U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHANIE R. McCOY and U.S. POSTAL SERVICE,
FREEHOLD POST OFFICE, Freehold, NJ

Docket No. 99-123; Submitted on the Record;
Issued November 28, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof to establish that she sustained a recurrence of disability on June 26 and August 12, 1996 causally related to her accepted employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

On November 11, 1988 appellant, then a 32-year-old letter carrier, filed a claim for an occupational disease (Form CA-2) alleging that she first became aware of the irritation to her cervical spine on July 8, 1988. Appellant further alleged that she first realized that her condition was caused or aggravated by her employment on October 14, 1988. Appellant stopped work on September 28, 1988.

By letter dated June 9, 1989, the Office accepted appellant's claim for temporary aggravation of thoracic outlet syndrome.

Appellant worked during intermittent periods after her July 8, 1988 employment injury. On February 26, 1992 appellant accepted the employing establishment's offer of employment for the modified position of general clerk. Appellant returned to work on March 9, 1992.

On May 10, 1996 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on May 6, 1996. Appellant stopped work on May 10, 1996.

By decision dated September 10, 1996, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on or after May 6, 1996 causally related to her July 8, 1988 employment injury.

On September 13, 1996 appellant filed two Forms CA-2a alleging that on June 26 and August 12, 1996 she sustained a recurrence of disability.

In a September 26, 1997 decision, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on June 26 and August 12, 1996 causally related to her July 7, 1988 employment injury. In an undated letter, appellant requested an oral hearing before an Office representative.

By decision dated October 14, 1998, the Office denied appellant's request for an oral hearing on the grounds that it was untimely filed under section 8124 of the Federal Employees' Compensation Act.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet her burden of proof to establish that she sustained a recurrence of disability on June 26 and August 12, 1997 causally related to her accepted employment injury.

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of substantial, reliable and probative evidence and to show that he or she cannot perform the light duty.[1] As part of her burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.[2]

In the present case, appellant has neither shown a change in the nature and extent of her injury-related condition or a change in the nature and extent of the light-duty requirements. The record shows that following the July 8, 1988 employment-related temporary aggravation of thoracic outlet syndrome appellant returned to work in a limited-duty capacity as a general clerk with certain physical restrictions. The record does not establish, nor does appellant allege, that the claimed recurrence of total disability was caused by a change in the nature or extent of the limited-duty job requirements.[3]

In support of her recurrence claims, appellant submitted a June 27, 1996 attending physician's supplemental report (Form CA-20a) of Dr. Robert L. Gabel, a Board-certified internist, noting the date of her employment injury as July 8, 1988, the period compensation was claimed as June 26 through July 22, 1996, and a diagnosis of shoulder-hand syndrome and hypertension. Dr. Gabel indicated that appellant's conditions were due to the injury for which compensation was claimed by placing a checkmark in the box marked "yes." He also indicated that appellant was totally disabled for usual work. In his July 25, 1996 Form CA-20a, Dr. Gabel again noted the date of injury as July 8, 1988 and that appellant was totally disabled for her usual work. He further noted the period compensation was claimed as July 22 through August 1, 1996 and a diagnosis of fibromyalgia, cervical-scapular girdle. As in his June 27, 1996 Form CA-20a, Dr. Gabel indicated that appellant's conditions were due to the injury for which compensation

[1] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[2] *Id.*

[3] On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1).

was claimed by placing a checkmark in the box marked "yes." The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's disability was related to the history is of diminished probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[4] He failed to provide any medical rationale in his reports explaining his opinion that appellant's conditions were caused by the July 8, 1988 employment injury. Therefore, his reports are insufficient to establish appellant's burden.

Appellant also submitted Dr. Gabel's July 11, 1996 medical report indicating her recent visits on May 9 and June 8 and 27, 1996. Dr. Gabel's report further indicated a history of appellant's alleged recurrence of disability on May 9, 1996 and medical treatment. Dr. Gabel provided his findings on physical examination and a diagnosis of fibromyalgia of the right neck and shoulder (mild fascial pain syndrome) most recently from disuse and from appellant's extreme sensitivity to temperature changes. He stated that appellant's history pointed to sensitivity in the area of the right neck and shoulder following her work as a letter carrier in 1987 and 1988. Dr. Gabel also stated that the "incident of July 8, 1988 is not specifically familiar to me." He concluded that appellant was intolerant to pain and quick to flare. Dr. Gabel further concluded that disability was recommended from June 26 through July 22, 1996 and noted appellant's medical treatment and physical restrictions. Dr. Gabel's report is insufficient to establish appellant's burden because he was unable to attribute appellant's conditions to her July 8, 1988 employment injury since he was not familiar with this employment injury.[5]

In addition, appellant submitted an August 15, 1996 report of Dr. Caroline Greenberg, a radiologist, regarding the results of a x-ray of her right ribs. Dr. Greenberg's report revealed a partial resection of the first right rib predominantly involving the posterior aspect and that the remainder of the ribs appeared normal. An August 23, 1996 addendum to Dr. Greenberg's report from Dr. Heidi Winchman, a Board-certified radiologist, revealed a tiny right riblet at C7 and a long left transverse process of C7. The reports of Drs. Greenberg and Winchman failed to address whether appellant's conditions were caused by her July 8, 1988 employment injury. Thus, they are insufficient to establish appellant's burden.

