U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRIDGETT H. MOORE and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

Docket No. 98-1327; Submitted on the Record;
Issued January 20, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence of disability on January 10, 1994 causally related to her federal employment; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

This case has been before the Board previously. By decision dated May 28, 1997, the Board set aside Office decisions dated November 22, July 26 and March 23, 1994 and remanded the case to the Office for further development of the medical evidence.[1] The facts and background of the case contained in the prior decision are incorporated herein by reference.[2]

Subsequent to the Board's May 28, 1997 decision, by letter dated July 17, 1997, the Office provided appellant's treating Board-certified orthopedic surgeon, Dr. E. Gregory Fisher, with a statement of accepted facts that included a job description of appellant's modified distribution clerk position along with a set of questions regarding whether appellant sustained a recurrence of disability on January 10, 1994. Dr. Fisher submitted a report dated July 31, 1997 and, by decision dated September 9, 1997, the Office denied appellant's claim on the grounds that the evidence of record failed to support that the claimed recurrence was causally related to the March 1, 1990 employment injury. On December 1, 1997 appellant requested reconsideration and submitted additional medical evidence. By decision dated December 12, 1997, the Office denied appellant's request, finding that the evidence submitted was immaterial and irrelevant. The instant appeal follows.

[1] Docket No. 95-1143.

[2] The Board notes that the record contains evidence that appellant subsequently sustained an employment injury when she slipped and fell at work on July 11, 1995. By notice dated July 12, 1997, the Office proposed to terminate compensation for that injury. This injury was adjudicated by the Office under file number A9-404508. The instant case was adjudicated under A9-341502.

The Board finds that appellant failed to establish that she sustained 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.[3]

Causal relationship is a medical issue,[4] 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 supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[5] Moreover, neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[6]

In the present case, the Office accepted that appellant sustained cervical and lumbosacral sprains. At the time of the claimed recurrence, she was working in a modified clerk position with certain restrictions. There is no evidence in the record to indicate that her limited-duty position had changed. The record, however, indicates that appellant was pregnant in April 1994 and was in an automobile accident on September 22, 1994. She returned to limited duty in January 1995.

In his July 31, 1997 report, Dr. Fisher advised:

> "In reviewing my notes on [appellant], she was seen on January 27, 1994 because of increasing pain and discomfort over the neck and upper back area. She wanted at that time for me to give her physical therapy. She basically had restriction of neck and upper back motion associated with back pain. I did start her on some physical therapy to the area consisting of moist heat, ultrasound and massage in an attempt to relieve her symptoms about the neck for a four-week period. She was also continued on Vicodin and Lodine. I stated in my notes on that day, that

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

[4] *Mary J. Briggs*, 37 ECAB 578 (1986).

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

[6] *Minnie L. Bryson*, 44 ECAB 713 (1993); *Froilan Negron Marrero*, 33 ECAB 796 (182).

she will be able to return to work on March 1, 1994. The only material change in [her] condition that prohibited her from performing the duties of a distribution clerk in a modified capacity, was the increase[d] pain over the neck and upper back area. I tried to remedy this by the physical therapy for a three-week period.... I reviewed my notes in 1994 and could find no evidence of [her] being pregnant as of April 1994. I did see [her] several times through 1994-1995, and she did not tell me of any pregnancy or delivery of a child. I do n[o]t feel that her pregnancy would affect the ability to perform the jobs as a modified distribution clerk.... I saw [her] in July 1994, and then saw her again on the January 1, 1995 and no mention of an automobile accident was given to me by [her] in January 1995. I know nothing about this accident at all and I do n[o]t know what type of injuries she sustained from this automobile accident. I can[no]t answer how this affect[ed her] claim of the shoulder and back condition."

The medical evidence in this case does not support that appellant sustained a recurrence of disability causally related to the accepted employment injury. In his July 31, 1997 report, Dr. Fisher stated that the only reason he advised appellant not to work was increased pain. He further indicated that he felt that she could return to work on March 1, 1994. Appellant therefore failed to discharge her burden of proof, and the Board finds that she failed to establish a recurrence of disability.

The Board further 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 Federal Employees' Compensation Act,[7] 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.[8] 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.[9] 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.[10] 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.[11]

[7] 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).

[8] 20 C.F.R. §§ 10.138(b)(1) and (2).

[9] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[10] 20 C.F.R. § 10.138(b)(2).

[11] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

With the request for reconsideration, appellant submitted an unsigned treatment note from Dr. Fisher dated May 1, 1997 in which he stated that he had not seen appellant for about five months and that she had not worked since May 1996. He noted findings of pain on examination. In reports dated September 26 and October 7, 1997, Dr. Elbert Nelson, who is Board-certified in obstetrics and gynecology, reported that appellant had been in an automobile accident on September 22, 1994 and that, while he had hospitalized her for observation due to her pregnancy, she had sustained no injuries. He advised that she had a cesarean section on December 12, 1994.

In this case, appellant did not advance a point of law not previously considered or articulate any legal argument with a reasonable color of validity in support of her request. While she submitted additional medical evidence with her request, neither Dr. Fisher nor Dr. Nelson provided an opinion, or for that matter, discussed the claimed recurrence of disability on January 10, 1994. The Office, therefore, properly denied appellant's request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated December 12 and September 9, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 20, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member