

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRENDA W. THIEME and U.S. POSTAL SERVICE,
PROCESSING AND DISTRIBUTION CENTER, Atlanta, GA

*Docket No. 99-2435; Submitted on the Record;
Issued October 30, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claims for continuing compensation on the grounds that she failed to submit medical evidence establishing that she was disabled after November 12, 1998 due to her employment-related right carpal tunnel syndrome; (2) whether appellant satisfied her burden of proof to establish that she sustained a recurrence of disability on January 2, 1999 causally related to her employment-related right carpal tunnel syndrome; and (3) whether the Office properly denied appellant's May 21, 1999 hearing request.

On July 29, 1996 appellant, then a 42-year-old manual distribution clerk, filed an occupational disease claim alleging that on May 23, 1996 she first became aware of her right hand pain and related it to her federal employment. The Office accepted her claim for right carpal tunnel syndrome and authorized surgical treatment for her condition. Appellant underwent right carpal tunnel release surgery on October 23, 1996. She resumed work on December 8, 1998. The record shows that appellant worked intermittently in a limited-duty status.

On December 1, 1998 appellant filed a claim for continuing compensation on account of disability (Form CA-8) alleging loss of pay from November 12, 1998 to January 1, 1999. To support her compensation claim, appellant submitted an attending physician's supplemental report dated December 7, 1998 from Dr. Donald S. Orr, a Board-certified neurologist. He diagnosed thoracic outlet syndrome and reflex sympathetic dystrophy, advised that he was unable to address appellant's conditions adequately and noted that she would be able to resume light-duty work on December 8, 1998. Dr. Orr indicated by check mark that appellant's present condition was due to the injury for which compensation was claimed. Appellant also submitted a duty status report dated December 29, 1998 in which Dr. Orr noted that he advised appellant that she could return to work on December 8, 1998 and indicated by check mark that she was not able to perform regular work.

By letter dated February 1, 1999, the Office requested additional factual and medical evidence in support of appellant's claim and allowed her 45 days within which to respond to its request. The Office noted that appellant's accepted employment injury did not include thoracic outlet syndrome and that if it was previously misdiagnosed as right carpal tunnel syndrome, medical evidence explaining the misdiagnosis was necessary. The Office further stated that if appellant's thoracic outlet syndrome was a new condition causally related to her federal employment she should file a new occupational disease claim.

Appellant submitted reports from Dr. Orr dated June 26, 1997 to February 15, 1999. In his February 15, 1999 report, Dr. Orr stated that he had been treating appellant since August 1996 at which time he diagnosed carpal tunnel syndrome complicated by reflex sympathetic dystrophy evolving from a right hand injury. He further stated that on June 26, 1997 appellant complained of primarily right side pain over her shoulder girdles, neck area and upper extremities. Dr. Orr diagnosed myofascial trigger points and left thoracic outlet syndrome. He stated:

"It is my opinion that [appellant's] present difficulties reflect also the requirements of the workplace. It is possible that this condition existed in a more subdued form prior to her right carpal tunnel release, but it would have been impossible to have dissected out any contribution which it might have added to her earlier pain syndrome. The only plausible means of assessing its significance at that time had it, in fact, been operative, would have been to have proceeded with the carpal tunnel release, with assessment of her clinical response post-surgery. It is equally likely that, in fact, her thoracic outlet syndrome is a new occurrence and developed insidiously, as she was able to resume her earlier work responsibilities."

Appellant also submitted a narrative statement dated March 2, 1999 in which she discussed her treating physicians, regular job duties and light-duty assignment.

On April 11, 1999 appellant filed a recurrence of disability claim (Form CA-2a) alleging that on January 2, 1999 she sustained a recurrence of her accepted right carpal tunnel syndrome. On the claim form, appellant alleged that after returning to work she primarily used her left hand but used her right hand "off and on" in order to increase its range of motion. She stated that she needed a chair with back support at work and had to look for it or work while standing. Appellant noted that since returning to work, following her original occupational disease, she sustained thoracic outlet syndrome. An employing establishment human resources specialist noted that appellant stopped work on January 2, 1999 and returned on January 9, 1999.

On April 11, 1999 appellant also filed a claim for continuing compensation on account of disability (Form CA-8) claiming compensation for the period from January 2, 1999 to the "present." On the reverse side of the claim form, an employing establishment human resources specialist noted that appellant earned partial pay from January 2, 1999 to present as she had worked intermittently during that period. She stated that the employing establishment controverted appellant's claim on the grounds that an anonymous caller reported that she was running basket-making craft and upholstery businesses.

To support her claim, appellant submitted a December 4, 1997 physical therapy prescription note from Dr. Orr diagnosing trigger points. She also submitted a duty status report (Form CA-17) dated February 14, 1999 from Dr. Orr in which he diagnosed trigger points and thoracic outlet syndrome, provided physical activity restrictions and indicated that appellant was advised that she could resume light-duty work on December 8, 1999. Appellant further submitted an undated note from Dr. Susan L. Savage, an internist, stating that appellant was totally incapacitated and would be unable to return to work until neuropathy surgery was performed.

