

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY K. POWERS and NATIONAL CREDIT UNION
ADMINISTRATION, REGION VI, Concord, Calif.

*Docket No. 96-1663; Submitted on the Record;
Issued May 1, 1998*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established any disability causally related to her accepted back injury; and (2) whether the Office of Workers' Compensation Programs properly denied her request for a hearing.

On September 2, 1994 appellant filed a claim alleging that her sciatica was causally related to her federal employment. Appellant indicated in a narrative statement that her condition was aggravated by driving and sitting as part of her duties as an auditor.¹ The Office accepted the claim for aggravation of left sciatica. By decision dated January 26, 1996, the Office determined that appellant did not have any disability commencing December 14, 1993 causally related to the employment injury. Appellant requested a hearing by letter dated March 1, 1996 and the Office, by decision dated April 1, 1996, denied the request for a hearing as untimely.

The Board has reviewed the record and finds that appellant has not established a period of disability for the accepted employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim, including that any disability for which compensation is claimed is causally related to the employment injury.³

An attending neurologist, Dr. Scott Shoemaker, indicated in a June 30, 1995 report, that appellant's left sciatica had been aggravated by prolonged sitting, while driving from site to site. In letters dated July 31 and August 16, 1995, the Office asked Dr. Shoemaker to provide an

¹ The record indicates that appellant had stopped working on December 14, 1993 and did not return to work.

² 5 U.S.C. §§ 8101-8193.

³ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

opinion as to disability, resulting from the employment-related aggravation. In a report dated August 11, 1995, Dr. Shoemaker stated that appellant had suffered from sciatica for approximately 18 to 24 months, prior to his initial examination on February 22, 1993 and that driving would exacerbate that condition, but even without driving appellant had an underlying sciatica. He indicated that he was under the impression that appellant was forced into disability retirement, because her employer could not accommodate a need for frequent breaks from driving and therefore the issue of disability had already been decided.

Dr. Shoemaker does not provide a reasoned opinion in his August 11, 1995 report, on the issue of whether the aggravation caused disability on or after December 14, 1993. The Board notes that when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation.⁴ Where the aggravation is temporary and leaves no permanent residuals, compensation is not payable after the aggravation has ceased.⁵ In other words, even though an employee is found to be medically disqualified to continue in such employment, because of the possibility of future aggravation, this would not be compensable if the prior aggravation by the identified employment factors has resolved.⁶ The Office advised Dr. Shoemaker of the relevant issues regarding aggravation and disability in a July 31, 1995 letter, but the physician does not explain his statement as to disability, nor does his subsequent report dated August 29, 1995 clarify the issue. In this report Dr. Shoemaker stated that, appellant's sciatica was permanent and stationary and "temporary aggravations of sciatica, will continue to occur indefinitely. These temporary aggravations are produced by prolonged sitting without positional changes (such as driving) or by stress." Dr. Shoemaker stated that appellant could return to work, if she was restricted to no more than 30 minutes of driving without a break.

In referring to "temporary aggravations," Dr. Shoemaker appears to be discussing current aggravations, rather than the employment-related aggravations occurring prior to December 14, 1993. He does not clearly indicate whether he believed sitting and driving in federal employment caused a disabling aggravation and if so, the period of disability. Given that Dr. Shoemaker was unresponsive to this issue, the Office properly referred the case to Dr. Jerry L. Morris, an orthopedic surgeon, serving as a second opinion referral physician. In a report dated October 23, 1995, Dr. Morris provided a history, results on examination and reviewed the medical record. In a supplemental report dated December 19, 1995, Dr. Morris stated in pertinent part:

"It is my opinion that [appellant's] disability on December 14, 1993 to the present is not reasonably related to any industrially-caused change in her sciatica.

"Any industrially-related change would have ceased at the time she stopped work on December 14, 1993. My opinion for this conclusion is that she was no longer

⁴ *Larry Warner*, 43 ECAB 1027 (1992).

⁵ *Id.*; *Gaetan F. Valenza*, 39 ECAB 1349 (1988).

⁶ *See Gaetan F. Valenza, supra* note 5; *James L. Hearn*, 29 ECAB 278 (1978).

required to sit for prolonged periods of time and could move about on an as needed basis which she could not do when she was working.”

Dr. Morris offers an opinion, based on a complete background, that appellant had a temporary aggravation caused by her employment, that ceased as of the time she stopped work. This represents the weight of the evidence of record on the issue, since there is no probative medical opinion evidence to the contrary. As noted above, compensation is not payable after the employment-related aggravation has ceased. The Board accordingly finds that the Office properly determined that appellant did not have any employment-related disability commencing on or after December 14, 1993.

The Board further finds that the Office properly denied appellant’s request for a hearing.

Section 8124(b)(1) of the Act provides in pertinent part:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this title 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.”⁷

A claimant requesting a hearing after the 30-day period is not entitled to a hearing as a matter of right.⁸ In this case, appellant requested a hearing by letter dated March 1, 1996. Since this is more than 30 days after the January 29, 1996 decision, appellant is not entitled to a hearing as a matter of right.⁹

Although appellant’s request for a hearing was untimely, the Office has discretionary authority, with respect to granting a hearing and the Office must exercise such discretion.¹⁰ In the April 1, 1996 decision, the Office advised appellant that the issue in the case could properly be resolved by requesting reconsideration and submitting relevant evidence. This is considered a proper exercise of the Office’s discretionary authority.¹¹ There is no evidence of an abuse of discretion in this case.

⁷ 5 U.S.C. § 8124(b)(1).

⁸ See *Robert Lombardo*, 40 ECAB 1038 (1989).

⁹ Although appellant stated she did not receive the decision until early February 1996, and therefore the hearing request was filed within 30 days, under section 8124(b)(1) the 30-day period begins to run from the date the Office decision was issued.

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

¹¹ *Mary B. Moss*, 40 ECAB 640, 647 (1989).

The decisions of the Office of Workers' Compensation Programs dated April 1 and January 29, 1996 are affirmed.

Dated, Washington, D.C.
May 1, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member