U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ODELL WOODEN, JR. and U.S. POSTAL SERVICE,
MAPLETON POST OFFICE, Indianapolis, Ind.

Docket No. 97-2577; Submitted on the Record;
Issued July 9, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that he sustained herniated cervical or lumbar discs in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a review of the written record.

The procedural history of the case is as follows. On January 9, 1997 appellant then a 39-year-old letter carrier, filed a notice of occupational disease alleging that he sustained herniated cervical and lumbar discs[1] in the performance of duty on or before August 27, 1996.[2] In attached statements, he attributed his condition to carrying a mail bag weighing 30 pounds or more, casing mail, working overtime several years before, working six days per week[3] turning his neck while backing up his postal vehicle.[4] He submitted medical evidence in support of his initial claim and on subsequent requests for reconsideration.

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[1] In an April 8, 1997, appellant noted undergoing lumbar surgery for a herniated disc on October 10, 1994 due to an occupational fall. This claim is not before the Board on the present appeal.

[2] On the reverse of the form, an employing establishment supervisor noted that appellant was on limited duty, with restrictions against lifting more than 10 pounds, carrying a mail satchel on his shoulder, and reaching above the shoulder. Appellant's work schedule was Tuesday to Saturday, with Sunday and Monday off.

[3] There is no indication of record regarding whether appellant worked six days per week, instead of his assigned five-day schedule, due to mandatory or voluntary overtime. There is also no indication as to the dates or number of weeks appellant worked this extra day.

[4] Appellant submitted employing establishment dispensary notes indicating a history of hypertension in 1982 and 1983. These notes do not directly address a neck condition.

In a March 13, 1997 letter, the Office advised appellant to submit a description of his job duties and nonoccupational activities.[5] The Office also emphasized the importance of submitting a rationalized statement from his physician supporting a causal relationship between the claimed condition and factors of his federal employment.

By decision dated April 25, 1997, the Office denied appellant's claim on the grounds that causal relationship was not established due to a lack of rationalized medical evidence. In a May 12, 1997 letter, appellant requested reconsideration and a review of the written record by a representative of the Office's Branch of Hearings and Review.[6] He submitted new medical evidence.

By decision dated May 20, 1997, the Office denied modification on the grounds that the medical evidence submitted was insufficiently rationalized to warrant modification of the prior decision. Appellant again requested reconsideration and submitted new evidence.

By decision dated June 11, 1997, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record on the grounds that he had previously requested reconsideration and therefore was not entitled to a review of the written record as a matter of right. The Office noted conducting a limited review and also denied appellant's request on the grounds that the issue in the case could be addressed equally well by requesting reconsideration and submitting new, relevant evidence. In a June 23, 1997 letter, appellant again requested reconsideration and submitted additional evidence.[7]

By decision dated July 11, 1997, the Office denied modification of the prior decision on the grounds that the medical evidence submitted was insufficiently rationalized to establish causal relationship.

Regarding the first issue, the Board finds that appellant has not established that he sustained herniated cervical or lumbar discs in the performance of duty as alleged.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[8] (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or

[5] Appellant responded by April 8, 1997 letter, describing nonoccupational activities of mowing "four to five yards a week" with his nephew, planting flowers, swimming, skating and bicycling.

[6] In a June 5, 1997 letter, appellant again requested a review of the written record.

[7] Appellant also submitted several medical forms and slips: an October 14, 1996 procedure form for cervical and lumbar myelogram; a January 7, 1997 physical therapy referral slip; January 10, 1997 medication information regarding a prescription from Dr. Blankenhorn for Lodine XL, a nonsteroidal antiinflammatory; March 27 and May 27, 1997 epidural steroid injection discharge instructions; forms for a May 12, 1997 bilateral knee arthroscopy. There are no claims regarding knee injuries or conditions before the Board on the present appeal. These forms do not contain medical rationale.

[8] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

occurrence of the disease or condition[9] and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[10] The medical opinion must be one of reasonable medical certainty[11] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12]

In this case, the Board finds that appellant has submitted sufficient factual and medical evidence to establish the presence of the claimed cervical and lumbar disc conditions and to corroborate the alleged work factors of carrying a mail satchel and casing mail.[13] Thus, the medical record must be examined to ascertain whether it contains sufficient support for causal relationship to establish appellant's claim.

In support of his claim, appellant submitted reports from Dr. Peter V. Hall, an attending neurosurgeon. In an October 14, 1996 report, Dr. Hall reviewed magnetic resonance imaging (MRI), computerized tomography (CT) scans and a myelogram performed that day.[14] Dr. Hall diagnosed a "large right C4-5 disc protrusion" resulting in cord compression, small central C3-4 and C5-6 disc protrusions and "a bilateral L4-5 disc protrusion" with bilateral nerve root compression. In a January 8, 1997 report, Dr. Hall restricted lifting to 40 pounds or less, stated that appellant was "unable to carry bag on shoulder," and recommended a "motorized route vs. walking route" to accommodate the weight restriction. In a May 27, 1997 note, Dr. Hall stated that as of October 14, 1996, appellant "was told not to carry the mail bag." Although Dr. Hall diagnosed the claimed cervical and lumbar disc disease, he did not provide sufficient medical rationale explaining how and why the cited work factor of carrying a mail satchel would cause those conditions. The work restrictions against heavy lifting and carrying the satchel do not indicate in and of themselves that the diagnosed conditions were caused by those activities. Without a clear medical explanation the causal relationship of appellant's herniated cervical and

[9] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979). The Office, as part of its adjudicatory function, must make findings of fact and a determination as to whether the implicated working conditions constitute employment factors prior to submitting the case record to a medical expert; *see John A. Snowberger*, 34 ECAB 1262, 1271 (1983); *Rocco Izzo*, 5 ECAB 161, 164 (1952).

