U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA TORMAN and DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, Utah

Docket No. 96-438; Submitted on the Record;
Issued February 4, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden of proof in establishing that her disability on or after November 3, 1994 was causally related to her accepted employment injury; (2) whether the Branch of Hearings and Review properly denied her request for an oral hearing; (3) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for review of the merits on August 17, 1995; and (4) whether appellant has met her burden of proof in establishing that she sustained an emotional condition due to factors of her federal employment.

Appellant filed a claim on September 20, 1994, alleging that on September 16, 1994, she developed muscle strain in her neck, back and shoulder due to factors of her federal employment. The Office accepted appellant's claim for cervical strain on December 21, 1994. Appellant filed claims requesting additional compensation after November 3, 1994. By decision dated February 13, 1995, the Office found appellant's continuing disability was not causally related to her accepted employment condition. Appellant requested reconsideration on February 28, 1995. Appellant submitted a request for an oral hearing dated February 27, 1995 and received by the Office on April 13, 1995. By decision dated April 17, 1995, the Office denied modification of its February 13, 1995 decision. In a decision dated May 8, 1995, the Branch of Hearings and Review denied appellant's request for an oral hearing as she had previously requested reconsideration. Appellant requested reconsideration on August 7, 1995 and by decision dated August 17, 1995, the Office declined to reopen appellant's claim for review of the merits.

Appellant filed a claim for an emotional condition on June 26, 1995 and an additional claim for chronic fatigue on October 23, 1995.[1] By decision dated October 24, 1995, the Office denied appellant's claim for an emotional condition.

The Board finds that appellant has failed to meet her burden of proof in establishing that her disability on or after November 3, 1994 was causally related to her accepted employment injury.

An employee seeking benefits under the Federal Employee's Compensation Act[2] 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.[3]

Appellant's attending physician, Dr. Lawrence E. George, a Board-certified family practitioner, completed a form report on September 23, 1994 and diagnosed chronic fatigue, cervical sprain and fibromyalgia. He indicated that appellant could return to regular duty on October 25, 1994 pending reevaluation. Dr. George completed a work restriction evaluation on October 28, 1994 and indicated it was uncertain whether appellant could return to work eight hours a day. He stated appellant was suffering with fibromyalgia and severe emotional problems with regard to her previous job position. Dr. George stated, "I would expect she could return to full time work in another area after rehabilitation counseling when her condition improves."

These reports are not sufficient to meet appellant's burden of proof in establishing that she was totally disabled after November 1994 due to her accepted condition of cervical strain. Dr. George did not clearly state that appellant was totally disabled and did not provide an opinion that her disability was due to her accepted employment injury of cervical strain.

In a report dated December 7, 1994, Dr. George noted appellant's history of injury and listed her physical findings during his first examination on September 15, 1994 as spasm and tenderness in the neck, upper back and shoulders. He stated at the time of his second evaluation on September 23, 1994 that his diagnosis was fibromyalgia. Dr. George stated that fibromyalgia was a muscle spasm disorder precipitated by the muscle strain in combination with appellant's significant emotional problems. He stated as of this report appellant's problems were primarily of a psychological nature with secondary fibromyalgia.

This report is not sufficient to meet appellant's burden of proof as the Office has not accepted fibromyalgia nor an emotional condition as causally related to appellant's federal

[1] The record does not contain a final decision on this claim, therefore, the Board may not address it on appeal; *see* 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. §§ 8101-8193.

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

employment. Dr. George did not opine that appellant's accepted condition of cervical strain had rendered her totally disabled, but instead suggested that her disability was due to her psychological condition.

On November 21, 1994 Dr. William F. Brandt, a physician Board-certified in physical medicine and rehabilitation, noted appellant's history of injury and provided the results of his physical examination including limited range of motion and multiple trigger points. He diagnosed cervical and lumbar strain secondary to overuse as well as fibromyalgia initiated by the strains, probable hyperthyroidism, depression and bilateral carpal tunnel syndrome. On December 1, 1994 Dr. Brandt listed his diagnoses as cervical strain, lumbar strain, major depression, hyperthyroidism and bilateral carpal tunnel syndrome. He stated, "I felt that the majority of her disability was related to her depression which may be aggravated by underlying hyperthyroidism. Fibromyalgia which is initiated by cervical and lumbar strains can also be aggravated by hyperthyroidism."

