

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN A. CAUBLE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Salisbury, NC

*Docket No. 99-1352; Submitted on the Record;
Issued July 14, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on or about June 10, 1996, casually related to her November 19, 1992 accepted injury; and (2) whether the refusal of the Office of Workers' Compensation Programs in its March 3, 1999 decision 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.

On February 9, 1993 appellant, then a licensed nurse practitioner, filed a traumatic injury claim for compensation benefits, alleging that on November 19, 1992 she sustained an injury to her lower back and right leg while picking up a linen hamper and putting it down a chute at work.¹ She worked intermittently while being treated with cortisone shots and epidural blocks for pain by Dr. H. Boyd Watts, a Board-certified orthopedic surgeon. Appellant was restricted from full work duty as a result of her injury. The Office accepted appellant's claim for lumbar sacral strain and aggravation of lumbar degenerative disc on February 18, 1993.

On August 27, 1993 appellant filed a claim for recurrence of disability, alleging that the original injury caused additional disability on June 10, 1993. Appellant alleged that she had continually experienced pain in her lower back and legs since the November 19, 1992 work incident. On the reverse side on the claim form, appellant's supervisor also indicated that appellant had continued to suffer pain and had worked whenever possible. She noted, however, that the injury had not interfered with her work assignment.

¹ The Board notes that appellant has filed three previous claims for compensation, including a claim for low back strain sustained on September 8, 1980, a back injury sustained on January 31, 1983 and a right eye injury sustained on October 10, 1983. The record does not indicate whether the Office has accepted any of the previous claims. Appellant filed a claim after the November 19, 1992 incident that was accepted by the Office for contusion of the left knee for an injury sustained on August 15, 1993.

On September 8, 1993 the Office requested additional information from appellant. The Office inquired about appellant's health benefits and whether a light-duty assignment had been made available to her, whether she accepted such a position and the description of physical requirements for such light duty.

On September 22, 1993 appellant's employing establishment submitted to the Office a letter describing the light-duty assignment offered to appellant on February 8, 1993. The employing establishment related that appellant was refrained from any activity related to twisting, pushing, pulling, bending or lifting.

On November 12, 1993 the Office informed appellant by letter that she was eligible for compensation benefits for the period June 15 through August 1, 1993, for a total of 57 hours.

Dr. Ada Fisher, appellant's attending physician, examined her on April 28, 1996. In a letter to the employing establishment dated June 19, 1996, Dr Fisher noted her concern that appellant had developed some permanent disability that might worsen without intervention. She indicated that appellant had a herniated nucleus propulsa in her back and that appellant's son had noticed that she occasionally drags her leg and does not walk straight. Dr. Fisher recommended that a second opinion evaluation be performed because of the potential problems that appellant might face in the future.

Appellant sought treatment on December 2, 1997 for pain and swelling in her right foot. An x-ray revealed mild degenerative changes along the dorsal aspect of the mid foot. On May 5, 1998 Dr. Fisher diagnosed appellant with a permanent disability of the right leg and further recommended assessment of the extent of disability. Dr. Fisher reviewed appellant's file and noted that she has had several injuries in the past and questioned, which injuries had been accepted related to her employment. After an examination on June 24, 1998, appellant was permanently restricted from lifting or pulling more than 50 pounds, but told that she could continue her current work duties.

On July 29, 1998 appellant filed a second recurrence claim alleging that the original injury on November 19, 1992 caused her additional injury on June 10, 1996. Appellant alleged that her back and legs continued to hurt and that her right leg had continued to swell. Appellant's supervisor also indicated on the reverse side of the claim form that she has had back and right leg pain, however, she has continued to work in her modified job assignment.

On August 4, 1998 the Office requested that appellant submit additional information in support of her recurrence claim. The Office specifically requested that appellant furnish a completed CA-2a form, including her duties on return to work, her physical condition at that time and her current condition, an explanation of how her current condition related to the original injury and medical notes of all the treatment received for her knee condition since the injury.

Appellant submitted a statement dated August 16, 1998, in which she outlined the history of her medical treatment since her November 12, 1992 injury and how her back and leg condition had worsened over time. Appellant also asserted that her left knee injury in August 1993 had aggravated her back condition. Appellant further submitted various treatment notes

pertaining to the November 12, 1992 back and leg injury and medical documentation, which included the May 5, 1998 clinical notes and letters from Dr. Fisher, dated June 16, 1996 and August 18, 1998, which related her concern that appellant might have developed a permanent disability of her right leg.

By decision dated January 14, 1999, the Office denied appellant's claim for recurrence of disability on the grounds that the evidence was insufficient to establish that her current condition was causally related to the work injury on November 19, 1992. The Office found that no relevant medical evidence was received between June 16, 1996 and August 18, 1998 and that Dr. Fisher's medical reports dated June 16, 1996 and August 18, 1998 were speculative and lacking in rationale sufficient to establish a cause and effect relationship between appellant's current condition and her original work injury on November 19, 1992.

