

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DIANNE LOVELACE and DEPARTMENT OF THE AIR FORCE,  
OKLAHOMA CITY AIR LOGISTICS CENTER,  
TINKER AIR FORCE BASE, Okla.

*Docket No. 97-1777; Submitted on the Record;  
Issued March 22, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that her hand and neck conditions are causally related to factors of federal employment; (2) whether the Office of Workers' Compensation Programs abused its discretion under section 8124 (b) of the Federal Employees' Compensation Act<sup>1</sup> in denying appellant's request for a hearing; and (3) whether the Office abused its discretion by refusing to reopen appellant's claim for merit review.

The Board has duly reviewed the case record in the present appeal and finds that appellant failed to meet her burden of proof in establishing that her hand and neck conditions are causally related to factors of federal employment, that the Office properly denied appellant's hearing request, and that the Office did not abuse its discretion by refusing to reopen appellant's claim for review of the merits.

On May 24, 1995 appellant, then a 41-year-old secretary, filed a claim for compensation alleging that pain in her hands extending to her upper neck were caused by factors of federal employment. By letters dated August 15 and September 12, 1995, the Office advised appellant that she needed to submit additional information regarding her claim for compensation, including a detailed narrative medical report explaining how her doctor believed that her federal employment caused the current medical condition.

On October 23, 1995 the Office denied appellant's claim on the grounds that she failed to establish that the injury was sustained as alleged. On October 31, 1995 appellant requested reconsideration. On November 28, 1995 the Office denied modification. On January 9, 1996 appellant again requested reconsideration. On February 6, 1996 the Office denied modification on the grounds that appellant failed to submit rationalized medical opinion evidence in support of a work-related diagnosis of carpal tunnel syndrome. On March 13, 1996 appellant requested reconsideration of the Office's February 6, 1996 decision. On May 16, 1996 the Office denied modification. On July 8, 1996 appellant again requested reconsideration. On July 17, 1996 the

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<sup>1</sup> 5 U.S.C. § 8124(b).

Office denied appellant's request for modification in a nonmerit decision on the grounds that the evidence submitted in support of her request was irrelevant and thus was insufficient to warrant review of the May 16, 1996 decision. On October 1, 1996 appellant requested a hearing. On December 20, 1996 the Office denied appellant's request for a hearing on the grounds that since appellant had previously filed a request for reconsideration, she was not entitled to a hearing as a matter of right, and that a review of the case record revealed that the issue could be addressed by requesting reconsideration and submitting evidence not previously submitted. On January 7, 1997 appellant requested reconsideration of the Office's December 20, 1996 decision denying her request for a hearing. In a January 15, 1997 decision, the Office denied appellant's request for reconsideration. On March 14, 1997 appellant again requested reconsideration of the Office's January 15, 1997 decision denying her request for reconsideration. On March 28, 1997 the Office denied this request for reconsideration.

The Board finds that appellant has failed to establish a causal relationship between her medical condition and factors of federal employment.

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; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.<sup>2</sup>

In this case, appellant submitted several medical reports from Dr. William M. Harsha, appellant's treating physician and Board-certified in orthopedic surgery. In a December 12, 1995 medical report, Dr. Harsha stated that appellant was symptomatic in both hands, more in the left, had paresthesias in the left elbow, and tenderness in the volar surface, distal tendon and the surface of the wrist. He noted a tendency towards positive Tinel's sign. He noted that appellant's diagnosis was job-related carpal tunnel syndrome of the left forearm. In a February 27, 1996 medical report, Dr. Harsha stated that appellant's carpal tunnel syndrome was based on subjective symptoms, noting also that "an equally valid diagnosis would be shoulder, arm syndrome." In a June 28, 1996 medical report, he stated that appellant had a burning, dysethetic pain over the distal forearm extending onto the volar surface of the wrist as well as thumb, index and middle finger, and along the radial side of the ring finger. Dr. Harsha noted positive Phalen and Tinel's signs. He stated that appellant had medial nerve irritation-carpal tunnel compression syndrome "being the most probable diagnosis." Dr. Harsha also noted that flexor tendinitis of wrist tendons at carpal tunnel "can do this also." However, none of these reports establish a causal relationship between appellant's condition and factors of federal employment. For example, he stated in his December 12, 1995 report that appellant's condition was job related but did not provide a rationalized medical opinion which adequately explained

