

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RENATE M. BROWN and DEPARTMENT OF DEFENSE, DEFENSE
LOGISTICS AGENCY, MALLONEE VILLAGE COMMISSARY, Fort Bragg, N.C.

*Docket No. 96-2440; Submitted on the Record;
Issued November 9, 1998*

DECISION and ORDER

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

The issues are: (1) whether appellant sustained an injury on April 29, 1995 in the performance of duty, as alleged; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's untimely request for a review of the written record.

On May 6, 1995 appellant, then a 51-year-old grocery department manager, filed a traumatic injury claim alleging that on April 29, 1995 she felt sharp pains in her neck and back while stocking milk and eggs at the commissary.

In a form report dated May 12, 1995, Dr. Gary L. Thorne, a chiropractor, diagnosed degenerative disc disease and spondylolisthesis and indicated by checking the block marked "yes" that the condition was caused or aggravated when appellant was stocking milk and eggs at work.

By letter dated January 30, 1996, the Office advised appellant that a chiropractor was only considered a physician under the Federal Employees' Compensation Act when diagnosing and treating a subluxation of the spine as diagnosed by x-ray and noted that Dr. Thorne had not made such a diagnosis and was therefore not considered a physician under the Act.

In a report dated February 8, 1996, Dr. Thorne provided findings on examination and stated that, after orthopedic, neurologic and radiographic examinations, his diagnosis was subluxations of the right and left sacroiliac joints, L4-5 and L5-S1 complicated by degenerative disc disease and spondylolisthesis.

In clinical notes dated February 19, 1996, Dr. Inad B. Atassi, a Board-certified neurosurgeon, related that appellant complained of persistent pain in the lower back with radiation to the right hip and right leg. He stated that a magnetic resonance imaging (MRI) scan appeared to reveal a disc herniation at the L5-S1 level on the right side and he diagnosed a herniated lumbar disc at L5-S1 on the right. Dr. Atassi did not indicate the cause of this condition.

In a note dated February 20, 1996, Dr. Atassi related that appellant was seen in his office on February 14, 1996 complaining of pain in the low back and right hip and leg which began after an incident at work on April 29, 1995. He stated “[h]er lumbar MRI revealed a disc herniation at the L5-S1 level on the right side which, in my opinion, is due to her job-related injury that she sustained in April 1995.”

By decision dated April 3, 1996, the Office denied appellant’s claim on the grounds that fact of injury had not been established.

By letter dated June 12, 1996, appellant requested a review of the written record by the Office’s Branch of Hearings and Review.

By decision dated July 22, 1996, the Branch of Hearings and Review denied appellant’s request for a review of the written record on the grounds that her request had not been timely submitted and that the issue in the case could be equally well resolved by a request for reconsideration and the submission of additional evidence.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained an injury on April 29, 1995 in the performance of duty, as alleged.

An award of compensation may not be based on surmise, conjecture, speculation, or appellant’s belief of causal relationship.¹ The Board has held that the mere fact that a disease or condition manifests itself during a period of employment does not raise an inference of causal relationship between the condition and the employment.² Neither the fact that the condition became apparent during a period of employment nor appellant’s belief that the employment caused or aggravated her condition is sufficient to establish causal relationship.³ While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty,⁴ neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.⁵ Appellant submitted no such evidence in support of her claim and therefore failed to discharge her burden of proof.

On May 6, 1995 appellant, then a 51-year-old grocery department manager, filed a traumatic injury claim alleging that on April 29, 1995 she felt sharp pain in her neck and back while stocking milk and eggs at the commissary.

¹ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979); *Miriam L. Jackson Gholikely*, 5 ECAB 537, 538-39 (1953).

² *Edward E. Olson*, 35 ECAB 1099, 1103 (1984).

³ *Ern Reynolds*, 45 ECAB 690 (1994); *James Mack*, 43 ECAB 321 (1991); *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).

⁴ *See Kenneth J. Deerman*, 34 ECAB 641 (1983).

⁵ *See Margaret A. Donnelley*, 15 ECAB 40 (1963); *Morris Scanlon*, 11 ECAB 384 (1960).

