

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERT CABELLO and DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION, Sacramento, CA

*Docket No. 99-1339; Submitted on the Record;
Issued June 21, 2000*

DECISION and ORDER

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

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability on or after May 22, 1998 due to his employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after May 22, 1998 due to his employment injury.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.¹ 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 the employment injury and supports that conclusion with sound medical rationale.² Where no such rationale is present, medical evidence is of diminished probative value.³

In June 1994, appellant, then a 47-year-old accountant, filed a claim alleging that he sustained upper extremity, neck and back conditions due to using his computer at work. The Office accepted that appellant sustained employment-related neck and upper back strains. Appellant stopped work on May 16, 1994 and returned to his regular work on June 15, 1994. He stopped work on May 22, 1998 and alleged that he sustained a recurrence of disability due to his

¹ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

² *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

³ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

employment injury.⁴ By decision dated October 21, 1998, the Office denied appellant's claim for recurrence of disability on the grounds that he did not submit sufficient medical evidence in support thereof. By decision dated January 19, 1999, the Office denied appellant's request for a hearing on the grounds that it was untimely.

In support of his claim for an employment-related recurrence of disability, appellant submitted a June 26, 1998 report in which Dr. Douglas B. Merrill, an attending physician Board-certified in physical medicine and rehabilitation, noted his neck and shoulder complaints and diagnosed "chronic neck pain; recent exacerbation." Appellant also submitted medical notes, dated in August 1998, in which Dr. Merrill provided a similar assessment of his condition. These reports, however, are of limited probative value on the relevant issue of the present case in that they do not contain an opinion on causal relationship.⁵ Dr. Merrill did not present an opinion that appellant sustained an employment-related recurrence of disability due to his employment injury, neck and back strains, which initially developed more than four years earlier.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.⁶ Appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied his claim for compensation.⁷

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁸ As section 8124(b)(1) is unequivocal in setting

⁴ Appellant indicated that he experienced pain in his neck, back and shoulders after working extra hours beginning in late 1997. He retired from the employing establishment in July 1998.

⁵ See *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

⁶ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

⁷ The medical record also does not contain an opinion establishing that appellant sustained a new injury in May 1998 due to employment factors. In its October 21, 1998 decision, the Office noted that appellant had not filed a claim alleging the occurrence of a new employment injury in May 1998. Appellant submitted additional evidence after the Office's last merit decision, but the Board cannot consider such evidence for the first time on appeal; see 20 C.F.R. § 501.2(c).

⁸ 5 U.S.C. § 8124(b)(1).

forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁹

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁰ 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,¹¹ when the request is made after the 30-day period for requesting a hearing,¹² and when the request is for a second hearing on the same issue.¹³

In the present case, appellant's November 23, 1998 hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated October 21, 1998 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing before an Office representative in a letter postmarked November 23, 1998.¹⁴ Hence, the Office was correct in stating in its January 19, 1999 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's 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 January 19, 1999 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 issue in the case could be resolved by submitting additional medical evidence to establish that the claimed recurrence of disability was employment related. 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.¹⁵ 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.

⁹ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

¹⁰ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹¹ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹² *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹³ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

¹⁴ The letter was dated November 20, 1998, but the postmark determines that the hearing request was filed on November 23, 1998; *see* 20 C.F.R. § 10.616(a) (1999).

¹⁵ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated January 19, 1999 and October 21, 1998 are affirmed.

Dated, Washington, D.C.
June 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member