

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN R. STEWART and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Hartford, Conn.

*Docket No. 97-338; Submitted on the Record;
Issued April 5, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues on appeal are: (1) whether appellant has met his burden of proof to establish that he sustained injuries on May 27 and June 3, 1993 and September 2, 1994 in the performance of duty causally related to factors of his federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration of the Office's denial of his claim for an injury on October 21, 1993 on the grounds that the request was untimely and failed to demonstrate clear evidence of error.

Appellant, an administrative law judge, filed claims alleging that he sustained back injuries at work on May 27, June 3 and October 21, 1993 and September 2, 1994.

Under file number A1334996, appellant filed a claim on May 27, 1993¹ alleging that he suffered a back injury on May 27, 1993 while moving furniture at work.² By decision dated March 19, 1996, this claim was denied by the Office.

Under file number A1334997, appellant alleged that he strained his back on June 3, 1993 while moving file cabinets. This claim form was filed on October 23, 1995. By decision dated March 19, 1996, the Office denied appellant's claim.

Under file number A1334998, appellant alleged that he sustained a back injury on September 2, 1994 which he attributed to the claimed incident on June 3, 1993 while moving file cabinets. He noted that on September 1 and 2, 1994 he experienced additional pain in his back while driving from Connecticut to Missouri. By decision dated March 19, 1996, the Office denied appellant's claim.

¹ Appellant was 60 years of age on this date.

² Appellant subsequently stated that he was mistaken and that there was no injury on May 27, 1993 but that there was an injury on June 3, 1993.

Under file number A1323465, appellant alleged that he sustained a back injury on October 21, 1993 while moving a television set and a video cassette recorder which he attributed to an “aggravation” of an injury sustained in “May 1993” while moving file cabinets. He filed this claim form on August 10, 1994.

In a letter dated October 28, 1994, appellant stated that on October 21, 1993 he moved a television set and a video cassette recorder at work and that the lifting involved caused him severe back pain. He stated that this incident followed an incident in May 1993 when he moved file cabinets.

In a report dated November 18, 1994, Dr. Guy Owens, a Board-certified neurosurgeon, related that appellant had complained of pain in his low back and right hip area “for several years probably beginning in May of 1993” and that the problem “began as a result of furniture moving on the job and has been aggravated on at least one occasion with work-related activities.” He related that the pain was always present though at varying degrees of severity and that “physical activity can aggravate the situation, driving a car any distance for any length of time is difficult, sitting in a chair is frequently a problem and is part of his job description.” Dr. Owens provided findings on examination and diagnosed nerve root compression or irritation in the lumbar region. He noted that a magnetic resonance imaging (MRI) scan had been scheduled.

By decision dated December 9, 1994, the Office denied appellant’s claim for an injury on October 21, 1993 on the grounds that the evidence of record failed to establish that he had sustained an injury on that date or any other date causally related to factors of his federal employment.

Following the Office’s December 9, 1994 decision, additional evidence was received.

An MRI report dated November 29, 1994, received on December 21, 1994, indicated that appellant had moderate spondylosis at L4-5 with a borderline central stenosis and slight to mild stenosis at L5-S1 and L3-4.

In a report dated December 9, 1994, received by the Office on December 21, 1994, Dr. W. Jay Krompinger, a Board-certified orthopedic surgeon, stated that appellant gave a history of lifting file cabinets at work in “approximately May 1993” and that he experienced back pain for several weeks, had some improvement, and then became symptomatic again. He stated that diagnostic studies were indicative of lumbar degenerative disc disease. Dr. Krompinger stated that “The mechanism of injury and [appellant’s] complaints are consistent and I believe this is a credible patient.”

By letter dated December 7, 1995, through his attorney, which was hand-delivered and stamped by the Office as received on December 7, 1995, appellant requested a “review” of the Office’s December 9, 1994 decision and submitted additional new evidence as well as evidence previously of record.

In a report dated September 20, 1994, Dr. Krompinger related that appellant had developed back pain after lifting file cabinets at work in May 1993, that he was symptomatic for

approximately one to two months, but that his symptoms had dissipated over time. He related that appellant had been experiencing a gradual return of back pain over the past several weeks. Dr. Krompinger provided findings on examination and noted that x-rays of the spine were indicative of a degenerative disease. He stated, "He most likely sustained an original discogenic injury in May of 1993."

In notes dated December 16, 1994, Dr. Owens related that an MRI of the lumbosacral spine showed significant pathology which could require surgery at some time in the future. He stated that appellant was given a note indicating that he should be off work for 30 days and that he should consider retirement or a reduction in his traveling.

