U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWINA FLEMING and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Kansas City, MO

Docket No. 98-1708; Submitted on the Record;
Issued March 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained an injury to her right shoulder in the performance of duty causally related to factors of her federal employment; and (2) whether the refusal of the Office of Workers' Compensation Programs, in its January 14, 1998 decision, to review the merits of appellant's claim, constituted an abuse of discretion.

On February 21, 1997 appellant, then a 51-year-old claims and records clerk, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she sustained cervical radiculopathy and fibromyositis in the performance of duty causally related to factors of her federal employment. Specifically, appellant stated that, in June 1996, she experienced sharp, stabbing pains in the upper part of her back on the right side. She alleged that her federal work "load was pretty heavy" which caused "a lot of stress and strain in her back."

On July 17, 1996 appellant was examined by Dr. Laura L. Dill, a Board-certified emergency medicine specialist, who noted that appellant fell through a weak area in her porch one week prior and had x-rays. She opined that appellant had perithoracic strain and right shoulder pain and lumbar strain, as well as diabetes mellitus.

In a chart note of August 27, 1996, Dr. Robert M. Drisko, II, a Board-certified orthopedic surgeon, noted that appellant came to his office with her chief complaint being pain in her cervical spine and into her right shoulder and a great deal of pain in her parascapular area.[1] Appellant related to Dr. Drisko that she had this pain since June. He noted that x-rays showed mild cervical spondylosis at C5-6 and C6-7. In Dr. Drisko's note dated September 5, 1996, he noted that appellant's electromyogram (EMG) showed some nerve root irritation of C5 and 6,

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[1] Dr. Drisko previously treated appellant for carpal tunnel syndrome. The record reveals that the Office accepted appellant's carpal tunnel syndrome as employment related, Office File No. A11-139924 and paid appellant appropriate compensation benefits.

but stated that she was getting better with physical therapy. He also stated that her magnetic resonance imaging (MRI) scan appeared to be normal, at least with regard to disc disease. However, in his November 12 and 25, 1996 notes, Dr. Drisko concluded that appellant was having a recurrence of her cervical radiculopathy at C5-6, that the MRI scan was "essentially normal" and that the EMG demonstrated radiculopathy at C5-6.

In a medical report dated November 13, 1996, Dr. Lowell Reynolds noted that appellant suffered from "neck pain, probably secondary to cervical radiculopathy." In his January 20, 1997 report, he noted that, under his care, appellant has received four cervical epidural nerve blocks with steroid augmentation and that she noticed a significant reduction of pain following these injections. Dr. Reynolds further noted that appellant was "complaining of neck stiffness and pain which she describes as aching in nature. That pain is reportedly 10/10 in severity on a verbal analog scale." He concluded that appellant suffered from cervical radiculopathy and fibromyositis and added that appellant would benefit from a series of multiple trigger point injections.

Other medical tests in the record include an x-ray report by Dr. H.M. Cloogman, a Board-certified radiologist, dated July 9, 1996, which indicated that there were minimal degenerative changes in appellant's lumbar spine. In addition, the record contains two x-ray reports from Dr. Michael T. Otte, a Board-certified radiologist. His x-rays of July 17, 1996 indicate "frontal and lateral views of the entire thoracic spine show no obvious osseous or soft tissue irregularity and his x-ray of appellant's right shoulder on April 11, 1997 indicated "degenerative changes at the AC [acromioclavicular] joint" and "somewhat subtle cortical changes at the inferior glanoid margin."

On May 28, 1997 Dr. Reynolds responded to a questionnaire from the Office regarding appellant's physical limitations and the relationship to her federal employment by answering every question "unable to say." However, on the same date, he issued a medical report in which he responded to the May 21, 1997 letter from the Office and described appellant's history with him. Dr. Reynolds indicated that, at the time he made the diagnosis of cervical radiculopathy in August 1996, he was unaware that this could possibly be work related and "am still uncertain as to what [appellant]'s injury was." He continued, "It is possible that this [cervical radiculopathy] could have resulted over prolonged repetitive types of work activities, however, [she] reports that she works as a computer operator and therefore I am uncertain as to how this would cause cervical radiculopathy without knowing more of the details of her job description." Dr. Reynolds also noted, "Through your correspondence I understand that apparently there was an injury in June 1996 at [appellant]'s work, however, [she] has not made me aware of such an incident. It is possible that [appellant]'s underlying carpal tunnel syndrome which had been released in the past was aggravated through repetitive motions while at work." He also opined that he was hopeful that this condition was temporary.

In response to questions from the Office dated May 21, 1997, appellant wrote a letter dated June 20, 1997 in which she explained that, during the past year she has had symptoms of pain in her back, shoulders and neck, that it has been a year now and it is not getting any better, and that steroid injections only provided temporary relief. She also noted that her work load was heavy the month June 1996 and she started to experience muscle spasms in the upper right side

of her back at that time and that it is now "a repeated spasm and sharp pain in my shoulder and neck on the right side."

In a decision dated August 19, 1997, the Office denied appellant's claim for compensation, noting that "the medical evidence was not sufficient to establish that your condition was caused by the employment factor, as required by the Federal Employees' Compensation Act."

