

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RITA D. McALPINE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER LIBRARY, Beckley, WV

*Docket No. 00-942; Submitted on the Record;
Issued April 6, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant sustained a neck, back or arm condition in the performance of duty; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for a review of the written record as untimely.

On March 29, 1999 appellant, then a 52-year-old library technician, filed an occupational disease claim alleging that her neck pain, headaches and shoulder pain radiating into her arms were caused by her work duties. Appellant did not stop work.

Appellant attributed her condition to repetitive typing, holding a telephone handset on her left shoulder, prolonged writing, working with her head bent forward and stress in various federal secretarial jobs beginning in 1964. She specifically alleged that since being transferred to the medical library in 1985, she was required to shelve heavy books and perform repetitive typing. Appellant asserted that these tasks strained her neck and back.

In an October 30, 1998 note, Dr. Syed Zahir, an attending Board-certified orthopedic surgeon, held appellant off work through November 1, 1998 and released her to light duty as of November 2, 1998.

In a December 8, 1998 report, Dr. Frederick H. Armbrust, an attending neurologist, noted appellant's 25-year history of neck and right arm pain, with intermittent chiropractic treatment. Appellant underwent a repeat carpal tunnel procedure in August 1998. Dr. Armbrust stated that appellant had been diagnosed with fibromyalgia and took prescription medications for it. Dr. Armbrust reviewed a November 20, 1998 cervical magnetic resonance imaging (MRI) report showing a "herniated vertebral disc, bulging into a focal herniation primarily at the C5-6 level tending towards the right side ... also centrally to the left ... [with] mild neuroforamen compromise." He diagnosed "[c]ervical radiculopathy probably related in part to herniated vertebral disc, C5-6 with perhaps underlying spondylosis." Dr. Armbrust did not mention appellant's federal employment or specific work factors in this report.

In a March 3, 1999 report, Dr. Robert K. Davis, a chiropractor, diagnosed a variety of conditions including “cervical and thoracic spinal subluxations.” Dr. Davis noted providing chiropractic manipulations in regular appointments from November 1997 onward. He did not mention work factors or otherwise discuss causal relationship in this report or in one dated September 12, 1999.¹

By decision dated October 4, 1999, the Office denied appellant’s claim on the grounds that causal relationship was not established. The Office found that appellant had failed to specify “specific employment factors ... contributing to the claimed condition” or submit medical evidence addressing causal relationship.

Appellant disagreed with this decision and in a November 10, 1999 letter requested a review of the written record by a representative of the Office’s Branch of Hearings and Review. She submitted additional evidence.²

A position description notes that appellant was required to perform prolonged computing tasks, bending, crouching, stooping, stretching and reaching. Appellant was also required, when volunteers were unavailable, to “push heavy items such as books, carts and equipment carts with machinery on top,” and lift “moderately heavy items such as boxes or journals.” She also submitted a statement, corroborated by an employing establishment official, noting the requirements of shelving books, logging in mail and filing.

In a March 16, 1987 letter, Dr. Patrick M. Lillard, an attending orthopedist, noted appellant’s complaints of neck and bilateral arm and hand pain with numbness. Dr. Lillard obtained cervical spine x-rays which were “unremarkable.” He diagnosed “bilateral carpal tunnel syndromes that are quite mild” and prescribed medication. Dr. Lillard did not mention work factors in this report.

In a March 5, 1999 report, Dr. Zahir noted that appellant underwent left carpal tunnel release in January 1990, right carpal tunnel release in August 1991, with a repeat surgery in August 1998. He noted that appellant had returned to modified work without any “repetitive type of work with her hands” and only minimal typing.

In an August 30, 1999 report, Dr. Kelly M. Pitsenbarger, an attending family practitioner, noted that appellant’s employment required “typing, reaching to shelve books, pushing carts, with repetitive bending, static exertion from lifting, twisting, leaning, standing at a station....

¹ Dr. Davis appears to qualify as a physician for the purposes of this case under section 8101(3) of the Federal Employees’ Compensation Act, as he diagnosed “cervical and thoracic spinal subluxations” by x-ray and provided manual manipulation to treat those subluxations. He submitted a work absence slip dated January 5, 1999, holding appellant off work through January 7, 1999.

