continuing symptoms of back pain were due to "nontraumatically induced" degenerative changes within her lumbar vertebrae as confirmed by MRI evidence.²

In a December 29, 1997 decision, the Office denied appellant's claim for a recurrence of disability, finding that appellant failed to carry her burden of proof on causation.

On February 2, 1998 appellant requested reconsideration and submitted a May 12, 1997 report from Dr. DeMuth, which stated:

"The issue at hand is whether or not her December 4, 1995 office visit for lower back and right leg sciatica was indeed related to the July 6, 1994 work-related injury. I had written a letter on her behalf on September 17, 1996 regarding this issue, however, the [Office] apparently did not find my report supportive of the claim that this was a recurrent injury. Although my initial office evaluation may be vague on this issue, it was always my understanding during that visit and subsequent visits the patient's symptoms were a [continuation] of her previous significant lower back injury. I based this on the amount of time she had been off initially from the July 6, 1994 episode."³

In a May 7, 1998 decision, the Office denied appellant's request for a review on the merits.

The Board finds that appellant failed to establish that she sustained a recurrence of disability on or after December 4, 1995 that was causally related to her July 6, 1994 employment injury.

¹ The Office hearing representative noted that, since the Office had undertaken to have appellant examined by a referral physician, it was obligated to obtain a reasoned opinion with respect to the causal relationship between appellant's disability on or after December 5, 1995 and the accepted work injury.

² Dr. Goodman noted that "several MRI were performed and while not demonstrating any evidence of acute herniation did demonstrate findings of spinal stenosis, degenerative disc disease and there is a description of some desiccation and/or drying of the disc material between the vertebrae. These pathological entities are never traumatically induced and based purely upon factors other than trauma."

³ The remainder of Dr. DeMuth's report is a verbatim copy of his earlier September 17, 1996 report.

As used in the Federal Employees' Compensation Act,⁴ the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁵ 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.⁶ 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 reasoning.⁷ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on appellant's unsupported belief of causal relationship.⁸

In the instant case, the Office properly determined, at the time of the December 29, 1997 decision, that the record failed to establish that appellant sustained a recurrence of disability since there was no rationalized medical evidence of record attributing appellant's disability on or after December 5, 1995 to her July 6, 1994 work injury. The only reasoned medical opinion of record was obtained by the Office referral physician, Dr. Goodman, who opined that appellant sustained only a back strain due to the July 6, 1994 work injury that would have resolved within two months of the date of injury. He specifically attributed appellant's continuing complaints of back pain and her alleged disability to factors of degenerative disc disease. Dr. Goodman further explained that appellant's degenerative back condition was unrelated to a traumatic event such as the July 6, 1994 work injury.

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

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.⁹ The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.¹⁰ When application for review of the merits of a claim does

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Eldon H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.57(17). Disability is not synonymous with physical impairment. An employee who has a physical impairment, even a severe one, but who has the capacity to earn the wages he was receiving at the time of the injury, has no disability as that term is used in the Act and is not entitled to disability compensation; see *Gary L. Loser*, 38 ECAB 673 (1987); *Cf.* 5 U.S.C. § 8107 (entitlement to schedule compensation for loss or permanent impairment of specified members of the body).

⁶ *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

⁷ See *Nicolea Brusio*, 33 ECAB 1138 (1982).

⁸ *Ausberto Guzman*, 25 ECAB 362 (1974).

⁹ 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁰ 20 C.F.R. § 10.138(b)(1).

not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹¹ 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.¹² Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹³ Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.¹⁴

The Board has duly reviewed Dr. DeMuth's May 12, 1997 report and finds that it is cumulative in nature when compared to his prior reports and treatment notes of record. The Office previously found that, while Dr. DeMuth opined that appellant's treatment on or after December 5, 1995 was related to July 6, 1994 work injury, he did not provide any rationale for his medical conclusions. The Board also notes that Dr. DeMuth never adequately addressed the role of appellant's degenerative back condition with respect to her continuing back symptoms and alleged disability from work. The most recent report dated May 12, 1997 adds nothing new to Dr. DeMuth's stated opinion. He merely reiterates that he considered appellant's treatment to be due to the July 6, 1994 work injury with no apparent rationale.

Appellant has not shown that the Office erroneously applied or interpreted a point of law. She had not raised a new legal argument, nor has she submitted new and relevant evidence to establish her claim for a recurrence of disability. Consequently, appellant has failed to establish the requirements of section 8128. The Board, therefore, concludes that the Office properly refused to perform a merit review.

¹¹ 20 C.F.R. 10.138(b)(2).

¹² *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹³ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁴ *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

The decisions of the Office of Workers' Compensation Programs dated May 7, 1998 and December 29, 1997 are hereby affirmed.

Dated, Washington, DC
March 15, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member