U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL WHITE and DEPARTMENT OF THE ARMY,
ROCK ISLAND ARSENAL, Rock Island, Ill.

Docket No. 96-2246; Submitted on the Record;
Issued November 23, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence of disability on or after September 11, 1994 causally related to her August 27, 1993 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for subpoenas.

On August 27, 1993 appellant, then a 28-year-old janitor, sustained a cervical strain in the performance of duty while emptying a bucket.

In clinical notes dated January 18, 1994, Dr. John E. Sinning, Jr., a Board-certified orthopedic surgeon, noted that appellant had tolerated limited regular work very well and wanted to return to full-time regular work. He provided findings on examination and opined that appellant's cervical strain was resolved.

On September 19, 1994 appellant filed a claim for a recurrence of disability on September 11, 1994 which she attributed to her August 27, 1993 employment injury.

By decision dated February 14, 1995, the Office denied appellant's claim for a recurrence of disability commencing on September 11, 1994.

Appellant subsequently requested an oral hearing before an Office hearing representative.

By letter dated August 16, 1995, appellant's attorney submitted to the Office hearing representative a request for three subpoenas to be issued for the oral hearing. The attorney did not explain how the testimony of the requested witnesses was necessary to a full presentation of the case.

On September 11, 1995 a hearing was held before an Office hearing representative at which time appellant testified.

In notes dated September 19, 1994, Dr. Sinning, Jr., related that on the morning of September 11, 1994 appellant awoke with a stiff neck and pain in the right side of her neck. He provided findings on examination and diagnosed "recurrent acute cervical strain." Dr. Sinning Jr., indicated that appellant could continue her work.

In notes dated January 20, 1995, Dr. Sinning, Jr., related that appellant was seen in a follow-up examination for her August 1993 employment injury. He related that appellant no longer worked as a janitor and was now working as an assistant manager. Dr. Sinning, Jr., provided findings on examination and diagnosed "recurrent cervical and upper back pain." Regarding the cause of the condition, Dr. Sinning, Jr., wrote "Onset is spontaneous in that it is not predictable or seemingly related to work that she had been doing. There may be some workplace stress involved."

In notes dated March 2, 1995, Dr. Sinning, Jr., stated that appellant was complaining of neck and shoulder pain and related appellant's belief that this was related to her August 1993 employment injury. He stated:

> "[Appellant] thinks of this being a continuation of the work accident ... I agree that for a time it is reasonable to consider this as a continuation of that neck pain problem, but at some point it is no longer reasonable because of regular factors of life stress that have a far more significant effect on neck symptoms."

In a letter dated August 24, 1995, Dr. Sinning, Jr., stated that, between the time of appellant's August 27, 1993 employment injury and January 18, 1994, she was seen on a frequent basis and returned to full-time work on January 24, 1994 but continued to have problems with pain and was seen again on March 7, 1994. He noted that appellant's next visit was on September 19, 1994 with another exacerbation of neck pain with a history of having had continued awareness during the previous six months of neck pain. Dr. Sinning, Jr., stated, "It is because of that continued awareness of symptoms that I believe her September 1994 exacerbation of symptoms is part of the original work injury and its continued manifestation.... The reason for the conclusion that this is connected is because [appellant] has continued to have some level of symptoms since the onset of the accident."

By decision dated November 20, 1995, the Office hearing representative affirmed the Office's February 14, 1995 decision. He also denied appellant's request for subpoenas, noting that appellant's attorney had failed to indicate exactly who was being subpoenaed, what appellant sought to establish through the subpoenas, and did not indicate that such evidence could not be obtained through other means.

By letter dated March 14, 1996, appellant, through her representative, requested reconsideration of the denial of her claim and submitted additional evidence.

In a report dated March 1, 1996, Dr. Sinning, Jr., noted that appellant was performing custodial work when she was injured on August 27, 1993 but later began performing sedentary secretarial work with no lifting. Dr. Sinning, Jr., stated:

> "It must be emphasized that [appellant] never recovered to a point that she could return to her daily custodial work but only recovered to a point of returning to secretarial work with light custodial tasks, no more than one hour per day.
>
> "In spite of this minimal level of activity compared to full-time custodial work, she continued to have symptoms of neck pain and it is because of these continued symptoms and failure to make a full recovery allowing return to custodial work that I felt the September 1994 exacerbation of symptoms represented a work-connected progression or exacerbation of her symptoms."

By decision dated June 3, 1996, the Office denied appellant's request for reconsideration on the grounds that appellant had not submitted relevant evidence or legal argument not previously considered.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained a recurrence of disability on or after September 11, 1994 causally related to her August 27, 1993 employment injury.

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.[1] 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 rationale.[2] Where no such rationale is present, medical evidence is of diminished probative value.[3]

In this case, appellant alleged that she sustained a recurrence of disability on September 11, 1994 which she attributed to her August 27, 1993 employment-related cervical strain. In clinical notes dated January 18, 1994, Dr. Sinning, Jr., a Board-certified orthopedic surgeon, provided findings on examination and opined that appellant's cervical strain was resolved.

