

**United States Department of Labor
Employees' Compensation Appeals Board**

N.E., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
ROBINS AIR FORCE BASE, GA, Employer)

Docket No. 06-2074

Issued: January 17, 2007

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 11, 2006 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated October 24, 2005 which denied her claim for an occupational disease. Appellant also appealed an August 28, 2006 decision which denied her request for an oral hearing as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether appellant has met her burden of proof in establishing that she developed lower back pain while in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely.

FACTUAL HISTORY

On August 9, 2005 appellant, then a 46-year-old aircraft worker, filed an occupational disease claim alleging that she developed low back pain and numbness in her left leg while

performing her work duties. Appellant became aware of her condition on April 5, 2005. She did not stop work.

In letters dated August 16 and September 12, 2005, the Office advised appellant of the factual and medical evidence needed to establish her claim. It requested that appellant submit a physician's reasoned opinion addressing the relationship of her claimed condition and specific employment factors.

Appellant submitted an x-ray of the lumbar spine dated April 13, 2005, which revealed significant right-sided facet arthropathy at L5-S1. Also submitted were reports from Dr. Frank Marshall Parker, a Board-certified obstetrician, dated April 20 to May 5, 2005. Dr. Parker treated appellant for pain in her back and numbness in the right leg. He diagnosed incidental elevated blood pressure and persistent low back discomfort. Appellant came under the treatment of Dr. P. Jeffrey Jarrett, a Board-certified orthopedic surgeon, who noted in a report dated May 25, 2005 that appellant experienced back pain with radiation into her right leg. She reported no history of injury or surgery to her back. Dr. Jarrett diagnosed intermittent symptomatic lumbar degenerative disc disease and recommended a back brace. He returned appellant to light-duty work on May 31 to August 24, 2005. Dr. Jarrett treated appellant for lumbar pain and advised that she could return to light-duty work. He noted in reports dated August 24 and September 28, 2005 that appellant underwent three lumbar epidural steroid injections without much improvement. Appellant related her back pain to her work activities as a sheet metal mechanic and did not believe that she could return to her regular position. Dr. Jarrett diagnosed mechanical low back pain and intermittently symptomatic lumbar disc disease and advised that appellant could return to light-duty work. On July 6, 2005 a physician's assistant treated appellant in a follow-up for low back pain radiating into her leg. In a July 7, 2005 report, Dr. Andrew O. Obamwonyi, an employing establishment physician, noted that appellant could return to work with restrictions on lifting, pushing and pulling. A magnetic resonance imaging (MRI) scan of the lumbar spine dated July 20, 2005 revealed no abnormalities.

In two undated statements, appellant asserted that the numbness in her right leg started in January 2005 and she failed to report it at that time because she was experiencing other medical problems. She indicated that the pain in her back began in July 2001 and was intermittent and became worse from January to May 2005 when she was lifting floor board panels at work which weighed between 25 to 150 pounds.

In a decision dated October 24, 2005, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that her back condition was caused by her employment duties.

In a letter dated August 10, 2006, appellant requested an oral hearing before an Office hearing representative. Appellant submitted employing establishment treatment notes prepared by Dr. Anna M. Abrigo, a Board-certified pediatrician, dated January 12 and 31, 2006, who treated appellant for low back pain and numbness in the right leg and diagnosed chronic back pain. In reports dated March 15 and May 22, 2006, Dr. Abrigo noted treating appellant in a follow-up for persistent low back pain which was aggravated by prolonged activity. Appellant reported that her symptoms have improved due to the nature of her light-duty position. She

diagnosed lumbago and advised that appellant could return to work without limitations. In prescription notes dated January 11, March 14 and May 16, 2006, Dr. Jarrett advised that appellant could continue to work light duty.

In a decision dated August 28, 2006, the Office denied appellant's request for an oral hearing. The Office found that the request was not timely filed. Appellant was informed that her case had been considered in relation to the issues involved, and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation 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 the 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.¹

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) 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 causal relationship is generally 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 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.²

ANALYSIS -- ISSUE 1

It is not disputed that appellant's duties as an aircraft worker included bending, lifting and pushing aircraft equipment. It is also not disputed that she was diagnosed with low back pain and radiculopathy. However, appellant has not submitted sufficient medical evidence to

¹ Gary J. Watling, 52 ECAB 357 (2001).

