

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN M. O'SHAUHNESSY and U.S. POSTAL SERVICE,
POST OFFICE, Westland, MI

*Docket No. 98-195; Submitted on the Record;
Issued September 23, 1999*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant had any disability after January 13, 1995 causally related to her October 11, 1994 employment injury; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124; and (3) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

In the present case, the Office accepted that appellant, a part-time flexible carrier, sustained a right groin muscle strain, bilateral knee strain and right tibia tendinitis due to an injury on October 11, 1994. Appellant, pursuant to the restrictions imposed by her physician, began working limited duty. On November 30, 1994 the employing establishment terminated appellant due to her inability to meet the expectations of her position.

On April 9, 1996 appellant filed a claim for a recurrence of disability beginning November 30, 1994 causally related to her October 11, 1994 employment injury. The Office accepted appellant's claim for a recurrence of disability and authorized continuation of pay for 45 days.

By decision dated November 14, 1996, the Office denied appellant's claim for compensation beyond the expiration of continuation of pay on January 13, 1995 on the grounds that the medical evidence did not establish disability after that date due to the accepted employment injury.

In a letter dated December 18, 1996, appellant requested a review of the written record, which the Office denied as untimely by decision dated January 17, 1997. In a decision dated July 11, 1997, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was duplicative and therefore insufficient to warrant review of the prior decision.

The Board has duly reviewed the case record and finds that appellant has not established that she had been disabled after January 13, 1995 causally related to her October 11, 1994 employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including the fact that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed is causally related to the employment injury.² As part of this burden, the claimant must present rationalized medical evidence, based upon a complete and accurate medical background, showing causal relationship.³

In a report dated May 4, 1995, Dr. Herbert Mendelson, a Board-certified orthopedic surgeon, noted that appellant related a history of injuring her back and right thigh when she fell at work on October 11, 1994. Dr. Mendelson listed normal findings on physical examination and by x-ray. He stated:

“The symptoms very much resemble a trochanteric bursitis in that she states that when she sits or lays on that right side it hurts. Although I do not get a distinct tenderness, I think she may well have something of that sort or some variation of, perhaps, other bursa about the hip region.”

Dr. Mendelson concluded, “I am going to call this a trochanteric bursitis for now, secondary to the fall and sprain.” While Dr. Mendelson offered a tentative diagnosis of trochanteric bursitis due to appellant's employment injury, he provided no medical findings to support his diagnosis and thus his finding is speculative in nature and of limited probative value.⁴ Further, as the Office did not accept appellant's claim for the condition of bursitis of the hip, she retains the burden of proving by the submission of probative evidence that the condition was due to her employment injury.⁵

In a progress note dated April 9, 1996, Dr. Mendelson stated that he obtained x-rays on May 4, 1995 and diagnosed bursitis of the right hip. In a report dated August 13, 1996, Dr. Mendelson diagnosed apparent trochanteric bursitis and a possible “tear of the labrum about the hip region.” He found that appellant could currently perform her usual employment. However, as Dr. Mendelson did not address the causation of the bursitis or the issue of disability, his reports are insufficient to meet appellant's burden of proof.

In a form report dated September 18, 1996, Dr. Mendelson diagnosed bursitis of the hip, a sprain of the hip and leg, and trochanteric bursitis. He checked “yes” that the condition was

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Joseph T. Gulla*, 36 ECAB 516 (1985).

⁴ *Johnson K. Yazzie*, 39 ECAB 701 (1988).

⁵ *See Gary L. Whitmore*, 43 ECAB 441 (1992).

due to the injury for which compensation was claimed and found that appellant could return to work. The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, that opinion has little probative value without further detail and explanation.⁶ As Dr. Mendelson did not provide any rationale supporting his conclusion, his opinion is insufficient to establish causal relationship.⁷ Further, as the physician found that appellant could perform her usual employment, his report is of little relevance to the pertinent issue of whether appellant had any disability after January 31, 1995.⁸

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 her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.⁹ Appellant failed to submit rationalized medical evidence establishing that her claimed continuing disability was causally related to the accepted employment injury and, therefore, the Office properly denied her claim for compensation.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁰ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.¹¹

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. 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 to a hearing,¹² when the request is made after

⁶ *Alberta S. Williamson*, 47 ECAB 569 (1996).

⁷ *Lucrecia M. Nielson*, 41 ECAB 583 (1991).

⁸ Appellant submitted physical therapy reports; however, a physical therapist is not considered a physician under the Act and cannot supply medical opinion evidence necessary to establish appellant's claim. 5 U.S.C. § 8101(2); *Arnold A. Alley*, 44 ECAB 912 (1993).

⁹ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

¹⁰ 5 U.S.C. § 8124(b)(1).

¹¹ *Frederick D. Richardson*, 45 ECAB 454 (1994).

¹² *Rudolph Bermann*, 26 ECAB 354 (1975).

the 30-day period established for requesting a hearing,¹³ or when the request is for a second hearing on the same issue.¹⁴ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹⁵

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated November 14, 1996 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated December 18, 1996. Hence, the Office was correct in stating in its January 17, 1997 decision that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's November 14, 1996 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its January 17, 1997 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence to establish that she had continuing disability causally related to her October 11, 1994 employment injury. The Board has held that as the only limitation on the Office's authority is reasonableness, 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 deduction from established facts.¹⁶ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The Board further finds that the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Federal Employees' Compensation Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the

¹³ *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁴ *Johnny S. Henderson*, 34 ECAB 216 (1982).

¹⁵ *Sandra F. Powell*, 45 ECAB 877 (1994).

¹⁶ *Daniel J. Perea*, 42 ECAB 214 (1990).

decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”¹⁷

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.¹⁸ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁹ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.²⁰

In the present case, the Office denied appellant’s claim on the grounds that the medical evidence failed to establish that she had any disability after January 31, 1995 causally related to her October 11, 1994 employment injury. In support of her request for reconsideration, appellant resubmitted the April 9, 1996 and May 4, 1995 reports from Dr. Mendelson. As this evidence duplicated evidence already in the record, it is insufficient to warrant reopening appellant’s claim.²¹

Appellant further submitted a report from Dr. Mendelson dated August 13, 1996, in which he found that she could resume employment. As Dr. Mendelson does not address the issue of whether appellant had any disability due to her accepted employment injury, his report is not relevant to the issue at hand.

As appellant has not established that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office, she has not established that the Office abused its discretion in denying her request for review under section 8128 of the Act.

¹⁷ 20 C.F.R. § 10.138(b)(1).

¹⁸ *See* 20 C.F.R. § 10.138(b)(2).

¹⁹ *Daniel Deparini*, 44 ECAB 657 (1993).

²⁰ *Id.*

²¹ *Id.*

The decisions of the Office of Workers' Compensation Programs dated July 11 and January 17, 1997 and November 14, 1996 are hereby affirmed.

Dated, Washington, D.C.
September 23, 1999

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member