U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA L. SALATOWSKI and U.S. POSTAL SERVICE, POST OFFICE, Wyandotte, MI

Docket No. 98-1703; Submitted on the Record;
Issued July 20, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant has established that she sustained intermittent periods of disability from February 14 through September 27, 1996 causally related to her September 21, 1992 employment injury; (2) whether appellant has established that she sustained a recurrence of disability on January 24, 1997 causally related to her September 21, 1992 employment injury; and (3) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to 5 U.S.C. § 8124.

On October 20, 1992 appellant, then a 43-year-old letter carrier, filed a claim alleging that she sustained a traumatic injury on September 21, 1992 in the performance of duty. The Office accepted appellant's claim for right shoulder strain, aggravation of cervicodorsal myofascitis of the right shoulder and a consequently injury of bilateral overuse syndrome of the right arm. The Office authorized a July 9, 1994 arthroscopy of appellant's right shoulder. On October 17, 1995 appellant accepted a job offer from the employing establishment initially working for five hours per day and then increasing to eight hours per day by week four in accordance with the restrictions found by Dr. Richard M. Singer, a Board-certified orthopedic surgeon and her attending physician. The position offered by the employing establishment required appellant to "sort/distribute mail to a letter case by picking up one piece at a time ([weight].5 [ounces]) and place in appropriate pigeon hole, no reaching above shoulder level, answering telephone, sorting forms, sitting, standing and walking at will."

In a report of telephone call dated November 29, 1995, the Office indicated that an official with the employing establishment reported that appellant was working full time in a limited-duty capacity.

By decision dated December 29, 1995, the Office terminated appellant's compensation benefits effective that date on the grounds that she had no further injury-related disability. In a decision dated May 22, 1996 and finalized May 23, 1996, a hearing representative affirmed the Office's December 29, 1995 termination of appellant's benefits but remanded the case for

resolution of a conflict in medical opinion regarding whether appellant had established that she had continuing disability after December 29, 1995 due to her accepted employment injury.

In a letter dated August 14, 1996, the Office informed appellant that the opinion of Dr. S. Maitra, an orthopedic surgeon, to whom the Office referred appellant for an impartial medical examination, established that she could not perform her date-of-injury position but could work for eight hours per day with physical restrictions. In another letter of the same date, the Office advised the employing establishment of Dr. Maitra's findings and enclosed a copy of his work restrictions.

On October 4, 1996 appellant filed claims for compensation on account of disability (Form CA-8) requesting compensation for wage-loss disability from February 14 through September 27, 1996. Appellant indicated on the claim form that the employing establishment did not provide her work within her restrictions. In a statement accompanying the claim form, appellant's supervisor related that the employing establishment had provided appellant with light-duty employment after the Office denied her claim for workers' compensation but that she had refused to work more than three hours a day.

By decision dated February 7, 1997, the Office denied appellant's claim on the grounds that the evidence did not established that she sustained any disability from work for the period of February 14 through September 27, 1996. The Office further found that the evidence did not establish that the employing establishment sent appellant home after three hours of work but rather that appellant refused to work for eight hours within her restrictions.

In a decision dated March 6, 1997, the Office found that appellant had no loss of wage-earning capacity effective October 25, 1995 on the grounds that her actual earnings in her limited-duty position fairly and reasonably represented her wage-earning capacity.

By letter dated March 16, 1997, appellant requested reconsideration of her claim.[1]

On March 18, 1997 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that she sustained a recurrence of disability on January 24, 1997 causally related to her September 21, 1992 employment injury. By decision dated July 22, 1997, the Office denied appellant's claim for a recurrence of disability beginning January 24, 1997. In another decision of the same date, the Office denied modification of its February 7, 1997 decision denying appellant's claim for intermittent wage loss from February 14 through September 27, 1996.

In a letter received by the Office on August 25, 1997, appellant requested reconsideration of the Office's denial of her claim for compensation for the period February 14 through September 27, 1996. By decision dated September 5, 1997, the Office denied modification of its prior decision.

In letters postmarked September 19, 1997, appellant requested a hearing on the Office's July 22 and September 5, 1997 decisions. By decision dated April 1, 1998, the Office denied

[1] Appellant initially requested a hearing before an Office hearing representative but subsequently withdrew her request to pursue reconsideration of her case.

appellant's request for a hearing regarding its July 22, 1997 decision as untimely and denied her request for a hearing regarding its September 5, 1997 decision as made after a previous request for reconsideration.