² Solomon Polen, 51 ECAB 341 (2000).

support her low back pain and radiculopathy are causally related to specific factors of her employment. On August 16 and September 12, 2005 the Office advised appellant of the medical evidence needed to establish her claim. Appellant did not submit a rationalized medical report from an attending physician addressing how specific employment factors caused or aggravated her claimed back condition.

Dr. Jarrett treated appellant for lumbar pain and advised that she could return to light-duty work. On May 25, 2005 he diagnosed intermittent symptomatic lumbar degenerative disc disease. However, Dr. Jarrett failed to provide a history of injury. He did not discuss appellant's work duties or provide a rationalized opinion regarding the causal relationship between appellant's lumbar pain, radiculopathy and lumbar degenerative disc disease and the factors of her employment.³ Dr. Jarrett did not address how her work would cause or contribute to the development of her work condition. In reports dated August 24 to September 28, 2005, he noted that appellant underwent three lumbar epidural steroid injections without much improvement. Dr. Jarrett diagnosed mechanical low back pain and intermittent symptomatic lumbar disc disease. He noted that appellant related her back pain to her work activities as a sheet metal mechanic and that she did not believe she could return to her regular position. However, Dr. Jarrett merely repeated the history as reported by appellant without providing his own opinion addressing how appellant's condition was work related. He failed to provide a rationalized opinion regarding the causal relationship between appellant's low back pain and her employment factors or explain how her work caused or contributed to such condition.⁴ Therefore, Dr. Jarrett's opinion is insufficient to meet appellant's burden of proof.

Appellant also submitted reports from Drs. Obamwonyi and Parker who treated her for back pain and numbness in the right leg. They diagnosed incidental elevated blood pressure and persistent low back discomfort and advised that appellant could return to work with restrictions. However, the physicians failed to provide a history of injury, address her work or provide a rationalized opinion regarding the causal relationship between appellant's low back pain and numbness in the right leg and the factors of her employment believed to have caused or contributed to such condition.⁵ Therefore, these reports are insufficient to meet appellant's burden of proof.

Appellant also submitted a physician's assistant note dated July 6, 2005. However, the Board has held that treatment notes signed by a physician's assistant are not considered medical evidence as a physician's assistant is not a physician as defined under the Act.⁶ Therefore, this report is insufficient to meet appellant's burden of proof.

³ *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

⁴ *Id.*

⁵ See *Jimmie H. Duckett*, *supra* note 4.

⁶ See 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

The remainder of the medical evidence, including x-ray of the lumbar spine dated April 13, 2005 and an MRI scan of the lumbar spine dated July 20, 2005, fail to provide an opinion on the causal relationship between appellant's job and her diagnosed conditions of lumbar pain and radiculopathy.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is sufficient to establish causal relationship.⁷ Causal relationships must be established by rationalized medical opinion evidence. Appellant failed to submit such evidence and the Office therefore properly denied appellant's claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides 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 her claim before a representative of the Secretary."⁸ Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.⁹ Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹⁰ The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

"If the claimant is not entitled to a hearing or review (*i.e.*, the request was untimely, the claim was previously reconsidered, etc.), H&R [Hearing and Review] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."¹¹

ANALYSIS -- ISSUE 2

In the present case, appellant requested a hearing in a letter dated August 10, 2006 and postmarked August 12, 2006. Section 10.616 of the federal regulations provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."¹² As the postmark date of the request

⁷ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁸ 5 U.S.C. § 8124(b)(1).

⁹ 20 C.F.R. §§ 10.616, 10.617.

¹⁰ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

¹² 20 C.F.R. § 10.616.

was more than 30 days after issuance of the October 24, 2005 Office decision, appellant's request for an oral hearing was untimely filed.

The Office notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. The Office has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.¹³ There is no indication that the Office abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish an employment-related back condition. It further finds that the Office properly denied appellant's request for a hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2006 and October 24, 2005 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 17, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹³ *Samuel R. Johnson*, 51 ECAB 612 (2000).