U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSARY MULLINIKS and DEPARTMENT OF THE NAVY, AIR SYSTEMS COMMAND, San Diego, CA

Docket No. 98-2395; Submitted on the Record;
Issued March 16, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether appellant met her burden of proof to establish that she had disability after February 7, 1997 due to her employment injuries; 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.

The Board finds that appellant did not meet her burden of proof to establish that she had disability after February 7, 1997 due to her employment injuries.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2] The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. 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 claimant's diagnosed condition and the compensable 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,

[1] 5 U.S.C. §§ 8101-8193.

[2] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

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.[3]

In October 1996 appellant, then a 65-year-old electrical equipment repair person, filed an occupational disease claim alleging that she sustained nausea, stomach upset, rashes, nose and eye irritation and voice loss due to working with glues, toxins and fumes at work. She indicated that she first realized her condition was employment related in July 1990. The Office accepted that appellant sustained allergic rhinitis and dermatitis. Appellant claimed that she sustained employment-related disability on and after February 7, 1997.[4] By decision dated May 30, 1998, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence in support thereof. On July 14, 1998 appellant requested reconsideration of the Office's May 30, 1998 decision and, by decision dated July 16, 1998, the Office denied appellant's request for merit review.

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained disability on or after February 7, 1997 due to her employment injuries, allergic rhinitis and dermatitis. In a report dated May 5, 1997, Dr. A. Donald Trotter, an attending Board-certified otolaryngologist, indicated that appellant presented on April 30, 1997 with severe swelling and erythema of the nasal mucosa. Dr. Trotter diagnosed chronic sinusitis, allergic rhinitis, chronic lung disease and asthma.[5] In a report dated May 21, 1997, Dr. Trotter indicated that he examined appellant on May 15, 1997 and diagnosed chronic sinusitis and allergic rhinitis. Although Dr. Trotter indicated that appellant had symptoms of an allergic condition, he did not provide a clear opinion that she sustained disability on or after February 7, 1997 due to her employment injuries. In a report May 14, 1997, Dr. Nicholas P. Gomez, an attending family practitioner, stated that appellant had been hospitalized in January 1997 due to intractable upper respiratory tract infections and pneumonitis. Dr. Gomez stated that in the past he had treated appellant for sneezing, coughing and dermatitis due to exposure to substances at work. Dr. Gomez did not, however, provide any opinion that appellant had employment-related disability on or after February 7, 1997.

In a report dated July 1, 1997, Dr. Roger D. Stoike, a Board-certified internist, indicated that appellant had been referred to him by Dr. Gomez for acute bronchitis, chronic obstructive pulmonary disease and pneumonia. Dr. Stoike indicated that appellant continued with these diagnoses and stated, "She is still unable to work with fumes and I consider that her health condition is due in part to work conditions (fumes, toxins) since 1990." In a report dated December 15, 1997, Dr. Stoike noted that appellant reported she was reexposed to "toxic fumes, gases, allergens and irritants" in the workplace. Dr. Stoike stated, "I think it is conceivable that a good portion of her symptoms were caused by, aggravated, precipitated and accelerated by her environment, according to what she has documented. Although Dr. Stoike attributes a portion of appellant's symptoms to her employment injuries, he also does not provide a clear explanation

[3] *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

[4] Appellant stopped work after February 6, 1997 and retired on medical retirement in August 1997.

[5] Dr. Trotter indicated that appellant reported she had been reassigned to an area where she was exposed to soldering fumes.

that she had employment-related disability on or after February 7, 1997. Moreover, it does not appear that Dr. Stoike's opinion is based on a complete and accurate factual basis.[6] It appears from the record that appellant was last exposed in February 1991 to the substances which caused her employment injuries; appellant asserted that she was reexposed to these substances in November 1996 but the record remains unclear on this matter.[7]

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[8] 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.[9] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[10] 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.[11]

In the July 14, 1989 letter, which constituted her reconsideration request, appellant indicated that she would be submitting additional argument and evidence in support of her claim. Appellant did not, however, submit such evidence prior to the Office's decision denying her request for merit review and, therefore, she provided no basis on which to reopen her claim for reconsideration on the merits.[12]

In the present case, appellant has not established that the Office abused its discretion in its July 16, 1998 decision by denying her request for a review on the merits of its May 30, 1998 decision under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not

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[6] *See William Nimitz, Jr.*, 30 ECAB 567, 570 (1979) (finding that a medical opinion on causal relationship must be based on a complete and accurate factual and medical history).

[7] In addition, the medical evidence suggests that any disability appellant suffered after February 7, 1997 would be due to her nonwork-related chronic obstructive pulmonary disease, pneumonia or asthma.

[8] 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. §§ 10.138(b)(1), 10.138(b)(2).

[10] 20 C.F.R. § 10.138(b)(2).

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

[12] Appellant submitted additional evidence after the Office's July 16, 1998 decision, but the Board cannot consider such evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated July 16 and May 30, 1998 are affirmed.

Dated, Washington, D.C.
March 16, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member