The Board finds that the case is not in posture for decision on the issue of whether appellant has established that she sustained intermittent disability from February 14 through September 27, 1996 causally related to her September 21, 1992 employment injury.

In the present case, it is not clear whether appellant was provided work within the restrictions found by Dr. Maitra, the physician to whom the Office referred appellant for an impartial medical examination. In a report dated July 10, 1996, Dr. Maitra related:

> "Based on this orthopedic examination today, it is my opinion that [appellant] is suffering from chronic tendinitis of the right shoulder and is not able to work as a letter carrier, as described to me. As far as her ability to perform a restricted job, she should be able to do an inside [employing establishment] job on a full-time basis. The restrictions regarding the use of the shoulder are permanent and no further orthopedic treatment is indicated."

In an accompanying work capacity evaluation (OWCP-5c), Dr. Maitra found that appellant had restrictions on reaching and lifting of up to 5 pounds 12 to 15 times per hour for 8 hours per day.

In a letter dated January 31, 1997, an official with the employing establishment stated:

> "[Appellant's] [w]orkers' [c]ompensation claim was denied by the Department of Labor. She submitted a request for light duty to our office. Light duty was approved, within her doctor's restrictions, casing mail below shoulder height only, picking up one letter at a time, up to eight hours per day, with the employee taking extra breaks when necessary to ice her arm to alleviate pain. Although this work was available for eight hours, [appellant] refused to work longer than three hours a day, stating that her shoulder hurt too much after that. At no time was she sent home for lack of available work. Sick leave and/or leave without pay was approved for hours not worked. [Appellant] would not accept that she had to perform productive work while on light duty, as opposed to limited duty where we are obligated to provide her with eight hours of work, whether productive or not. [She] filed an appeal with the Department of Labor regarding her [w]orkers' [c]ompensation claim. The appeal decision was not received in our office until September 26, 1996.
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> "Our office did not receive a copy of the accepted work restrictions from the Department of Labor (dated August 14, 1996) as stated in your letter. Our offer of light-duty work was made following the medical restrictions provided by [appellant's] doctors, stating limited reaching, no reaching above shoulder level, [and] no lifting more than five pounds. I am unable to locate a copy of the

medical restrictions, other than a CA-17 which [appellant] wrote her own restrictions on, so I am unable to supply a copy at this time."[2]

The Office determined that the employing establishment provided appellant with work within the restrictions provided by her attending physician. However, the relevant inquiry in the present case is whether the employing establishment provided appellant with limited-duty employment from February 14 through September 27, 1996 within the restrictions imposed by Dr. Maitra, the physician selected the Office to resolve a conflict in medical opinion evidence. He indicated that appellant had continuing disability causally related to her employment injury and listed work restrictions, including limitations on lifting of not over 5 pounds or more than 12 to 15 times per hour. It is not clear whether the position offered by the employing establishment required appellant to lift items more than 12 to 15 times per hour. Therefore, the case will be remanded to the Office to make the appropriate factual determination regarding whether the employing establishment provided appellant with work during this period within the restrictions found by Dr. Maitra.

The Board further finds that appellant has not established that she sustained a recurrence of disability on January 24, 1997 causally related to her September 21, 1992 employment injury.

Where 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 establishes that the employee 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 to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[3]

In the present case, appellant has not alleged that a change in her light-duty employment as a cause of her recurrence of disability. The medical evidence is also insufficient to establish that she was disabled from her limited-duty employment as the result of a change in the nature and extent of her injury-related conditions.

In a report dated February 10, 1997, Dr. Alice R. Shanaver, an osteopath, discussed appellant's hospitalization on January 24, 1997 for left flank pain which occurred at work on that date. Dr. Shanaver noted appellant's history of a right shoulder injury and discussed her current employment duties of using "a hand stamp with her right hand to mark hundreds of letters per

[2] Appellant submitted a statement dated December 10, 1996, from her union representative, who indicated that the employing establishment believed that appellant's claim had been denied and that management "stated that they would let her work as long as she could perform normal carrier duties…. [The employing establishment] was of the impression that [appellant] was no longer receiving workman's comp[ensation] and, therefore, they were not required to provide her with eight hours work…. [Appellant] stated that she had heard nothing from the office of Detroit injury comp[ensation] and, therefore, would work her only three hours per day until she was informed of something different." In a statement dated March 12, 1997, a coworker stated that in late February or early March he heard appellant's supervisor "send [appellant] home after three hours because she could not perform her duties as a letter carrier."

