U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOAN L. CROUCH and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Federal Way, WA

Docket No. 00-708; Submitted on the Record;
Issued January 26, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has established disability after February 14, 1998 causally related to her accepted injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.[1]

On February 26, 1998 appellant, then a 31-year-old postal clerk, filed a notice of occupational disease alleging that heavy lifting caused pain in her lower back.

In support of her claim, appellant submitted progress notes dated January 26, 27 and 29, February 18 and 19 and March 3, 1998 from Dr. Haven Silver, a Board-certified family practitioner, who stated that appellant had developed increased lower back pain since starting her postal job and was required to work much overtime. He provided work restrictions on January 26, 1998 of no more than 40 hours a week and no lifting more than 20 pounds. Dr. Silver later released appellant to part-time work starting on February 14, 1998. He noted on March 3, 1998 that appellant's pain had improved since switching to a job not requiring heavy lifting.

In a May 13, 1998 report, Dr. Silver stated that he had treated appellant since August 1996 for low back problems which began during her military service. He stated that in January 1998 appellant reported a significant increase in her low back discomfort since starting a strenuous job at the employing establishment. "She reportedly worked long shifts, repetitively lifting heavy objects up to 70 pounds and had to work up to 18 consecutive days without a break."

While the January examination showed no loss of back function or reflexes of the lower extremities, appellant continued to complain of low backache on several occasions through February. Dr. Silver opined that appellant's chronic low back discomfort "certainly was exacerbated by her strenuous duties performed during her employment at the [employing

[1] 5 U.S.C. §§ 8101-8193.

etablishment]." He referred appellant to Dr. Elizabeth F. Cook, Board-certified in physical medicine and rehabilitation.[2]

In a June 16, 1998 report, Dr. Cook took a history, noted appellant's job duties, and repeated appellant's comment that her preexisting back problem was asymptotic until November 1997 after she had begun working at the employing establishment. Physical examination revealed restriction of back range of motion in side bending and flexion and inability to extend because of low back pain. Dr. Cook diagnosed central disc syndrome, based on a magnetic resonance image (MRI) scan that showed mild degenerative disc disease at L5-S1 with posterior bulging. She concluded that appellant's work was responsible for her current back problem, given that she was asymptotic prior to starting her new job, which required frequent lifting.

Asked by the Office to clarify her diagnosis, Dr. Cook responded that central disc syndrome referred to pain resulting from disc bulging or protrusion, and reasonably explained appellant's pain symptom complex. She added that her diagnosis was associated with a normal neurological examination and reiterated her opinion that appellant's low back pain condition was directly related to her employment.

In a September 21, 1998 report, Dr. Cook expanded her rationale for finding causal relationship and described appellant's work duties in more detail. As a distribution clerk, appellant was frequently required to work "secondaries," which consisted of 4 to 5 hours a day bagging mail and then lifting the 20- to 70-pound bag to a towline. During her 4 months at the employing establishing, she put in so much overtime that she had only 16 days off and worked up to 20 days without a break.

Dr. Cook noted that appellant developed backaches, but used a back support and took Motrin, hoping the pain would go away. When appellant saw Dr. Silver on January 26, 1998, he took her off work and appellant resigned her position on February 10, 1998. Dr. Cook added that appellant suffered lumbar sprain/strain, consistent with central disc syndrome, during her employment, which was fairly high paced. Recognizing that appellant was free of back trouble from 1993 until she was required to do the frequent and heavy lifting at work, Dr. Cook stated that "it is a reasonable conclusion" that appellant's employment was directly related to developing her low back condition for which compensation is claimed.

On September 10, 1998 the Office denied appellant's claim but subsequently accepted that her lower back pain was work related and found that it had resolved by February 14, 1998.

On July 5, 1999 appellant requested reconsideration and submitted a March 12, 1999 report from Dr. Brian Stemp, a chiropractor, who examined appellant on January 27, 1999 and determined that she had sustained lumbar sprain and strain, deterioration of lumbar intervertebral disc between L5 and sacrum, sciatica and radiculitis sue to displacement of the lumbar intervertebral disc.

The Office then referred appellant to a second opinion physician.

[2] On September 28, 1998 Dr. Silver reiterated his May 13, 1998 opinion that appellant's back pain "commencing during military service in the remote past has all but resolved, only to recur during her more recent [employing establishment] job."

In a medical report dated August 31, 1999, Dr. Neal Shonnard, a Board-certified orthopedic surgeon, and Dr. Clifford Roberson, Board-certified in neurological surgery, noted appellant's history of injury, including lower back pain, thoracic back pain and numbness in the legs and groin area, and her preexisting L5-S1 back condition.