In a report dated November 21, 1995, Dr. Owens stated that he initially saw appellant on November 18, 1994 for back pain which appellant felt had occurred in May 1993 when he moved file cabinets at work. He stated, "On further review it is probable that this injury actually occurred on June 3, 1993." Dr. Owens related that on October 21, 1993 appellant again experienced back pain when he moved a television set and video cassette recorder and that "transport[ing] himself from Albany to Hartford where his job demands his presence" aggravated his back condition. He stated that, as a result of the lifting episodes at work, appellant had a chronic back problem confirmed by the November 29, 1994 MRI.³ Dr. Owens noted that the MRI revealed spondylosis at the L4-5 level with a borderline central stenosis and slight to mild spondylosis at L5-S1 and L3-4. He provided findings on examination and stated:

"It is impossible to document their presence or absence prior to his original injury in June of 1993 but suffice it to say that the presence either then or at present, is significant in that they demonstrate back disorders which are consistent with severe lumbar spine pain which is aggravated by activity as well as any lifting process. It is my contention therefore that the back disorder which is disabling for [appellant] began specifically in June of 1993 and [was] further exacerbated by [a] lifting injury in October of 1993. Both incidents occurred at work. Compounding this were his needs to travel by motor vehicle especially on a two-day trip ... on September 2, 1994. His present status therefore is lumbar spine pathology instigated by work-related injuries and or aggravated by work activities which are significant by MRI studies."

"This disabling condition that resulted from the injuries producing abnormal lumbar spine findings by MRI are a frequent causative factor in preexisting disorders of the back and or initiating those disorders seen in the MRI study."

* * *

"There is no question in my mind that his present predicament is directly related to injuries sustained at work on at least two occasions and these coupled with the neurologic findings on the initial examination, triggered the request for MRI

³ Dr. Owens cited a November 30, 1994 date for the MRI but the record shows that the MRI was performed on November 29, 1994 and the report was typed on November 30, 1994.

studies which documented the pathology present in the lumbar region. His principle reason for missing a fair amount of time from work over the course of the last two years is directly related to chronic, severe pain present on a continuing basis with fluctuations of degrees of pain resulting from his activities and weather alterations. He is never free of pain and on some occasions can escape the painful condition only by bed rest. He is not able to sit or stand for long periods of time without having to change positions or having to ambulate. He will be afflicted with these circumstances for the rest of his life.”

In a letter dated March 4, 1996, appellant stated that he initially thought that he was injured on May 27, 1993 but that his hearing office manager informed him that the claimed incident occurred the subsequent week on June 3, 1993. He did not indicate the date that the office manager discussed the date of injury with him. Appellant also stated that, following a business trip on September 2, 1994, he again experienced symptoms which he felt were attributable to the incident on June 3, 1993.

By letter dated March 19, 1996 to appellant and his attorney, an Office claims examiner asked that appellant specify which of the appeal rights he was requesting. The claims examiner stated, “review is not one [of] the appeals rights.”

By letter dated April 14, 1996, appellant, through his attorney, requested reconsideration of the Office’s denial of his October 21, 1993 claim in its December 9, 1994 decision. At the top of his letter, he referenced the Office file numbers for all four of his back injury claims.

By decision dated July 11, 1996, the Office denied appellant’s request for reconsideration of the denial of his claims for injuries on May 27 and June 3, 1993 and September 2, 1994 on the grounds that he did not submit new and relevant evidence or legal argument not previously considered.

In a second decision dated July 11, 1996, the Office denied appellant’s request for reconsideration of the Office’s denial of his October 21, 1993 claim on the grounds that his request dated April 14, 1996 was untimely and the evidence submitted with his request failed to show clear evidence of error in the Office’s merit decision dated December 9, 1994.

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained an injury on May 27 or June 3, 1993 or September 2, 1994 causally related to factors of his employment.

An award of compensation may not be based on surmise, conjecture, speculation or appellant’s belief of causal relationship.⁴ 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.⁵ Neither the fact that the condition became apparent during a period of employment nor appellant’s belief that the employment

⁴ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979); *Miriam L. Jackson Gholikely*, 5 ECAB 537, 538-39 (1953).

⁵ *Edward E. Olson*, 35 ECAB 1099, 1103 (1984).

caused or aggravated his condition is sufficient to establish causal relationship.⁶ 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,⁷ 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.⁸

Appellant filed a claim on May 27, 1993 alleging that he suffered a back injury on May 27, 1993 while moving furniture at work. However, as noted above, he later stated that he was in error and the date of his claimed back injury was June 3, 1993. The claim for the May 27, 1993 date of injury was filed on that date. The claim for the June 3, 1993 date of injury was not filed until October 23, 1995.