In a form report dated May 12, 1995, Dr. Thorne, a chiropractor, diagnosed degenerative disc disease and spondylolisthesis of L5 on S1⁶ and indicated by checking the block marked “yes” that the condition was caused or aggravated when appellant had been stocking milk and eggs at work. Although Dr. Thorne later diagnosed spondylolisthesis as shown by x-ray, thus qualifying him as a “physician” under the Act under the limited definition for a chiropractor, the Board has held that an opinion on causal relationship which consists only of checking “yes” to a form report question on whether the claimant’s disability was related to the history given is of little probative value.⁷ Without any explanation or rationale, such a report has little probative value and is insufficient to establish causal relationship.⁸

In a report dated February 8, 1996, Dr. Thorne provided findings on examination and stated that, after orthopedic, neurologic and radiographic examinations, his diagnosis was spondylolisthesis of the right and left sacroiliac joints, L4-5 and L5-S1 complicated by degenerative disc disease and spondylolisthesis. However, he did not provide a rationalized medical opinion explaining how appellant’s back condition was causally related to the alleged incident at work on April 29, 1995 and therefore this report is not sufficient to discharge appellant’s burden of proof.

In clinical notes dated February 19, 1996, Dr. Atassi, a Board-certified neurosurgeon, related that appellant complained of persistent pain in the lower back with radiation to the right hip and right leg. He stated that an MRI scan appeared to reveal a disc herniation at the L5-S1 level on the right side and he diagnosed a herniated lumbar disc at L5-S1 on the right. However, he did not indicate the cause of this condition and therefore this report does not support appellant’s claim of an employment-related injury.

In a note dated February 20, 1996, Dr. Atassi related that appellant was seen in his office on February 14, 1996 complaining of pain in the low back and right hip and leg which she attributed to an incident at work on April 29, 1995. He stated “[h]er lumbar MRI revealed a disc herniation at the L5-S1 level on the right side which, in my opinion, is due to her job-related injury that she sustained in April 1995.” However, Dr. Atassi did not provide any factual background for his opinion. He did not relate any details of the incident such as the activity appellant was performing at the time of the April 29, 1995 employment injury. Nor did he provide any rationalized explanation as to how appellant’s back condition which he diagnosed in 1996 was causally related to the April 29, 1995 incident. Although he states that it was his opinion that appellant’s back condition was related to the 1995 incident, he failed to explain how he arrived at that conclusion, particularly in light of the fact that he did not examine appellant until February 1996, ten months after the incident. Due to these deficiencies, this report is not sufficient to establish that appellant sustained an employment-related injury on April 29, 1995, as alleged.

⁶ After appellant was notified by the Office that a chiropractor was only considered a physician under the Act when diagnosing and treating a spondylolisthesis of the spine as diagnosed by x-ray (see 5 U.S.C. § 8101(2)), Dr. Thorne changed his diagnosis to spondylolisthesis complicated by degenerative disc disease and spondylolisthesis.

⁷ *Deborah S. King*, 44 ECAB 203 (1992); *Donald W. Long*, 41 ECAB 142, 146 (1989).

⁸ *Id.*

The Board further finds that the Office did not abuse its discretion in denying appellant's untimely request for a review of the written record.

The Board notes that effective June 1, 1987 the Office's regulations implementing the Act were revised. Several revisions were made which affect the appellate rights of employees who seek review of the Office's final decisions. Section 8124 provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision. The Office's new regulations have expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing." The Office has provided that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.⁹

In the present case, the Office denied appellant's request for a review of the written record on the grounds that the request was untimely. In its July 22, 1996 decision, the Office stated that appellant was not entitled as a matter of right to a review of the written record since her June 12, 1996 request was not made within 30 days of the Office's April 3, 1996 decision. The Office noted that it had considered the matter in relation to the issue involved and determined that appellant's request was denied on the basis that the issue of causal relationship could be addressed through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁰ The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.¹¹

While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right, the Office, in its July 22, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that the issue of causal relationship could be addressed through a reconsideration application.

The July 22 and April 3, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
November 9, 1998

⁹ 20 C.F.R. § 10.131(b); see *Michael J. Welsh*, 40 ECAB 994, 996 (1989).

¹⁰ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹¹ See *Welsh*, *supra* note 9 at 996-97.

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member