U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERE A. HENRY and U.S. POSTAL SERVICE,
POST OFFICE, Birmingham, AL

Docket No. 98-2641; Submitted on the Record;
Issued September 20, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant has established that she sustained a neck injury on February 6, 1998 in the performance of duty, as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on its merits under 5 U.S.C. § 8128(a).

On March 4, 1998 appellant, then a 42-year-old rural mail carrier, filed a claim alleging that on February 6, 1998 she sustained a neck injury. Appellant described the cause of her injury as "extreme head pain while casing mail mostly when bending to pick up mail from floor. Had been having headaches for several days but did not equate it to work until I realized that was when it came on [and] doctor said [it] was due to neck injury." The employing establishment controverted appellant's claim.

In an accompanying statement dated March 4, 1998, appellant claimed that this was "an injury that has gradually occurred over time, caused by the constant bending, standing, twisting [and] lifting of heavy things from floor."

In support of her claim appellant submitted billing forms and return to work certificates.[1] Also submitted was a February 10, 1998 medical progress note from Dr. Michael J. McCarthy, a Board-certified family practitioner, which noted as follows:

> "[Appellant] has had a headache for three or four days, mostly occipital, upper left neck pain with marked limitation of motion of her head. Sometimes she turns her head incorrectly and she will have a sharp, stabbing sort of pain that goes from her occipital area forward along her left scalp, not really one of her migraine headaches, not really anything else. No particular history of injury, some spasm

[1] Hospital forms submitted from February 9, 1998 were largely illegible but did note a diagnosis of headache for four days. Causation was not discussed.

at times, but she went all day yesterday without any discomfort during the day time and then it got worse in the evening."

A February 14, 1998 hospital treatment record from Dr. McCarthy noted the chief complaint as "headache." Another February 14, 1998 hospital treatment form completed by Dr. David K. Calderwood, a Board-certified family practitioner, noted appellant's complaint of severe headache of sudden onset one week earlier. Tender left paraspinous muscles were noted.

A February 25, 1998 magnetic resonance imaging (MRI) scan ordered by appellant's chiropractor, Dr. Donald D. Ross, Jr., was reported as revealing "Suspect mild spondylosis C6-7."

Also submitted was a March 9, 1998 orthopedic consultation from Dr. Ray A. Fambrough, a Board-certified orthopedic surgeon,[2] who noted:

"[Appellant] sustained an injury at work on February 6, 1998 when she was lifting some mail and something happened to her neck. Later that afternoon she started having more and more pain in her neck and this has progressed to a point where she has severe headaches associated with the neck pain. The pain radiates out of her neck and goes up around the side of her head and causes severe pain.... There is no history of any other injuries...."

Dr. Fambrough noted that appellant's best relief was obtained from muscle relaxants and he stated:

"On examination her pain is between the mastoid sinus and the posterior cervical area and some irritation in this area could have caused some problems in the past but certainly not absolute. Her pain is located in the paraspinous muscle groups on the left side. Palpation in this area reveals minimal pain but after about 10 minutes of palpating, motion of her neck recreates her neck pain and headache."

Dr. Fambrough diagnosed "Muscular strain" and noted that radiologic evaluation revealed some mild disc bulging and spondylosis at the C6-7 level.

In a March 19, 1998 statement appellant indicated that on February 6, 1998 she began "having severe headaches and neck tension while working." She claimed that she did not initially equate her headaches with a work injury, but that, after seeking emergency room treatment and chiropractic treatment, she was referred to Dr. Fambrough who told her that she had a "torn muscle" in her neck.

By letter dated April 7, 1998, the Office advised appellant that further information was necessary to establish her claim, including a comprehensive medical report including an opinion on causal relation.

[2] A prior report from Dr. Fambrough noted that appellant had a "fair amount of cervical muscle stiffness," but offered no diagnosis nor discussed causation or history of injury.