On February 3, 1999 appellant requested reconsideration of the January 14, 1999 decision. Appellant argued that it was Dr. Fisher's concern about her back pain and loss of use of her right leg that led her to request reconsideration of the prior decision. Appellant resubmitted the reports by Dr. Fisher and noted that she might not have been initially aware of the previous injury claims because Office files were kept in human resources and not in the employee health office. Appellant asserted that on July 8, 1996 she had requested copies of her Office files, however, more than eight months had passed before she received them. Appellant also argued that on April 28, 1997, Dr. Fisher reviewed appellant's records and then kept them for approximately a year. Appellant further argued that when Dr. Fisher noted her concern about a potential disability, she indicated that a second opinion evaluation had to be performed, but that the Office had not approved such evaluation until October 6, 1998. Appellant submitted a report from Dr. David Kelly, a Board-certified neurologist, who evaluated her on November 12, 1998 for back pain. He noted that appellant had sustained two injuries, one in 1983 and the other in November 1992. Dr. Kelly related her complaints of gradual worsening of back and leg symptoms and weakness and pain in her foot, which he opined, suggests early foot drop. He noted that her back was stiff and pain was produced upon forward bending of 15 degrees. Dr. Kelly recommended that a magnetic resonance imaging (MRI) scan of the lumbar spine be conducted. Appellant also submitted the MRI report dated November 18, 1998 conducted of the lumbar spine, which she argued, revealed the source of her pain.

In a March 3, 1999 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was found to be of a repetitious nature and, therefore, insufficient to warrant review of the prior decision.

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained a recurrence of disability on or about June 10, 1996 causally related to her November 19, 1992 accepted injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that 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 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 requirements.² Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability commencing June 10, 1996 and her November 19, 1992 employment injury.³ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.⁴

In this case, appellant asserted that she sustained a recurrence of disability commencing June 10, 1996 causally related to her November 19, 1992 lumbar sacral strain and aggravation of lumbar degenerative disc. Appellant submitted in support of her claim treatment notes dated from January 26 through September 23, 1993, letter reports from Dr. Fisher dated June 19, 1996 and August 18, 1998, and examination reports from April 28, 1997 until June 24, 1998. None of the medical documentation, however, established a causal relationship between appellant's current condition and the accepted employment injury, but merely diagnosed her condition at the time of each evaluation and outlined appropriate work restrictions. Dr. Fisher, in her reports dated June 16, 1996 and August 18, 1998, noted her concern that appellant had suffered a back injury and that she had potentially developed a permanent disability; however, she never mentioned the November 19, 1992 employment incident, or that appellant's condition resulted from a back and leg injury sustained due to employment factors. She implied that there might have been an occupational injury when she recommended that appellant request from the Department of Labor a second opinion evaluation; however, she did not address the facts of any employment incident or relate any such facts to appellant's medical condition at that time. Dr. Fisher merely speculated that appellant had suffered some permanent disability and without additional facts and sound medical reasoning, this type of conjecture falls short of the requisite medical evidence necessary to support a causal relationship. To be of probative value a physician must address the specific facts and medical condition applicable to appellant's case and support his or her findings with sound medical reasoning.⁵ An award of compensation may not be based upon surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between her condition and her employment.⁶ To establish causal relationship, appellant must submit a physician's report in which the physician reviews that factors of employment identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and appellant's medical history, state whether these employment factors caused or aggravated the diagnosed condition.⁷

² *Terry R. Hedman*, 38 ECAB 222 (1986).

³ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

⁴ *See Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *William S. Wright*, 45 ECAB 498 (1993).

⁷ *Id.*

Consequently, appellant has not met her burden of establishing by substantial, reliable and probative evidence that her alleged recurrent back condition is causally related to her November 19, 1992 employment injury.

The Board further finds that the refusal of the Office in its March 3, 1999 decision to reopen appellant's case for further consideration of the merits of her claim did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁸ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁹ 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.¹⁰

The evidence provided on reconsideration was insufficient and repetitious in terms of establishing appellant's recurrence claim. Among previously submitted medical documentation, appellant submitted as new evidence her statement dated February 3, 1999, Dr. Kelly's report dated November 12, 1998 and the MRI report conducted on November 18, 1998. The arguments advanced by appellant in her statement were not relevant or pertinent to evidence previously considered by the Office. Moreover, none of appellant's arguments raised a concern that the Office had erroneously applied or interpreted a point of law in her case. Appellant's allegations regarding the timeliness of which she received previous case files, or the fact that Dr. Fisher might not have been aware of the injury claims, simply do not address the relevant issue in this case. The January 14, 1999 decision denying appellant's recurrence claim was issued on the basis that appellant failed to establish a causal relationship between her recurrence of disability on June 10, 1996 and her accepted employment injury on November 19, 1992. Appellant's reconsideration request, however, did not provide new factual or legal evidence establishing that she sustained a recurrence of disability arising from compensable factors of employment. Neither Drs. Fisher nor Kelly offered causal relationship evidence in their reports, nor did the MRI report establish a causal relationship between the claimed recurrence and the November 19, 1992 employment incident. Because the medical evidence submitted on reconsideration contained no rationalized opinion causally relating appellant's alleged recurrence of disability to her November 19, 1992 injury, it is of little probative value to support review of her recurrence claim.

Appellant has not established that the Office abused its discretion in its March 3, 1999 decision by denying her request for a review on the merits of her claim under section 8128(a) of the Act, because she failed to show that the Office erroneously applied or interpreted a specific

⁸ 5 U.S.C. §§ 8101-8193. 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).

⁹ 20 C.F.R. § 10.606.

¹⁰ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated March 3 and January 14, 1999 are affirmed.

Dated, Washington, D.C.
July 14, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member