The report noted appellant's diagnosis as preexisting lower back pain, aggravation of lower back pain caused by work-related injury on January 25, 1998, mild preexisting lumbar degenerative disc disease, and functional pain behavior, etiology unknown, not work related. The physicians concluded that appellant's symptoms were consistent with her preexisting condition but were not related to her employment, that her current condition was a manifestation of her preexisting condition as appellant related continuous history of back problems from 1994 through 1998, that she has no disability as a result of her employment and that her lumbar condition would have resolved in six weeks from onset in January 1998.

By decision dated October 8, 1999, the Office denied appellant's request for reconsideration. By letter dated October 14, 1999, appellant requested an oral hearing.

By letter dated November 26, 1999, the Office denied appellant's request for an oral hearing on the grounds that she had previously requested reconsideration and that the issue in the case could be equally well addressed by filing a request for reconsideration and submitting evidence not previously considered that would establish a causal relationship between her back condition and her work-related injury.

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim[3] including the fact that the individual is an " employee of the United States" within the meaning of the Act,[4] that the claim was timely filed within the applicable time limitation period of the Act,[5] 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.[6]

Establishing whether an injury, traumatic or occupational, was sustained in the performance of duty as alleged, *i.e.*, "fact of injury," and establishing whether there is a causal relationship between the injury and any disability and/or specific condition for which compensation is claimed, *i.e.*, "causal relationship," are distinct elements of a compensation claim. While the issue of causal relationship cannot be established until fact of injury is established, acceptance of fact of injury is not contingent upon an employee proving a causal relationship between the injury and any disability and/or specific condition for which compensation is claimed. An employee may establish that an injury occurred in the performance

[3] *See Daniel R. Hickman*, 34 ECAB 216 (1980).

[4] *James A. Lynch*, 32 ECAB 216 (1980).

[5] 5 U.S.C. § 8122.

[6] *See Daniel R. Hickman, supra* note 3.

of duty as alleged but fail to establish that his or her disability and/or a specific condition for which compensation is claimed are causally related to the injury.[7]

In this case, the Office accepted appellant's claim for lower back pain, resolved as of February 14, 1998. In support of her request for reconsideration, appellant submitted a report from Dr. Brian Stemp, a chiropractor. He did not diagnose a subluxation of the spine demonstrated by an x-ray to exist, and thus cannot be considered a physician under the Act. Therefore, his report is of no probative value in establishing appellant's claim.[8] Further, the second opinion physicians provided a thorough, well-reasoned report noting that appellant's conditions were causally related to her preexisting conditions and that her work-related lower back pain had "completely resolved."

Appellant did not support her claim with medical evidence establishing that she had any residuals of her accepted work-related injury.

While the reports of Drs. Cook and Silver supported the Office's acceptance of appellant's back condition as work related, appellant resigned from the employing establishment on February 10, 1998, and Dr. Silver released her to work on February 14, 1998, when the Office found that the work-related injury had resolved. None of the subsequent medical reports from Drs. Cook and Silver relates her continuing back pain to the effects of the January 26, 1998 work injury. In fact, Dr. Silver stated in March 1998 that appellant's pain had "improved slightly" since she changed jobs, and Dr. Cook stated on September 28, 1998 that appellant was "clinically significantly improved." Thus, appellant has submitted no medical evidence establishing that she had any disability after February 14, 1998 resulting from the accepted work injury.

The Board also finds that the Office acted within its discretion in denying appellant's request for a hearing.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative states:

> "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 Act[10] is unequivocal 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

[7] As used in the Act, the term "disability" means incapacity because of an injury in employment to earn wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity; *see Frazier V. Nichol*, 37 ECAB 528 (1986).

[8] *Sheila A. Johnson*, 46 ECAB 323 (1994).

[9] 5 U.S.C. § 8124(b)(1).

[10] 5 U.S.C. §§ 8101-8193.

representative of the Office.[11] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[12]

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. The Office must exercise this discretionary authority in deciding whether to grant or deny a review of the written record by an Office hearing representative. Specifically, the Board has held that the Office has the discretion to grant or deny a request for review of the written record on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act. These provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. 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 this case, appellant requested reconsideration of the October 8, 1999 decision, which denied her request for reconsideration of the Office's February 24, 1999 decision denying benefits. Because appellant requested an oral hearing after she had requested reconsideration under section 8128(a) on July 5, 1999, she is not entitled to an oral hearing under section 8124 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 October 14, 1999 request for an oral hearing.

The decisions of the Office of Workers' Compensation Programs dated November 26 and October 8, 1999 are affirmed.

Dated, Washington, DC
January 26, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[11] 5 U.S.C. § 8124(b)(2); *Joe Brewer*, 48 ECAB 411 (1997); *Coral Falcon*, 43 ECAB 915, 917 (1992).

[12] *Eileen A. Nelson*, 46 ECAB 377, 380 (1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (March 1997).

[13] *Henry Moreno*, 39 ECAB 475 (1988).