An employee seeking benefits under the Federal Employees' Compensation Act⁹ has the burden of establishing the essential elements of his or her claim.¹⁰ When a claim for compensation is based on a traumatic injury, the employee must establish the fact of injury by proof of an accident or fortuitous event having relative definiteness with respect to time, place and circumstances and having occurred in the performance of duty, and by proof that such accident or fortuitous event caused an "injury" as defined in the Act and its regulations.¹¹

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on a claimant's statements. The employee has not met his burden of proof when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.¹²

In this case, appellant alleged that he was mistaken about sustaining an injury on May 27, 1993 and that the incident actually occurred on June 3, 1993. He stated in a March 4, 1996 letter

⁶ *Joseph T. Gulla*, 36 ECAB 516, 519 (1985).

⁷ *See Kenneth J. Deerman*, 34 ECAB 641 (1983).

⁸ *See Margaret A. Donnelley*, 15 ECAB 40 (1963); *Morris Scanlon*, 11 ECAB 384 (1960).

⁹ 5 U.S.C. §§ 8101-8193.

¹⁰ *See Margaret A. Donnelley*, *supra* note 8.

¹¹ *See John J. Carlone*, 41 ECAB 354 (1989); *Loretta Phillips*, 33 ECAB 1168, 1170 (1982); *Virgil M. Hilton*, 32 ECAB 447, 452 (1980); *Max Haber*, 19 ECAB 243, 247 (1967). For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

¹² *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); *see also George W. Glavis*, 5 ECAB 363 (1953).

that an individual in his office advised him that the incident involving moving furniture occurred on June 3, 1993, not May 27, 1993. As noted above, he did not indicate when this individual discussed the date with him, *i.e.*, whether it was 1993 or 1996 or some other time. Apparently, it was subsequent to August 10, 1994 because he filed his claim form for an injury on October 21, 1993 on August 10, 1994 and indicated in that claim form that his original claimed injury occurred in "May 1993." Appellant signed his claim form for the claimed May 27, 1993 injury on May 27, 1993. It would seem that on May 27, 1993, when he signed the claim form, he would recall whether he injured his back on that same date. Furthermore, the claim form for the June 3, 1993 date of injury was not filed until October 23, 1995, more than two years after the claimed June 3, 1993 injury. Such inconsistencies cast serious doubt as to whether the claimed initial incident occurred at work on June 3, 1993, as alleged.

Even if there were no inconsistencies regarding the date of injury, the medical evidence of record is not sufficient to establish that appellant sustained an injury in the performance of duty on June 3, 1993 or September 2, 1994 causally related to factors of his employment.

In a report dated September 20, 1994, Dr. Krompinger, a Board-certified orthopedic surgeon, related that appellant had developed back pain after lifting file cabinets at work in May 1993. He provided findings on examination and noted that x-rays of the spine were indicative of degenerative disease. Dr. Krompinger stated, "He most likely sustained an original discogenic injury in May of 1993." However, aside from providing a date of injury which appellant states is not correct, Dr. Krompinger provided insufficient medical rationale explaining how appellant's degenerative spinal condition was causally related to lifting file cabinets at work. Additionally, there is no mention of any incident or injury on June 3, 1993 or September 2, 1994 and no explanation from the physician as to why appellant did not seek treatment for the claimed 1993 condition until one year later; therefore this report is not sufficient to establish that a work-related injury occurred on June 3, 1993 or September 2, 1994, as alleged.

In a report dated November 18, 1994, Dr. Owens, a Board-certified neurosurgeon, related that appellant had complained of pain in his low back and right hip area beginning in May 1993 and that the problem "began as a result of furniture moving on the job and has been aggravated on at least one occasion with work-related activities." He related that the pain was always present though at varying degrees of severity and that "physical activity can aggravate the situation, driving a car any distance for any length of time is difficult." Dr. Owens provided findings on examination and diagnosed nerve root compression or irritation in the lumbar region. Aside from the fact that the history given in this report does not contain a June 3, 1993 date of injury, Dr. Owens has provided insufficient medical rationale explaining how appellant's lumbar spine problem is causally related to a furniture moving incident at work. As for the claimed September 2, 1994 incident which occurred following a motor vehicle trip, this report indicates that driving could be difficult, but there is no mention of a September 2, 1994 incident nor sufficient medical rationale as to how appellant's back condition was caused or aggravated by driving. Due to these deficiencies, this report is not sufficient to establish that appellant sustained an injury on June 3, 1993 or September 2, 1994 causally related to factors of his employment.

In a report dated December 9, 1994, Dr. Krompinger stated that appellant gave a history of lifting file cabinets at work in “approximately May 1993.” He stated that diagnostic studies were indicative of lumbar degenerative disc disease. Dr. Krompinger stated, “The mechanism of injury and [appellant’s] complaints are consistent and I believe this is a credible patient.” However, in addition to a history with an injury date which appellant states is incorrect, May 1993, the report lacks sufficient medical rationale explaining how appellant’s degenerative disc condition was caused or aggravated by his activities at work. Therefore, this report is not sufficient to discharge appellant’s burden of proof.