In notes dated September 19, 1994, Dr. Sinning, Jr., related that on the morning of September 11, 1994 appellant awoke with a stiff neck and pain in the right side of her neck. He provided findings on examination and diagnosed "recurrent acute cervical strain." Dr. Sinning, Jr., indicated that appellant could continue her work. However, Dr. Sinning, Jr., did

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[1] *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

[2] *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[3] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

not indicate the cause of the condition and therefore this report is not sufficient to establish that appellant sustained a recurrence of disability on September 11, 1994 causally related to her August 27, 1993 employment injury.

In notes dated January 20, 1995, Dr. Sinning, Jr., provided findings on examination and diagnosed "recurrent cervical and upper back pain." Regarding the cause of the condition, Dr. Sinning, Jr., wrote "Onset is spontaneous in that it is not predictable or seemingly related to work that she had been doing. There may be some workplace stress involved." As Dr. Sinning, Jr., indicated that that the back and neck pain did not seem to be related to appellant's work, this report is not sufficient to discharge appellant's burden of proof. Although he indicated that workplace stress might play some role in her condition, the Office has not accepted any stress condition as related to appellant's job.

In notes dated March 2, 1995, Dr. Sinning, Jr., stated that appellant was complaining of neck and shoulder pain and related appellant's belief that this was related to her August 1993 employment injury. He stated:

> "I agree that for a time it is reasonable to consider this as a continuation of that neck pain problem, but at some point it is no longer reasonable because of regular factors of life stress that have a far more significant effect on neck symptoms."

As Dr. Sinning, Jr., indicated that appellant's condition was no longer related to her employment injury, this report is not sufficient to discharge appellant's burden of proof that she sustained an employment-related recurrence of disability.

In a letter dated August 24, 1995, Dr. Sinning, Jr., stated that, between the time of appellant's August 27, 1993 employment injury and January 18, 1994, she was seen on a frequent basis and returned to full-time work on January 24, 1994 but continued to have problems with pain and was seen again on March 7, 1994. He noted that appellant's next visit was on September 19, 1994 with another exacerbation of neck pain with a history of having had continued awareness during the previous six months of neck pain. Dr. Sinning, Jr., stated, "It is because of that continued awareness of symptoms that I believe her September 1994 exacerbation of symptoms is part of the original work injury and its continued manifestation…. The reason for the conclusion that this is connected is because [appellant] has continued to have some level of symptoms since the onset of the accident. "However, Dr. Sinning, Jr., has provided insufficient medical rationale explaining how appellant's neck pain in September 1994 was causally related to her August 27, 1993 employment injury, particularly in light of the fact that Dr. Sinning, Jr., stated in his January 18, 1994 notes that the employment injury had resolved. He also failed to explain why he had indicated in his earlier reports that the condition was not work related. Furthermore, he did not provide any dates of disability. Therefore, this report is not sufficient to establish that appellant sustained a recurrence of disability on September 11, 1994 causally related to her August 27, 1993 employment injury.

In a report dated March 1, 1996, Dr. Sinning, Jr., noted that appellant was performing custodial work when she was injured on August 27, 1993 but later began performing sedentary secretarial work with no lifting. Dr. Sinning, Jr., stated:

> "It must be emphasized that [appellant] never recovered to a point that she could return to her daily custodial work but only recovered to a point of returning to secretarial work with light custodial tasks, no more than one hour per day.
>
> "In spite of this minimal level of activity compared to full-time custodial work, she continued to have symptoms of neck pain and it is because of these continued symptoms and failure to make a full recovery allowing return to custodial work that I felt the September 1994 exacerbation of symptoms represented a work-connected progression or exacerbation of her symptoms."

However, he failed to provide sufficient medical rationale explaining how the claimed disability and condition in September 1994 was related to the August 1993 employment injury. There is also an inaccurate factual background. As noted above, Dr. Sinning, Jr., indicated in notes dated January 18, 1994 that appellant's employment injury had resolved but he stated in this March 1, 1996 report that she had never made a full recovery. Furthermore, he has not indicated in his reports any dates that appellant was disabled from work. Because of these deficiencies, this report is not sufficient to discharge appellant's burden of proof.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[4] Appellant failed to submit rationalized medical evidence establishing that her claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied her claim for compensation.

The Board further finds that the Office did not abuse its discretion in denying appellant's requests for subpoenas.

Section 8126 of the Federal Employees' Compensation Act[5] states, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles." This section of the Act gives the Office discretion to grant or reject requests for subpoenas. The Office's regulation on subpoenas states, in part, "When reasonably necessary for full presentation of a case, an Office hearing representative may upon his or her own motion, or upon request of the claimant, issue subpoenas for the attendance and testimony of witnesses."[6]

[4] *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

[5] 5 U.S.C. § 8126.

[6] 20 C.F.R.C § 10.134(a).

The Office hearing representative, in a November 20, 1995 decision, noted that appellant's attorney had failed to indicate exactly who was being subpoenaed, what appellant sought to establish through the subpoenas, and did not indicate that such evidence could not be obtained through other means.

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts, and similar criteria. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[7] The Board finds no abuse of discretion in the finding of the Office hearing representative that appellant had failed to show that issuance of the requested subpoenas was necessary for a full presentation of the case.

The June 3, 1996 and November 20, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
November 23, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] *Dorothy Bernard*, 37 ECAB 124 (1985).