Further, appellant submitted an August 15, 1996 disability certificate of Dr. Jalal A. Najafi, a Board-certified surgeon, revealing that she had been disabled since August 13, 1996 due to chest pain and thoracic outlet syndrome and that she was under Dr. Najafi's care. Dr. Najafi's disability certificate is insufficient to establish appellant's burden because it failed to discuss whether or how the diagnosed conditions were caused by appellant's July 8, 1988 employment-related injury.[6]

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[4] *Lucrecia M. Nielson*, 42 ECAB 583, 594 (1991).

[5] The Board notes that appellant's claim alleging that she sustained a recurrence of disability on May 9, 1996, which was discussed by Dr. Gabel in his July 11, 1996 medical report, was denied by the Office in its September 10, 1996 decision.

[6] *Daniel Deparini*, 44 ECAB 657, 659 (1993).

In an August 17, 1996 Form CA-20a, Dr. Najafi indicated the date of appellant's employment injury as July 8, 1988, a diagnosis of severe tendinitis of the right shoulder and that spinal nerve injury had been ruled out. He indicated that appellant's condition was due to the injury for which compensation was claimed by placing a checkmark in the box marked "yes." Dr. Najafi's report is insufficient to establish appellant's burden because he failed to provide any medical rationale to support his opinion regarding causal relationship.[7]

Dr. Najafi's September 14, 1996 medical report provided a history of appellant's medical treatment, complaints of neck, right shoulder and right arm pain, and intermittent episodes of tingling in her right hand. Dr. Najafi opined that extensive evaluation, examinations and review of magnetic resonance imaging (MRI) and x-ray films clearly revealed that appellant was suffering from occupational right shoulder severe tendinopathy and spinal accessory nerve injury, and right shoulder drop. He further opined that appellant had a right cervical rib originating from C7 causing severe intermittent occupational pain. Dr. Najafi concluded that in light of the above clinical evaluation, there existed clear medical rationale for permanent and total disability based upon appellant's longstanding and documented occupational hazards. Dr. Najafi's report does not specifically address whether appellant's conditions were caused by her July 8, 1988 employment injury.

An August 21, 1996 medical report of Dr. William Zinn, a Board-certified radiologist, provided MRI results of appellant's right shoulder. Dr. Zinn found that appellant had supra greater than infraspinatus tendinopathy with a very small focus of possible interstitial injury in the region of the distal supraspinatus tendon. He further found that appellant had associated hooked low lying distal acromion exerting mass effect on the coraco-acromial arch. Dr. Zinn noted that correlation with symptoms of impingement was suggested if applicable and that there was no evidence of rotator cuff disruption or retraction. He further noted that appellant had trace joint effusion and acromioclavicular joint hypertrophic change. In a September 10, 1996 medical report, Dr. Noel I. Perin, a neurosurgeon, provided a history of appellant's medical treatment, his findings on physical examination and a review of medical records. Dr. Perin recommended that appellant undergo additional objective examination because her symptoms were not quite typical for thoracic outlet syndrome and the lack of good clinical correlation. Drs. Zinn and Perin failed to address whether appellant's conditions were caused by her July 8, 1988 employment injury. Thus, their reports are insufficient to establish appellant's burden.

Inasmuch as appellant has failed to submit rationalized medical evidence establishing that she sustained a recurrence of disability on June 26 and August 12, 1996, she has not satisfied her burden of proof in this case.

The Board further finds that the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that "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

[7] *Lucrecia M. Nielson, supra* note 4.

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 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 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,[10] when the request is made after the 30-day period established for requesting a hearing,[11] or when the request is for a second hearing on the same issue.[12] 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.[13]

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated September 26, 1997 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in an undated letter that was postmarked September 19, 1998. Hence, the Office was correct in stating in its October 14, 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 September 26, 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 September 26, 1997 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 submitting additional evidence to establish that she sustained a recurrence of disability due to the work-related injury of July 8, 1988. 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.[14] 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 that could be found to be an abuse of discretion.

[8] 5 U.S.C. § 8124(b)(1).

[9] *Frederick D. Richardson*, 45 ECAB 454 (1994).

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

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

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

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

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

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

The October 14, 1998 and September 26, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 28, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member