In response appellant submitted physical therapists' notes and nurses' notes. Also submitted was a March 9, 1998 physician's referral form signed by Dr. Fambrough referring appellant for physical therapy for the diagnosis "Muscular strain l[eft] neck." An unsigned March 6, 1998 chiropractic report from Dr. Ross was additionally submitted, which did not include any specific diagnosis. A March 5, 1998 emergency room physician's record indicated that appellant complained of headache which started about three weeks previously, and severe to moderate pain of abrupt onset in the back of her neck and up into the left side of her occiput. A stiff neck was found upon examination and the physician's signature was illegible.

Appellant stated in an April 27, 1998 letter that she performed lots of bending, twisting and lifting, both heavy and repetitious and that she was not sure which particular incident caused her "torn neck muscle," but indicated that her headache started on February 6, 1998 while on her mail route shortly after a particularly heavy business section of her route. She claimed that her continued working, further aggravated and damaged the muscle.

By decision dated May 27, 1998, the Office rejected appellant's claim finding that, although the initial evidence supported that the employment factors occurred as alleged, the medical evidence submitted failed to establish that appellant sustained an employment-related injury, as alleged.

Appellant disagreed with the May 27, 1998 decision and initially requested an oral hearing, but on June 26, 1998 she withdrew her hearing request too and requested reconsideration.

In support appellant resubmitted a copy of Dr. Fambrough's March 9, 1998 report, an employing establishment computer data form and an employing establishment interview sheet.

By decision dated August 4, 1998, the Office denied appellant's request for further review of her case on its merits under 5 U.S.C. § 8128(a), finding that the evidence submitted in support was repetitious and, therefore, was insufficient to warrant reopening appellant's claim for a further review on its merits.

The Board finds that appellant has failed to establish that she sustained a neck injury on February 6, 1998 in the performance of duty, as alleged.

An employee seeking benefits under the Federal Employees' Compensation Act[3] 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 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.[4] These are

[3] 5 U.S.C. §§ 8101-8193.

[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place and in the manner alleged.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

In this case, the Office accepted that appellant experienced the employment incidents on February 6, 1998 at the times and places and in the manner alleged. However, appellant has submitted insufficient medical evidence to establish that the employment incident caused a personal injury. Appellant has the burden of establishing by reliable, probative and substantial evidence that her medical condition was causally related to a specific employment incident or incidents, or to specific conditions of employment.[8] As part of such burden of proof, rationalized medical opinion evidence establishing causal relation must be submitted.[9] The mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between the condition and the employment.[10] Such a relationship must be shown by rationalized medical evidence supporting that causal relationship based upon a specific and accurate history of employment incidents or conditions which are alleged to have caused or exacerbated an identifiable and specific disability.[11]

In the instant case, the medical evidence of record most contemporaneous to the circumstances of February 6, 1998, the February 9, 1998 emergency treatment forms, noted only "headache" as a diagnosis, did not mention any neck injury and did not address causation with factors of appellant's employment. Therefore, those records do not support appellant's employment-related neck injury claim.

The next most contemporaneous evidence, Dr. McCarthy's February 10, 1998 report, notes that appellant had experienced a headache for three to four days, but indicated that there was "[n]o particular history of injury." Therefore, this report does not support appellant's claim of employment-related neck injury.

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[5] *Victor J. Woodhams*, 41 ECAB 345 (1989); *Delores C. Ellyet*, 41 ECAB 992 (1990).

[6] *John J. Carlone*, 41 ECAB 354 (1989).

[7] *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(a)(14).

[8] *Margaret A. Donnelly*, 15 ECAB 40, 43 (1963).

[9] *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983).

[10] *Juanita Rogers*, 34 ECAB 544, 546 (1983).

[11] *Edgar L. Colley*, 34 ECAB 1691, 1696 (1983).

A subsequent February 14, 1998 hospital form report from Dr. Calderwood noted as history of injury only that appellant complained of severe headache of sudden onset one week earlier. No employment relationship was noted. Therefore, this form does not support appellant's employment-related neck injury claim.