[3] *Terry R. Hedman*, 38 ECAB 222 (1986).

day" with a "a different work station daily and no chair with a right arm support." She noted that appellant experienced pain in her low back and flank and listed findings on physical examination. Dr. Shanaver stated, "It is obvious to us that her disabling pain of January 25 [to] 30[, 1997] is a direct result of biomechanical overutilization of her right upper extremity."

In a report dated March 18, 1997, Dr. Shanaver related:

> "[Appellant] states that she had had right shoulder corrective surgery in 1994. She had been a productive [l]etter [c]arrier until her shoulder injury in 1992. In 1996 she had been assigned light duty. This involved using a hand stamp in her right hand to mark hundreds of letters per day. She had had different work station daily and no chair with right arm support. Suddenly, on the 4th or 5th workday of that week, her left low back and flank developed pain of emergent severity."
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> "On January 30[, 1997] [o]steopathic structure examination revealed position and marked acute tissue changes involving the lumbar, sacral, pelvis and cervical regions. More specifically, the lumbar spine, pelvis and sacrum were all moved to the left and maintained near the physiological end range of motion by acute muscle spasm."

Dr. Shanaver described her continuing treatment of appellant and noted that the pain in her back worsened with activity. She attributed appellant's current condition to the following:

> "[Appellant] was required to perform repetitive right-handed motions in arm pronation. Her chair was without any support for her arm. In fact, she was required to use different chairs daily. She left flank musculature then gradually attempted to compensation for this upper extremity strain. On about January 23[, 1997] the biological compensation for this severe postural strain was exhausted. The severe pain she experienced from this musculoskeletal failure was catastrophic and resulted in the events described above.
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> "In *summary*, there is a direct causal connection between the original upper extremity injury and the current flank pain."

Dr. Shanaver found appellant totally disabled from most activities, including carrying anything in her right arm. However, Dr. Shanaver's reports are insufficient to establish that appellant sustained a recurrence of disability beginning January 24, 1997 causally related to her September 21, 1992 employment injury, which the Office accepted for right shoulder strain, aggravation of cervicodorsal myofascitis of the right shoulder and a consequential injury of bilateral overuse syndrome of the arms. The reports from Dr. Shanaver indicate that appellant's current condition of left flank pain is due to performing repetitive tasks with her right arm without proper support. While Dr. Shanaver's opinion may be relevant to an occupational disease claim, it is of little probative value to the claimed recurrence of disability. In a recurrence of disability situation, generally no evidence other than the previous injury accounts

for the disability.[4] Dr. Shanaver attributed appellant's condition to her current employment duties and thus her reports do not support appellant's claim for a recurrence of disability.[5]

The Board further finds that the Office properly denied appellant's request for a hearing of its July 22, 1997 decision, under section 8124(b) of the Federal Employees' Compensation Act.[6]

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,[7] when the request is made after the 30-day period established for requesting a hearing,[8] or when the request is for a second hearing on the same issue.[9] 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.[10]

In the present case, appellant's request for a hearing on the Office's July 22, 1997 decision was made more than 30 days after the date of issuance of that decision and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter postmarked September 19, 1997. Hence, the Office was correct in stating in its April 1, 1998 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 July 22, 1997 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 April 1, 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 hearing request on the basis that the case could be resolved by requesting reconsideration before the Office and submitting additional evidence to establish that she sustained a recurrence of disability causally related to her accepted employment injury.

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[4] *See William Henry Lance*, 18 ECAB 422 (1967).

[5] A recurrence of disability includes a work stoppage caused by a spontaneous material change in the employment-related condition without an intervening injury. If the disability results from new exposure to work factors, an appropriate new claim should be filed; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (January 1995).

[6] In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for a hearing on its September 5, 1997 decision denying her claim for wage-loss disability is moot.

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

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

[9] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[10] *Sandra F. Powell*, 45 ECAB 877 (1994).

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] 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 decision of the Office of Workers' Compensation Programs dated April 1, 1998 is affirmed in part and set aside in part. The decision of the Office dated July 22, 1997, which addressed the issue of whether appellant sustained an employment-related recurrence of disability beginning January 24, 1997 are affirmed. The decisions of the Office dated September 5 and July 22, 1997, which addressed the issue of whether appellant sustained intermittent periods of disability from February 14 to September 13, 1996 is set aside and the case is remanded for further proceedings consistent with this decision by the Board.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

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