

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID E. CANAWAY and U.S. POSTAL SERVICE,
POST OFFICE, Sevierville, TN

*Docket No. 98-2489; Submitted on the Record;
Issued April 26, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability causally related to his April 3, 1996 lumbar strain; (2) whether he established that his degenerative disc disease and disc herniations were caused or aggravated by employment factors; (3) whether the Office of Workers' Compensation Programs properly denied his request for a hearing under 5 U.S.C. § 8124; and (4) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On April 3, 1996 appellant, then a 49-year-old city carrier, sustained an employment-related lumbar strain when he was involved in a motor vehicle accident. He returned to work in May 1996 and after a trial at eight hours per day, began a limited-duty position for four hours per day. On May 20, 1997 he filed a recurrence claim, stating that he had never been able to return to full duty and was working limited duty for four hours per day. The employing establishment indicated that he had been provided limited duty and was still working under restrictions. By letter dated August 5, 1997, the Office informed appellant of the type evidence needed to support his recurrence claim and following further development, by decision dated September 17, 1997, denied the claim, finding that appellant failed to establish a recurrence of disability or that his degenerative disc disease and disc herniations were causally related to his employment. On December 1, 1997 appellant requested a hearing and, in a February 26, 1998 decision, an Office hearing representative denied his request. On April 21, 1998 appellant requested reconsideration and submitted additional evidence. By decision dated May 20, 1998, the Office denied appellant's reconsideration request. The instant appeal follows.¹

¹ The Board notes that on September 14, 1998 appellant requested reconsideration with the Office and submitted additional medical evidence. The Board and the Office may not have concurrent jurisdiction over the same issue in the same case. *Douglas E. Billings*, 41 ECAB 880 (1990).

The relevant medical evidence² includes an April 18, 1996 duty status report in which Dr. Steven M. Smith, appellant's treating Board-certified orthopedic surgeon, advised that he could return to part-time work with restrictions. On the form report, he stated that appellant's condition was due to chronic degenerative disc disease and was not due to the employment injury. In a September 5, 1996 duty status report, Dr. Smith advised that appellant could work eight hours per day with restrictions but provided no explanation regarding the cause of appellant's condition. In an October 4, 1996 report, he advised that appellant had multilevel degenerative disc disease and would permanently have problems with back pain. Dr. Smith restricted appellant to 70 pounds lifting, 40 pounds carrying and no repetitive bending. Dr. Gilbert L. Hyde, a Board-certified orthopedic surgeon, provided a June 17, 1997 duty status report in which he advised that appellant could work four hours per day with restrictions.³ He indicated "yes" in the box which asked "diagnosis due to injury" and stated that other disabling conditions included chronic degenerative disease.

Initially the Board finds that appellant failed to establish a recurrence of disability.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.⁴

Causal relationship is a medical issue,⁵ and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be

² The medical evidence also includes a June 29, 1996 magnetic resonance imaging of the lumbar spine that demonstrated multilevel degenerative disc disease, most advanced at the L5-S1 level, a left paracentral disc herniation at the L5-S1 level, a broad-based central to right paracentral disc protrusion/extrusion at the L4-5 level and a small left posterolateral disc herniation at the L2-3 level.

³ Dr. Hyde also submitted unsigned treatment notes. In a note dated October 8, 1996, he noted that appellant had been in a motor vehicle accident in April 1996 and diagnosed lumbar degenerative disc disease with herniated discs and advised that appellant should be able to work four to six hours daily with restrictions. In a May 13, 1997 report, Dr. Hyde stated, "I believe his back condition, as it is now, is related to [the] April 1996 injury [and that he] is unable to perform his regular duties at the present time." In a June 17, 1997 treatment note, he advised that appellant should continue to work half days.

⁴ *Mary A. Howard*, 45 ECAB 646 (1994); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ *Mary J. Briggs*, 37 ECAB 578 (1986).

supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

The medical evidence in this case does not support that appellant sustained a recurrence of disability causally related to the accepted injury. While the record contains medical reports from Dr. Hyde, who advised that appellant could work only four hours per day with restrictions, he did not identify any employment factors that caused appellant's disability. Dr. Smith advised that, while appellant should work limited duty, his condition was caused by degenerative disc disease and not by the April 3, 1996 employment injury. As appellant failed to submit rationalized medical evidence that identified specific employment factors that caused his condition, he failed to discharge his burden of proof, and the Board finds that he failed to establish a recurrence of disability.

The Board further finds that appellant failed to establish that his degenerative disc disease or herniated discs were caused or aggravated by employment factors.

Likewise, the medical evidence is insufficient to establish that appellant's degenerative disc disease or herniated discs were causally related to the employment injury because it does not contain a rationalized medical opinion explaining how these conditions were caused or aggravated by employment factors. Dr. Hyde did not provide a clear diagnosis in his May 27, 1995 report and Dr. Smith clearly opined that appellant's degenerative disc disease was not employment related. As none of the medical reports provides a notable description of appellant's work duties or medical rationale explaining how specific employment factors caused his condition, without further medical justification, they are insufficient to establish causal relationship.⁷ Appellant, therefore, did not provide the necessary rationalized medical opinion describing how employment factors caused his degenerative disc disease or disc herniations and, thus, did not meet his burden of proof.

The Board also finds that the Office did not abuse its discretion in denying appellant's request for a hearing as untimely.

The Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act,⁸ 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.⁹ In the present case, appellant's request for a hearing on December 1, 1997 was made more than 30 days after the date of issuance of the Office's prior decision dated September 17, 1997. Hence, the Office was correct in stating in its February 26, 1998 decision that appellant was not entitled to a

⁶ *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁷ *See Alberta S. Williamson*, 47 ECAB 569 (1996).

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Henry Moreno*, 39 ECAB 475, 482 (1988).

hearing as a matter of right because his request was not made within 30 days of the Office's September 17, 1997 decision.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its February 26, 1998 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 on the basis that the issue in question could be addressed through a reconsideration application. 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.¹⁰ 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.

Lastly, the Board finds that the Office did not abuse its discretion in denying appellant's request for review.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹¹ 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.¹² When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.¹³ To be entitled to merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁴

As stated above, 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.¹⁵ In this case, appellant did not advance a point of law not previously considered, articulate any legal argument with a reasonable color of validity in support of his request, or submit relevant and pertinent medical evidence with his request. While he submitted a November 25, 1994 x-ray of the lumbosacral spine that demonstrated degenerative disc disease at L5-S1 and the first page of an electromyographic study of the left lower extremity, neither of these reports discussed the cause of appellant's condition or whether

¹⁰ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

¹¹ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

¹² 20 C.F.R. §§ 10.138(b)(1) and (2).

¹³ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

¹⁴ 20 C.F.R. § 10.138(b)(2).

¹⁵ See *Daniel J. Perea*, *supra* note 10.

he was disabled therefrom.¹⁶ The Office, therefore, properly denied appellant's application for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated May 20 and February 26, 1998 and September 17, 1997 are hereby affirmed.

Dated, Washington, D.C.
April 26, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

¹⁶ Appellant also submitted a duplicate of Dr. Smith's April 18, 1996 duty status report.