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<sup>2</sup> *Lourdes Harris*, 45 ECAB 545, 547 (1994).

the causal connection between appellant's diagnosed condition and any specific workplace factor.<sup>3</sup> Further, Dr. Harsha's February 27, 1996 report is ambivalent in that he opines that appellant's condition may be either carpal tunnel syndrome or shoulder and arm syndrome. The Board has held that an award of compensation may not be made on the basis of surmise, conjecture or speculation, or appellant's belief in causal relationship.<sup>4</sup> His June 28, 1996 report similarly lacks specificity in that he opines that the "most probable" diagnosis concerning appellant's medical condition was carpal tunnel syndrome.<sup>5</sup>

As appellant did not submit rationalized medical opinion evidence establishing that her medical condition was causally related to her employment, she has failed to meet her burden of proof. The Board therefore affirms the Office's May 16, 1996 decision.

The Board also notes that the Office properly denied appellant's request for a hearing before an Office hearing representative.

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing, states in pertinent part as follows:

"A claimant is not entitled to an oral hearing ... if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."<sup>6</sup>

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.<sup>7</sup> Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right for a hearing.<sup>8</sup> In this instance the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>9</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is

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<sup>3</sup> *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

<sup>4</sup> *William S. Wright*, 45 ECAB 498 (1994).

<sup>5</sup> *Id.*

<sup>6</sup> 20 C.F.R. § 10.131(a).

<sup>7</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

<sup>8</sup> *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>9</sup> *Id.*

untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>10</sup>

In the present case, the Office issued its decision based on appellant's request for reconsideration on July 17, 1996. Appellant requested a hearing in a letter dated October 1, 1996. Since appellant had requested reconsideration, she was not entitled to a hearing under section 8124 as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its December 20, 1996 decision and denied the request on the basis that appellant could pursue her claim by requesting reconsideration and submitting additional medical evidence that supports a causal relationship between her condition and factors of federal employment. Abuse of discretion is generally shown through proof of manifest error or clearly unreasonable exercise of judgment.<sup>11</sup> There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

The Board finds that the refusal of the Office, in its March 28 and January 15, 1997 and July 17, 1996 decisions, to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act, the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>12</sup> When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.<sup>13</sup>

In her July 8, 1996 request for reconsideration, appellant submitted medical evidence which the Office had previously considered, and thus the Office properly denied her request on the grounds that the evidence constituted repetitive evidence. Dr. Harsha's June 28, 1996 medical report noted a diagnosis, carpal tunnel, as well as a description of appellant's subjective complaints that he had previously rendered. However, the doctor did not submit an opinion regarding causal relationship.

In her January 7, 1997 request for reconsideration, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did she advance a point of law or a fact not previously considered by the Office. In support of her reconsideration request, appellant submitted a September 11, 1996 medical report from Dr. Harsha, in which he noted appellant's subjective complaints of pain and noted also diagnostic test results. However, he rendered no opinion on causal relationship and thus the medical report was not material to the issue of whether appellant sustained an injury caused by employment factors as identified by appellant.

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<sup>10</sup> *Id.*

<sup>11</sup> *Daniel J. Perez*, 42 ECAB 214, 221 (1990).

<sup>12</sup> 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

<sup>13</sup> 20 C.F.R. § 10.138(b)(2).

The Office properly found that the report was not relevant to the issue of whether appellant sustained a carpal tunnel syndrome in the performance of duty causally related to factors of her employment since the report did not attribute the condition to factors of her employment. Further, appellant failed to submit evidence in support of her March 14, 1997 request for reconsideration. As appellant's July 8, 1996, and January 7 and March 14, 1997 requests for reconsideration did not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying those requests.

The decisions of the Office of Workers' Compensation Programs dated March 28 and January 15, 1997, and December 20, July 17 and May 16, 1996 are hereby affirmed.<sup>14</sup>

Dated, Washington, D.C.  
March 22, 1999

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>14</sup> The Board notes that subsequent to the Office's March 28, 1997 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952). The Board notes that the case record contains information not before the Office at the time of its final decision. The Board is restricted to reviewing only that evidence which was before the Office at the time its final decision. 20 C.F.R. § 501.1(c).