U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBIN J. WETZEL and DEFENSE LOGISTICS AGENCY, DEFENSE DISTRIBUTION DEPOT, Cherry Point, NC

Docket No. 99-2018; Submitted on the Record;
Issued August 24, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the written record.

On April 30, 1998 appellant, a 48-year-old materials handler, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she suffered from chronic low back pain as a result of her federal employment. Appellant stated that her condition resulted from constantly packing and lifting between 200 to 700 issues weighing anywhere from 1 to 40 pounds each. She indicated that she performed this type of work on a daily basis since December 1997. Appellant explained that she first became aware of her employment-related back condition on March 2, 1998. Appellant did not submit any medical documentation with her claim.

By letter dated May 14, 1998, the Office requested that appellant submit additional factual and medical information within 30 days. In response, the Office received a brief statement from appellant accompanied by an April 27, 1998 x-ray of the lumbar spine, which revealed grade II spondylolisthesis at L5-S1, marked degenerative disease and bilateral facet arthropathy. Appellant later submitted treatment notes and a duty status report (Form CA-17), both dated May 18, 1998, from Dr. Charles H. Classen, Jr., a Board-certified orthopedic surgeon, who diagnosed spondylolisthesis, grade II. He provided a similar diagnosis in a June 8, 1998 attending physician's report (Form CA-20). Dr. Classen did not specifically attribute appellant's condition to her federal employment, but noted his impression that "a patient with this condition should never be in any occupation that requires heavy work."

In a decision dated July 28, 1998, the Office denied appellant's claim on the basis that she failed to establish that she sustained an injury as alleged. The Office explained that, while the evidence of record supported that appellant experienced the claimed employment exposure, the medical evidence submitted was insufficient to establish that appellant's claimed condition was causally related to her accepted employment exposure.

Appellant subsequently requested a review of the written record, which was postmarked August 28, 1998.

By decision dated September 25, 1998, the Office found that appellant did not submit her request for review of the written record within 30 days of the Office's July 28, 1998 decision and, therefore, she was not entitled to a review as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of whether she sustained a work-related injury on or about March 2, 1998 could equally well be addressed through the reconsideration process. Appellant subsequently filed an appeal with the Board on June 16, 1999.[1]

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury in the performance of duty.

In an occupational disease claim, in order to establish that an injury was sustained in the performance of duty, 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 appellant 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.[2]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that the condition was caused, precipitated or aggravated by her employment is sufficient to establish a causal relationship.[3] Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.[4] A physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors must be based on a complete factual and medical background of the claimant.[5] Additionally, in order to be considered rationalized, the opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and claimant's specific employment factors.[6]

---

[1] The record on appeal includes additional medical evidence that was not submitted to the Office prior to the issuance of its July 28, 1998 decision denying compensation. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

[2] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[3] *Robert G. Morris*, 48 ECAB 238, 239 (1996).

[4] *Id.*

[5] *Victor J. Woodhams*, *supra* note 2.

[6] *Id.*

In the instant case, none of the reports provided by Dr. Classen specifically attribute appellant's grade II spondylolisthesis to her federal employment. The only history of injury noted by him was that appellant was treated for lower back pain on March 2, 1998. Additionally, while Dr. Classen expressed the opinion that "a patient with [grade II spondylolisthesis] should never be in any occupation that requires heavy work," Dr. Classen's treatment notes do not include a description of appellant's job duties nor did he indicate that "heavy work" either caused or contributed to appellant's current condition. In view of the absence of any medical evidence diagnosing a condition causally related to factors of appellant's federal employment, appellant has failed to establish that she sustained an injury in the performance of duty.

The Board also finds that the Office properly denied appellant's request for review of the written record.

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for review of the written record must be submitted, in writing, within 30 days of the date of issuance of the decision. A claimant is not entitled to a review if the request is not made within 30 days of the date of issuance of the decision, as determined by the postmark of the request.[7] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[8] In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[9]

As previously noted, the Office denied appellant's claim for compensation in a decision dated July 28, 1998. Appellant's request for review of the written record was postmarked August 28, 1998, which is more than 30 days after the Office's July 28, 1998. As such, appellant is not entitled to an oral hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether she sustained a work-related injury on or about March 2, 1998 could equally well be addressed through the reconsideration process.[10] Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for review of the written record.

[7] 20 C.F.R. § 10.131(a) and (b).

[8] *Herbert C. Holley*, 33 ECAB 140 (1981).

[9] *Rudolph Bermann*, 26 ECAB 354 (1975).

[10] The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

The decisions of the Office of Workers' Compensation Programs dated September 25 and July 28, 1998 are hereby affirmed.

Dated, Washington, D.C.
August 24, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member