[10] *See generally Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

[11] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[12] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[13] The Board notes that appellant submitted insufficient evidence regarding the duration of alleged overtime work, the precise requirements of the extra duties, and whether the overtime was voluntary or mandatory.

[14] A September 16, 1996 MRI scan of the cervical spine showed central disc herniations at C3-4, C4-5, C5-6 and C6-7 narrowing the cervical cord from C3-5, and abutting the cord at C5-6. An October 14, 1996 cervical CT scan demonstrated a "central to right-sided disc herniation present at C4-5, resulting in significant impression upon the ventral aspect of spinal canal and spinal cord," "multilevel degenerative disc disease" with small disc herniations at C2-3, C3-4, C4-5, C5-6 and C6-7. A cervical myelogram showed a "[m]inimal anterior extradural defect at C3-4 and 4-5 without cord impingement" or rootlet amputation. A lumbar CT showed an L4-5 disc herniation impinging the left lateral recess, and a central disc herniation at L5-S1. A lumbar myelogram showed a "[m]ild to moderate anterior extradural defect at L4-5 … with complete amputation of the left L5 nerve root."

lumbar discs and his job duties, Dr. Hall's opinion is of insufficient probative value to establish causal relationship.[15]

Appellant also submitted reports from Dr. Peter Blankenhorn, an attending internist. In an April 30, 1997 report, Dr. Blankenhorn diagnosed chronic cervical and lumbar disc disease with pain radiating into the right arm, "worst with prolonged activity. [Appellant] cannot work more than eight hours a day nor more than 40 hours per week." In a May 6, 1997 report, Dr. Blankenhorn provided a history of October 10, 1994 lumbar surgery and the onset of neck pain in September 1996. Dr. Blankenhorn opined that appellant's radicular symptoms and the underlying cervical and lumbar disc disease were "aggravated and worsen[ed]" by "turning his head," "heavy lifting," and working more than 40 hours per week, although he could not "prove that anything at work caused" those conditions. Similar to Dr. Hall, Dr. Blankenhorn diagnosed cervical and lumbar disc disease and noted restrictions against overtime work and heavy lifting. However, Dr. Blankenhorn stated that he could not "prove" that work factors caused appellant's conditions. This opinion tends to negate causal relationship and is also speculative and therefore of diminished probative value.[16]

Appellant also submitted January 7 and 14, 1997 form reports from Dr. Laurence J. Walsh, a physician specializing in occupational medicine. Dr. Walsh related appellant's account of episodes of right shoulder and neck pain on January 6 and 14, 1997, "while casing mail on right shoulder" and" carrying mail on right arm." Dr. Walsh diagnosed cervical disc herniations with secondary "right upper extremity neuropathy." Dr. Walsh proscribed carrying a mail bag on the shoulder and limited lifting to 10 pounds. Thus, Dr. Walsh also diagnosed the claimed cervical disc herniations and restricted heavy lifting and carrying a mail satchel on the right shoulder. However, as Dr. Walsh did not provide medical rationale explaining how those work factors would cause the claimed cervical disc disease, his opinion is of insufficient weight to establish causal relationship.

The Board notes that appellant was advised in detail by March 13, 1997 letter of the necessity of submitting rationalized medical evidence in order to establish his claim. Despite this advisement, appellant did not submit such evidence.

Consequently, appellant has failed to establish that he sustained a cervical or lumbar spine condition in the performance of duty on or before August 27, 1996, as he submitted insufficient medical evidence to establish a pathophysiologic causal relationship between specific factors of his federal employment and his claimed cervical and lumbar conditions.

Regarding the second issue, the Board finds that the Office did not abuse its discretion by denying appellant's request for a review of the written record.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request

[15] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

[16] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value).

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."[17] Section 10.131 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[18] Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulations.

In *James W. Croake*,[19] the Board found that the Office did not abuse its discretion in denying the employee's hearing request as the request for a hearing under section 8124 was not made until after the employee had sought reconsideration of his claim under section 8128. It was noted that the employee was not entitled to a hearing as a matter of right under section 8124(b)(1) as the employee had previously exercised his right to reconsideration under section 8128. The Board also held that the Office did not abuse its discretionary authority by denying appellant's request for an oral hearing.

The circumstances of this case are similar to those in *Croake*. In separate May 12, 1997 letters, appellant requested both reconsideration and a review of the written record. The Office considered new evidence that appellant submitted in support of his reconsideration request and denied modification by decision dated May 20, 1997 on the grounds of insufficient evidence. Thus, as of May 20, 1997, appellant requested and has been granted reconsideration. Therefore, by decision dated June 11, 1997, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record on the grounds that he had previously requested reconsideration and therefore was not entitled to a review of the written record as a matter of right. The Board finds that the Office properly exercised its discretion by conducting a limited review of the record and determining that the issue involved could be addressed equally well by submitting new evidence on reconsideration.

Therefore, the Office did not abuse its discretion by denying appellant's request for a review of the written record, as he had already requested and been granted reconsideration and the Office properly exercised its discretion in conducting a limited review.

[17] 5 U.S.C. § 8124(b)(1).

[18] 20 C.F.R. § 10.131.

[19] 37 ECAB 219 (1985).

The decisions of the Office of Workers' Compensation Programs dated July 11, June 11, May 20 and April 25, 1997 are hereby affirmed.

Dated, Washington, D.C.
July 9, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member