These reports also fail to support appellant's claim for total disability after November 1994 due to her accepted condition of cervical strain. Dr. Brandt attributed appellant's disability to her depression which has not been accepted by the Office as causally related to her accepted employment injury or other factors of her federal employment.

On December 12, 1994 Dr. Brandt stated that appellant had been unable to work since her work-related cervical strain on September 16, 1994. He stated appellant continued to be symptomatic and limited in her ability to work. Dr. Brandt recommended that appellant's medical leave continue for an additional two months. Although Dr. Brandt noted appellant's disability since September 16, 1994 he failed to provide any explanation for his current opinion that this disability was attributable to her accepted condition. Such supportive medical reasoning is necessary to meet appellant's burden of proof given Dr. Brandt's previous reports which attributed appellant's disability to nonemployment-related conditions.

In a report dated January 5, 1995, Dr. Brandt diagnosed cervical and lumbar strains, improved, and residual thoracic interspinous ligament strain. He stated:

> "Psychiatric follow-up recommended as this is her greatest current disabling condition. She probably has mild residual thoracic strain which would leave her with five percent impairment of the whole person if it does not improve within the next three months."

On January 26, 1995 Dr. Brandt noted appellant's history of injury and stated that her complaints of cervical and lumbar pain had improved. He stated appellant continued to have residuals of her thoracic condition and provided lifting restrictions due to this condition. Dr. Brandt stated that appellant's most disabling condition was depression.

Dr. Brandt again attributed appellant's disability to conditions not accepted by the Office including her emotional condition and a thoracic strain. For this reason, his reports are not sufficient to establish that appellant was disabled after November 1994.

The Board further finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

Appellant requested an oral hearing in a letter dated February 27, 1995 and date stamped as received by the Office on April 13, 1995.[4] By decision dated May 8, 1995, the Branch of Hearings and Review denied appellant's request for an oral hearing.

Section 8124(b) of the Federal Employees' Compensation Act,[5] concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[6]

In the instant case, the Office properly determined that appellant's hearing request was made after reconsideration had been undertaken in her claim. The Office, therefore, properly denied appellant's hearing as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing and properly exercised its discretion in determining to deny appellant's request for a hearing as she had other review options available.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits on August 17, 1995.

Appellant requested reconsideration of the Office's February 13, 1995 decision on August 7, 1995.

Section 10.138(b)(1) of the Code of Federal Regulations provides 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.[7] Section 10.138(b)(2) provides that when an application for review of the merits of a

[4] This is the only copy of appellant's request for an oral hearing in the record and the envelope is not included. There is no indication that the Office or Branch of Hearings and Review received this request prior to April 13, 1995.

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8124(b)(1).

[7] 20 C.F.R. § 10.138(b)(1).

claim does not meet at least one of these three requirements, the Office will deny the application for review without review the merits of the claim.[8]

In support of her request for reconsideration, appellant submitted a report from Dr. Brandt dated March 15, 1995. This report does not constitute relevant new evidence requiring the Office to reopen appellant's claim for review of the merits as Dr. Brandt merely repeated his earlier reports and attributed appellant's disability to her depression.

Appellant submitted a report dated June 9, 1995 from Dr. Michael D. Woolman, a Board-certified family practitioner, diagnosing chronic fatigue syndrome and fibromyalgia. He concluded that appellant was medically disabled.

Appellant submitted a report dated July 5, 1995 from Dr. Annette G. Burst, a physician Board-certified in preventative medicine, opining that appellant was generally unhealthy appearing and noting her complaints of pain and stress reaction. Dr. Burst concluded that appellant probably could not work at a new job.

These reports do not constitute relevant new evidence requiring the Office to reopen appellant's claim for review of the merits as Drs. Woolman and Burst did not address the causal relationship between appellant's disability and her accepted employment injury of cervical strain. The Office previously denied appellant's claim due to a lack of medical opinion evidence supporting causal relationship between disability and employment injury and only medical evidence which is relevant to this specific issue is sufficient to require the Office to reopen appellant's claim for review of the merits.

Appellant also submitted a statement from her supervisor addressing her position requirements, employing establishment documents relating to her requested disability retirement, a portion of her 1995 evaluation, a leave and earnings statement, a claim for job-related stress, a claim for compensation dated June 26, 1995, a supervisor's description of the employment incident, and a form report from Dr. George dated September 23, 1994. This evidence is not sufficient to require the Office to reopen appellant's claim for review of the merits as it is not relevant to the issue for which the Office denied appellant's claim, the failure to submit sufficient well-rationalized medical opinion evidence to establish a causal relationship between appellant's disability for work and her accepted employment injury.