² Appellant also submitted test results, which did not address causal relationship. February 4, 1987 neck x-rays showed “straightening of the normal lordotic curvature.” March 6, 1987 nerve conduction velocity and electromyography (EMG) studies showed “bilateral, borderline, carpal tunnel syndrome.” An October 30, 1997 MRI scan of the brain was within normal limits. October 30, 1997 right heel x-rays showed an “almost imperceptible spur.” She also submitted physical therapy notes April 9 to June 29, 1999, insurance claim forms and medical billing chronologies, which do not constitute medical evidence. *Merton J. Sils*, 39 ECAB 572 (1988).

[Appellant's] symptoms started in August 1997 with headache, neck pain, blurred vision and weakness." Dr. Pitsenbarger provided a history of treatment and diagnostic tests, with continuing right-sided neck pain with headaches. She diagnosed "cervical radiculopathy ... related to her work situation." Dr. Pitsenbarger explained that "a prolonged static ergonomically incorrect posture for many years has caused her muscles to maintain a static posture and they [we]re not allowed to relax when necessary. Therefore ... her problem has arisen from her employment."³

By decision dated December 20, 1999, the Office's Branch of Hearings and Review denied appellant's request for a hearing on the grounds that it was untimely filed. The Office determined that the issue in her case could "equally well be addressed by requesting reconsideration ... and submitting evidence not previously considered which establishes that an injury was sustained as alleged."

The Board finds that appellant has not established that she sustained a neck, arm or back condition in the performance of duty.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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 identified by the claimant.⁴

³ Dr. Pitsenbarger also submitted form reports May 21 to August 30, 1999 diagnosing cervical radiculopathy, neck pain and "muscle spasm in neck."

⁴ *Charles E. Burke*, 47 ECAB 185 (1995).

Appellant submitted medical reports from several physicians,⁵ but none addresses the critical issue of causal relationship. Dr. Zahir's October 30, 1998 attendance slip and Dr. Davis' March 3, 1999 report do not mention appellant's federal employment or any of her work duties. Similarly, Dr. Armbrust, an attending neurologist, diagnosed "[c]ervical radiculopathy" related to a herniated C5-6 disc with possible spondylosis, but did not attribute the herniated disc or spondylosis to any factor of appellant's federal employment. Without medical rationale explaining how and why appellant's specified duties would cause the claimed neck, back and arm conditions, the reports of Drs. Armbrust, Davis and Zahir are of extremely limited value in establishing causal relationship in this case.⁶

Consequently, appellant has not established that she sustained the alleged neck, arm and back conditions in the performance of duty because she submitted insufficient rationalized medical evidence addressing causal relationship.

The Board finds that the Office acted within its discretion in denying appellant's request for a review of the written record.

The Act⁷ provides that a claimant not satisfied with a decision of the Office has a right, upon timely request, to an oral hearing or written review of the record before a representative of the Office's Branch of Hearings and Review.⁸ Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states in pertinent part: "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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁹ The Office's procedures require it to exercise its discretionary authority to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a). The Board has held that the Office's exercise of this discretion is a proper interpretation of the Act and Board precedent.¹⁰

In this case, appellant did not request a review of the written record until November 10, 1999, more than 30 days following the issuance of the Office's October 4, 1999 decision denying

⁵ The Board notes that Dr. Zahir's March 5, 1999 and Dr. Pitsenbarger's August 30, 1999 reports, both submitted in support of appellant's November 10, 1999 request for a review of the written record, were not evaluated by the Office as to whether they contained sufficient medical rationale to establish a causal relationship between the diagnosed conditions and the specified employment factors. In its December 20, 1999 decision, the Office noted that appellant could advance her claim equally well by submitting these reports, along with the other evidence in support of the November 10, 1999 request for a review of the written record, accompanying a valid request to the appropriate district Office for reconsideration.

⁶ See *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB 411 (1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

⁹ 5 U.S.C. § 8124(b)(1).

¹⁰ *Henry Moreno*, 39 ECAB 475 (1988).

her claim. Because appellant requested a review of the written record after the 30-day time period had elapsed, she was not entitled to such review as a matter of right. The Office properly exercised its discretion when it decided not to grant a discretionary hearing on the grounds that appellant could have her case further considered on reconsideration by submitting relevant medical evidence. Consequently, the Office properly denied appellant's November 10, 1999 request for a review of the written record.

The decisions of the Office of Workers' Compensation Programs dated December 20 and October 4, 1999 are hereby affirmed.

Dated, Washington, DC
April 6, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member