On October 17, 1997 appellant requested reconsideration. She noted that since the date of the decision she has had another operation on her right arm. In support thereof, appellant submitted a medical report by Dr. Drisko dated September 12, 1997, in which he indicated that appellant suffered from symptomatic rotator cuff syndrome and that she needed operative intervention. Additional medical evidence submitted by appellant revealed that she was admitted to Trinity Lutheran Hospital on September 15, 1997, where Dr. Alfred W. Davis, Jr., a Board-certified internist, noted that appellant complained of "recent onset of severe and unrelenting discomfort to her right shoulder with inability to raise her arm that has progressed over the past month or so" and that "[appellant] had [an] MRI scan recently that did show marked degeneration of the rotator cuff with subacromial spur and AC arthritis," compatible with rotator cuff disease. He also diagnosed appellant as suffering from a rotator cuff tear and rotator cuff syndrome. On that same date Dr. Drisko performed an anterior acromioplasty, excision AC plasty, bursectomy, and inspection rotator cuff of appellant. Appellant was discharged from the hospital on September 17, 1997 with a diagnosis of impingement of the right shoulder. By progress note dated September 25, 1997, Dr. Drisko noted that appellant did not have a full thickness tear and for that reason, her course of recovery would be more rapid.

Appellant also submitted medical evidence previously of record.

In a decision dated January 14, 1998, the Office denied appellant's application for review. The Office found that the new evidence submitted by appellant was either repetitive and reviewed by the prior decision or was not relative to the issue for determination, which the Office noted was "the etiology of the condition as it related to specific work factors."

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained an injury to her right shoulder in the performance of duty causally related to factors of his federal employment.

An employee seeking benefits under the Act[2] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that an injury was sustained in the performance of the duty alleged and/or specific condition for which compensation is claimed are causally related to

[2] 5 U.S.C. §§ 8101-8193.

the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

To establish that an injury was sustained in a the performance of duty in an occupational disease claim, an appellant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is alleged; (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 the 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 appellant.[5] The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.[6] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the appellant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of appellant, 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.

In the instant case, there is no rationalized medical opinion that definitively supports a causal relationship between appellant's right shoulder condition and her federal employment. Dr. Dill, the first physician to see appellant regarding this condition, did not make any statement as to the cause of her perithoracic strain and right shoulder pain. Drs. Cloogman and Otte merely reported the results of diagnostic testing and made no statement that could be perceived as relating appellant's right shoulder pain to her employment. Neither Dr. Davis, the internist who admitted appellant for her surgery, nor Dr. Drisko, her orthopedic surgeon, made any comment as to a causal relationship between appellant's employment factors and her right rotator cuff syndrome/tear or surgery. Finally, Dr. Reynold's opinion is also inadequate to establish a causal relationship. Dr. Reynolds noted that, "at the time he made the diagnosis of cervical radiculopathy in August 1996, he was unaware at that time that this could possibly be work related and [I] am still uncertain as to what [appellant]'s injury was." Although he conceded that it was possible that this could have resulted from prolonged repetitive work activities, he was uncertain as to how appellant's job as a computer operator would cause cervical radiculopathy and would need more details about her job in order to make a statement on causal relationship. Dr. Reynolds further noted that appellant had not made him aware of any injury which occurred in June 1996.

[3] *Louise F. Garnett*, 47 ECAB 639, 643 (1996); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] The Office's regulations clarify that a traumatic injury refers to injury caused by a specific event or incident or series of events or incidents occurring within a single workday or work shift whereas occupational disease refers to injury produced by employment factors which occur or are present over a period longer than a single workday or shift; *see* 20 C.F.R. § 10.5(a)(15), (16).

[5] *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[6] *Ern Reynolds*, 45 ECAB 690 (1994).

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 his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship.[7] Causal relationship must be established by rationalized medical opinion evidence. Appellant failed to submit such evidence and the Office therefore properly denied appellant's claim for compensation.

The Board further finds that the Office did not, by its January 14, 1998 decision, abuse its discretion by refusing to reopen appellant's case for a review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,[8] which provide that a claimant may obtain review of the merits of the claim by:

> "(i) Showing that the Office erroneously applied or interpreted a point of law, or
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> "(ii) Advancing a point of law or a fact not previously considered by the Office, or
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> "(iii) Submitting relevant and pertinent evidence not previously considered by the Office."

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[9]

In support of her reconsideration request, appellant submitted medical reports from Drs. Drisko and Davis and an operative note from Dr. Drisko. This medical evidence shows that appellant underwent surgery on September 15, 1997 for an anterior acromioplasty, excision AC plasty, bursectomy and inspection of rotator cuff. However, none of these medical reports address the issue of whether appellant's injury to her right shoulder and resulting surgery were causally related to factors of her federal employment. Furthermore, she submitted medical evidence that was previously in the record. The Board has held that material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.[10]

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[7] *Victor J. Woodhams*, 41 ECAB 345, 353-54 (1989).

[8] 20 C.F.R. § 10.138(b)(1).

[9] 20 C.F.R. § 10.138(b)(2).

[10] *James A. England*, 47 ECAB 115, 119 (1995).

The decisions of the Office of Workers' Compensation Programs dated January 14, 1998 and August 19, 1997 are hereby affirmed.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member