Appellant also resubmitted her original claim form. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[9]

The Board further finds that appellant failed to meet her burden of proof in establishing that she sustained an emotional condition due to factors of her federal employment.

[8] 20 C.F.R. § 10.138(b)(2).

[9] *See Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

Appellant filed a claim on June 26, 1995 alleging that she developed an emotional condition due to factors of her federal employment. The Office denied her claim by decision dated October 24, 1995.

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 illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment to hold a particular position.[10]

Appellant attributed her emotional condition to her desire to have her grade level reflect her abilities, interests and performance. Appellant stated that she was overqualified for her position and asked to be placed somewhere else. Failure to be promoted is not compensable under the Act because the lack of a promotion does not involve an employee's ability to perform his or her regular or specially assigned duties but rather constitutes the employee's desire to work in a different position.[11] Here appellant's supervisor supported appellant's assertion of her abilities and noted that if there had been a higher grade position available, he would have considered appellant for the position.

Appellant stated that she experienced management retaliation and that she endured animosity from coworkers. For harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[12] Appellant has submitted no factual basis for her claim of animosity from coworkers or retaliation from management, therefore, she has failed to establish this factor of employment.

Appellant stated that she was totally submerged in the work environment and determined to "fix it." She worked at home at night and weekends to fill in for the fatigue and reduced performance, concentration problems and anxiety attacks she experienced at work. The Board finds that this allegation does not constitute a compensable factor of employment as appellant does not attribute her emotional condition to work at home and on weekends, but instead alleges that she worked at home and on weekends to complete duties which she neglected during regular hours due to her emotional condition.

[10] *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

[11] *Peggy Ann Lightfoot*, 48 ECAB ___ (Docket No. 95-1676, issued May 2, 1997).

[12] *Alice M. Washington*, 46 ECAB ___ (Docket No. 93-1156, issued December 29, 1994).

Appellant attributed her emotional condition to her employment injury. Appellant's cervical strain was accepted by the Office as occurring in the performance of duty and appellant has attributed her emotional condition to this injury. Therefore, the Board finds that appellant has established that the September 16, 1994 employment injury constitutes a compensable employment factor.[13]

As appellant has established a compensable factor of employment, the issue then becomes whether the medical evidence establishes that her emotional condition was caused or aggravated by her accepted employment injury.

In support of her claim, appellant submitted a report dated June 9, 1995 from Dr. Woolman noting appellant's accepted employment injury and diagnosing chronic fatigue syndrome and fibromyalgia. As Dr. Woolman did not offer an opinion on the causal relationship between appellant's accepted employment injury and her conditions, his report is not sufficient to meet her burden of proof.

Dr. Burst's report dated July 5, 1995 noted appellant's September 1994 employment injury and stated appellant was unhealthy. She noted appellant's reports of pain and resulting stress reaction and stated that it was improbable that appellant could work. Dr. Burst did not offer an opinion on the causal relationship between appellant's stress reaction and her accepted employment injury and, therefore, her report does not meet appellant's burden of proof.

In a note dated March 15, 1995, Dr. Brandt noted appellant's complaints of stress and diagnosed cervical thoracic strain, chronic and depression. He stated appellant was not medically disabled due to the cervical thoracic strain. This report does not establish a causal relationship between appellant's accepted employment injury and her emotional condition.

Dr. Jack Farber, a Board-certified psychiatrist, completed a report on April 6, 1995 and noted appellant's history of employment-related cervical injury. He diagnosed major depression and stated that appellant may have a pain disorder associated with both psychological factors and a general medical condition. Although Dr. Farber noted that appellant felt that there was a temporal link between her employment injury and her emotional condition, he did not offer a medical opinion on the relationship between the two.

As appellant has failed to submit the necessary medical opinion evidence to establish a causal relationship between her compensable factor of employment, her accepted condition of cervical strain, and her emotional condition, appellant has failed to meet her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment.

The decisions of the Office of Workers' Compensation Programs dated October 24, August 17, May 5 and February 13, 1995 are hereby affirmed.

Dated, Washington, D.C.
February 4, 1998

[13] *Clara T. Norga,* 46 ECAB ___ (Docket No. 93-853, issued January 31, 1995).

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member