In notes dated December 16, 1994, Dr. Owens related that an MRI of the lumbosacral spine showed significant pathology and that appellant was given a note indicating that he should be off work for 30 days. However, he did not provide sufficient explanation as to how the spinal condition was caused or aggravated by appellant’s job activities and therefore this report is not sufficient to discharge appellant’s burden of proof.

In a report dated November 21, 1995, Dr. Owens stated that he initially saw appellant on November 18, 1994 for back pain which appellant felt had occurred in May 1993 when he moved file cabinets at work. He stated, “On further review it is probable that this injury actually occurred on June 3, 1993.” However, Dr. Owens did not explain why he changed the date of injury from his initial November 18, 1994 report. He also did not explain why appellant did not seek treatment until one year after the claimed 1993 injury. Dr. Owens mentions an incident on September 2, 1994 related to a trip but provides insufficient medical rationale to explain how this trip caused or aggravated appellant’s back condition. He stated that, as a result of the lifting episodes at work, appellant had a chronic back problem confirmed by the November 29, 1994 MRI. However, he provided insufficient medical rationale explaining how appellant’s back problems were caused or aggravated by his job activities. Due to these deficiencies, this report is not sufficient to establish that appellant sustained an employment-related injury in June 1993 or September 1994, as alleged.

The Board further finds that the Office abused its discretion in determining that appellant’s request for reconsideration of the denial of his October 21, 1993 claim was untimely filed.

The Board’s jurisdiction to consider and decide appeals from final Office decisions extends only to those final decisions issued within one year prior to the filing of the appeal.¹³ As appellant filed his appeal of the denial of his October 21, 1993 claim with the Board on October 11, 1996, the only decision properly before the Board regarding his October 21, 1993 claim is the Office’s July 11, 1996 decision denying his request for reconsideration. The Board has no jurisdiction to consider the Office’s December 9, 1994 decision denying his claim for an injury on October 21, 1993.¹⁴

¹³ 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

¹⁴ *Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

Section 8128(a) of the Act¹⁵ does not entitle a claimant to a review of an Office decision as a matter of right.¹⁶ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.¹⁷

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.¹⁸ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).¹⁹

With regard to the content of the request for reconsideration, the Office's procedures provide: "While no special form is required, the request must be in writing, identify the decision and the specific issue(s) for which reconsideration is being requested, and be accompanied by relevant and pertinent new evidence or argument not previously considered."²⁰

In the present case, the Office determined that appellant did not request reconsideration until his April 14, 1996 letter, which was dated and received more than one year after the December 9, 1994 decision and therefore was untimely. The Board finds, however, that appellant's December 7, 1995 letter constitutes a timely request for reconsideration. In that letter, appellant identified the December 9, 1994 decision and indicated that relevant and pertinent evidence not previously considered by the Office had been submitted. Appellant requested a "review" of the Office's December 9, 1994 decision. As appellant submitted his letter to the Office and submitted new evidence in support thereof, a reasonable interpretation of this letter is that appellant was attempting to have his claim reconsidered by the Office rather than requesting a hearing or review by the Board. Given the fact that appellant identified the Office decision and indicated that additional evidence was being submitted, the Board finds that the December 7, 1995 letter constitutes a request for the Office to reconsider the December 9, 1994 decision based on the new evidence submitted.²¹

¹⁵ 5 U.S.C. § 8128(a).

¹⁶ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁷ *Jesus D. Sanchez* and *Leon D. Faidley, Jr.*, *supra* note 16. Compare 5 U.S.C. § 8124(b) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

¹⁸ 20 C.F.R. § 10.138(b)(2).

¹⁹ See *Gregory Griffin* and *Leon D. Faidley, Jr.*, *supra* note 16.

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2(a) (May 1996); see also 20 C.F.R. § 10.138(b)(1).

²¹ See *Vicente P. Taimanglo*, 45 ECAB 504, 507 (1994).

Since the December 7, 1995 request for reconsideration was within one year of the December 9, 1994 decision, it is timely and the Office must assess the reconsideration request under the appropriate standards.²² The “clear evidence of error” standard utilized in this case is appropriate only for reconsideration requests made more than one year after the Office decision. Accordingly, the case will be remanded for proper consideration of appellant’s timely request for reconsideration. After such further development as it deems necessary, it should issue an appropriate decision.

The decisions of the Office of Workers’ Compensation Programs dated July 11 and March 19, 1996 and regarding appellant’s May 27 and June 3, 1993 and September 2, 1994 claims are affirmed. The July 11, 1996 Office decision denying appellant’s request for reconsideration of the Office’s December 9, 1994 decision is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
April 5, 1999

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member

²² See 20 C.F.R. § 10.138(b)(1)(i)-(iii).