By decision dated May 5, 1999, the Office denied appellant's recurrence of disability and compensation claims on the grounds that the evidence of record failed to show that she sustained a condition or disability on or after November 12, 1998 causally related to her employment-related right carpal tunnel syndrome.

The record contains an envelope postmarked July 28, 1999, addressed to the Office's Branch of Hearings and Review, in which appellant indicated that she wanted to submit additional medical records. She submitted a note dated July 6, 1999 in which Dr. Orr stated that she was disabled from work for six months due to ongoing right-sided neck, shoulder and upper extremity pain.

By decision dated September 2, 1999, the Office construed appellant's letter as a hearing request and denied it as untimely filed. The Office advised appellant that she could request reconsideration or file an appeal with the Board.

The Board finds that the Office properly denied appellant's claims for continuing compensation after November 12, 1998.

Under the Federal Employees' Compensation Act,¹ the term "disability" means incapacity, due to an accepted employment-related injury, to earn the wages that the employee was receiving at the time of the injury.² Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages.³ An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages she was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.⁴ When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wage-earning capacity resulting

¹ 5 U.S.C. §§ 8101-8193.

² *Maxine J. Sanders*, 46 ECAB 835, 839-40 (1995).

³ *See id* at 840.

⁴ *Id.*

from such incapacity.⁵ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not upon actual wages lost.⁶

The evidence of record does not show that appellant was disabled from work after November 12, 1998 because of her right carpal tunnel syndrome. Dr. Orr's 1998 reports stated that appellant would be disabled from work until December 8, 1998 but did not include a rationalized opinion on whether her condition was caused or aggravated by her right carpal tunnel syndrome. In his February 15, 1999 report, Dr. Orr did not relate appellant's alleged disability to her accepted occupational disease.

To the contrary, Dr. Savage stated that appellant's condition possibly existed prior to her right carpal tunnel release surgery but that "it is equally likely that, in fact, her thoracic outlet syndrome is a new occurrence and developed insidiously, as she was able to resume her earlier work responsibilities." Her undated note stated that appellant was completely incapacitated and unable to work, but did not address whether appellant's alleged disability related to her right carpal tunnel syndrome.

As the evidence of record is devoid of a physician's opinion relating appellant's alleged disability to her accepted occupational disease, appellant is not entitled to compensation for disability after November 12, 1998.

The Board further finds that appellant did not satisfy her burden of proof to establish that she sustained a recurrence of disability on January 2, 1999 causally related to her right carpal tunnel syndrome.

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 shows 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 job requirements.⁷

As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.⁸ However, it is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.⁹

⁵ *Gary L. Loser*, 38 ECAB 673 (1987).

⁶ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

⁷ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry Hedman*, 38 ECAB 222, 227 (1986).

⁸ *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

⁹ *Richard E. Konnen*, 47 ECAB 388 (1996); *William J. Cantrell*, 34 ECAB 1233 (1983).

The medical evidence of record is devoid of rationalized medical opinion evidence relating appellant's alleged recurrence of disability to her right carpal tunnel syndrome. Dr. Orr's February 15, 1999 report clearly expressed his uncertainty about the causal relationship as evidenced by his statement that appellant's thoracic outlet syndrome is a "new" condition. The remaining evidence of record does not address causal relationship or is not contemporaneous with appellant's January 2, 1999 alleged recurrence of disability. Appellant, therefore, failed to establish that she sustained a recurrence of disability.

The Board further finds that the Office properly denied appellant's hearing request postmarked July 28, 1999.

Section 8124(b)(1) of the Act provides:

"Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."¹⁰

A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.¹¹ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.¹² In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.¹³

Because appellant made her July 28, 1999 hearing request more than 30 days after the Office's May 5, 1999 decision, she is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that she could pursue her claim through the reconsideration process. As appellant may address the issues in this case by submitting to the Office new and relevant evidence with a request for reconsideration, the Board finds that the Office did not abuse its discretion in denying her hearing request.¹⁴

¹⁰ 5 U.S.C. § 8124(b)(1).

¹¹ 20 C.F.R. § 10.616(a).

¹² *William E. Seare*, 47 ECAB 663, 666 (1996); *Herbert C. Holley*, 38 ECAB 140 (1981).

¹³ *See William E. Seare*, *supra* note 12 at 666; *Rudolf Bermann*, 26 ECAB 354 (1975).

¹⁴ The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion; *see William E. Seare*, *supra* note 12 at 667; *Jeff Micono*, 39 ECAB 617 (1988).

The decisions of the Office of Workers' Compensation Programs dated September 2 and May 5, 1999 are affirmed.¹⁵

Dated, Washington, DC
October 30, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

¹⁵ The Board notes that the decision herein does not preclude appellant from pursuing a separate claim for her thoracic outlet syndrome. The Board further notes that the record contains a schedule award claim filed by appellant on October 11, 1996. It does not appear that the Office developed this claim.