However, on March 9, 1998 Dr. Fambrough reported that appellant sustained a work injury on February 6, 1998 when she was lifting some mail "and something happened to her neck." He did not describe specifically what happened to appellant's neck, nor did Dr. Fambrough explain how appellant's mail lifting caused or contributed to that "something." This report is, therefore, too vague and speculative to establish that appellant sustained a specific employment-related neck injury. The remainder of Dr. Fambrough's narrative merely states that as the day progressed appellant developed more neck pain and a headache. As noted above, the mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between the condition and the employment.[12] He performed a physical examination that date, more than one month after the implicated date of injury and determined that, at that time, appellant had muscular strain, but Dr. Fambrough did not explain how muscular strain one month after the date of injury was causally related to lifting mail, twisting or bending over a month before. Consequently, this March 9, 1998 diagnosis has not been demonstrated to be causally related to specific employment activities on February 6, 1998.

The March 6, 1998 unsigned chiropractic report from Dr. Ross submitted to the record failed to diagnose a subluxation as demonstrated by x-ray to exist. Section 8101(2) of the Act provides that the term "'physician' ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist...."[13] Without diagnosing a subluxation from x-rays, a chiropractor is not a "physician" under the Act and his opinion does not constitute competent medical evidence.[14] Therefore, this report is not probative medical evidence and does not establish appellant's employment injury claim.

The nurses' notes and the physical therapists' reports are also not probative medical evidence on the issues of fact of injury or causal relation and hence their reports to not support appellant's claim.[15]

Lastly, none of the emergency medical treatment forms submitted contained any history of injury or discussed causation of any condition found. Therefore, none of these reports support appellant's employment-related injury claim.

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[12] *See Juanita Rogers, supra* note 10.

[13] 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986).

[14] *See generally Theresa K. McKenna*, 30 ECAB 702 (1979).

[15] *See e.g., Sheila A. Johnson*, 46 ECAB 323 (1994); *Joseph N. Fassi*, 42 ECAB 677 (1991) (nurse's opinion of no probative value); *Barbara J. Williams*, 40 ECAB 649 (1988) (physical therapist's opinion has no probative value).

As appellant has failed to submit sufficient medical evidence to establish that the accepted employment incidents of February 6, 1998 caused a specific and identifiable personal injury that date she has failed to meet her burden of proof to establish her claim.

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,[16] 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.[17] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[18] When a claimant fails to meet one of the above-mentioned 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.[19] Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.[20] Evidence which does not address the particular issue involved, in this case whether appellant sustained an identifiable injury or medical condition on February 6, 1998 that was causally related to specific event or series of events is irrelevant and, therefore, does not constitute a basis for reopening a case.[21]

In her request for reconsideration appellant resubmitted Dr. Fambrough's March 10, 1998 report. As this evidence had previously been submitted to the record and considered by the Office, its resubmission is repetitive and duplicative and it does not constitute a basis for reopening appellant's claim for further consideration on its merits.

The additional evidence submitted were two employing establishment administrative reports which were not medical reports and, therefore, did not constitute probative medical evidence identifying a specific medical condition or injury, or discussing the causal relationship between the identified medical condition and specific incidents of appellant's employment and consequently, as they did not address the particular issue involved, they were irrelevant and did not constitute a basis for reopening appellant's case for further consideration on its merits.

[16] 5 U.S.C. §§ 8101-8193.

[17] 20 C.F.R. § 10.138(b)(1), 10.138(b)(2).

[18] 20 C.F.R. § 10.138(b)(2).

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

[20] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

[21] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 228 (1984).

In the present case, appellant has not established that the Office abused its discretion in its February 28, 1997 decision by denying her request for a review on the merits of its November 23, 1995 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, failed to advanced a point of law or a fact not previously considered by the Office or failed to submitt relevant and pertinent evidence not previously considered by the Office.

As the only limitation on the Office's authority is reasonableness, an abuse of discretion can generally only be shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[22] Appellant has made no such showing here.

Consequently, the decisions of the Office of Workers' Compensation Programs dated August 4 and May 27, 1998 are hereby affirmed.

Dated, Washington, DC
September 20, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member

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