U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALERIE F. DOWNEY and U.S. POSTAL SERVICE,
POST OFFICE, Long Beach, CA

Docket No. 00-1017; Submitted on the Record;
Issued July 13, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained reactive airway disease in the performance of duty, causally related to factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for further consideration of her case on its merits under 5 U.S.C. § 8128(a).

This is appellant's second appeal before the Board on the first issue. In the prior decision, the Board affirmed the decisions of the Office's decisions dated September 20, October 20 and November 20, 1996 and February 12, 1997 finding that appellant had failed to establish that she sustained an upper respiratory condition or injury and a severe migraine headache in the performance of duty, causally related to factors of her federal employment.[1] The decision of the Board was issued on July 7, 1998, Docket No. 97-1371, petition for reconsideration was denied on September 29, 1998 and on November 18, 1998 appellant again filed a claim alleging that factors of her employment caused the same medical problems complained of in the prior claim previously denied by the Board.[2] Appellant additionally requested reconsideration in claim No. A13-1109468 on October 1, 1998. The record supports that she filed workers' compensation claims for injury occurring on June 1, 1982 (burning eyes and nasal membranes), No. A13-0712686; on September 26, 1988 (reactive airway disease), No. A13-1181547; on January 18, 1995 (stress-related back pain), No. A13-1095396; on March 31, 1995 (carpal tunnel syndrome), No. A13-1121896; on July 25, 1996 (chest pains, difficulty

[1] Claim No. A13-1109468. The facts and circumstances of the case are detailed in the prior Board decision and are hereby incorporated by reference.

[2] This claim was designated No. A13-11811547. On November 18, 1998 appellant filed a claim for occupational injury claiming that on September 26, 1988 she first became aware of her illness and that on June 20, 1994 she realized that it was causally related to her employment. She attributed it to chemical exposure during roof refurbishment of the building that evidently occurred in 1988 but was not diagnosed until July 1998, approximately 10 years later.

breathing), No. A13-1109468; on May 19, 1999 (back, leg, feet and neck pain), No. A13-1200264; and on November 3, 1999 (stress/mental abuse), No. A13-1202491.

In support of her claim No. A13-1181547 appellant submitted multiple reports, which had been previously submitted to the record for claim No. A13-1109468 and dating from 1996, material safety data sheets, multiple personal statements, coworker statements, OSHA reports, and a new March 1, 1999 medical report from Dr. Jeffrey B. Riker, a Board-certified pulmonologist, which noted that appellant claimed to be exposed to Pine-Sol, Spy Glass (a glass cleaner), Cut-Thru and a paint stripper and which stated that he "ha[d] no way of knowing whether the exposure after December 2, 1996 caused, aggravated, accelerated or precipitated any condition other than based on [appellant's] subjective complaints."

In support of appellant's request for reconsideration in claim No. A13-1109468, appellant submitted two new medical reports, a list of OSHA safety violations involving inadequate paperwork recordation of material safety data sheets,[3] a personal statement alleging that the employing establishment paperwork omissions endangered her health, that there were Privacy Act violations and that the Family Medical Leave Act was violated. Medical reports and a removal notice previously considered by the Board were also submitted. A July 13, 1998 report from Dr. Eric D. Feldman, a Board-certified physiatrist, opined "I feel that there is a causal relationship from the exposure of toxic environmental fumes with secondary exacerbation of myofascial pain and acute exacerbation of a costochondritis. This condition lasted from date of exposure in July 1996 through November 1996." A July 17, 1998 report from Dr. Jeffrey B. Riker, a Board-certified pulmonologist, noted that he could not find any objective abnormality or pulmonary dysfunction but noted that a positive methacholine challenge test on September 26, 1988 led him to believe that appellant did have reactive airway disease which could be irritated by exposure to irritants which could induce transient asthma symptoms. He opined that appellant's symptoms of reactive airway disease were precipitated by exposure to irritant chemical fumes.

By decision dated October 19, 1998, the Office denied appellant's claim finding that the evidence submitted was not sufficient to warrant modification of its prior decision.[4]

In a November 16, 1998 statement, a coworker claimed that a strong chemical odor was coming from the men's restroom.

In a statement dated February 24, 1999, a coworker claimed that she had been exposed to dust from cleaning machines, fumes from restroom cleaners and exhaust fumes from the trucks and forklifts, which made her sick and aggravated her asthma. In an additional February 24, 1999 statement, another coworker claimed exposure to carbon monoxide from truck fumes through the loading dock, restroom cleaning chemicals and dust spray used when mopping dust.

[3] The Board notes that no actual hazardous employment conditions or exposures were identified.

[4] Although the Office erroneously stated that it was denying modification of its Board's July 7, 1998 decision, in fact it was denying modification of its own February 12, 1997 decision, as the Office has no jurisdiction to reconsider a Board decision. *See* 20 C.F.R. § 501.6(c) which explains that the decision of the Board shall be final as to the subject matter appealed and such decision shall not be subject to review, except by the Board.

Appellant also submitted material safety data sheets and information of general application with regard to environmental sampling in her workplace.

Appellant additionally submitted a March 1, 1999 report from Dr. Riker which stated: "I have no way of knowing whether the exposures after December 2, 1996 caused, aggravated, accelerated or precipitated any condition other than based on [appellant's] subjective complaints."

By letter dated March 25, 1999, the employing establishment noted appellant's exposure complaints and indicated that she was not exposed to stripping paint on a regular basis but was 62 feet away and that it occurred sporadically at best. The employing establishment noted that several of the chemicals appellant complained of were used only sporadically in the repair cages where appellant did not work, that Pine-Sol and Spy Glass were used in cleaning restrooms, which were 145 feet away and were closed while cleaning and that appellant did not work with any of these chemicals and would be exposed only when approaching those working with the chemicals.

By decision dated April 30, 1999, the Office denied appellant's claim No. A13-1181547 finding that the evidence of record failed to establish that appellant sustained any medical condition causally related to factors of her federal employment. The Office found that appellant had filed two previous claims for the same conditions which were denied, that her allegations that she was daily exposed to xylene, acetone, orange terpene/surfactant solution, pine oil, isopropenol, sodium hydroxide, ethanol, sodium laurel ether sulfate, methyl salicylate, nitrolotriacetic acid and ethanolpropane were not supported by the record.[5]

On August 31, 1999 appellant requested reconsideration of the October 19, 1998 decision and in support she submitted a June 21, 1999 work restriction slip,[6] a March 3, 1999 statement from Dr. Feldman which noted that appellant had been under his care since 1986 and required periodic chiropractic manipulation, a December 7, 1998 report from Dr. Riker which noted that her present pulmonary function studies were normal but that, since she had rhinitis and pharyngitis on exposure to fumes, she should avoid any exposure to toxic or irritating chemical fumes at work due to reactive airway disease as demonstrated on the 1988 methacholine challenge test and multiple other previously submitted and considered medical reports. A December 4, 1996 report from Dr. Arthur F. Gelb, a Board-certified pulmonologist, was also submitted which reported positive results in a September 26, 1988 methacholine challenge test, a September 21, 1996 report from Dr. Vaughn Nixon, a Board-certified otolaryngologist, was additionally submitted which noted that appellant was seen on September 12, 1996 with nasal congestion, nose irritation and headache allegedly from chemicals in the workplace from new carpet and furnishings. Causal relation was not discussed. Publication excerpts of general application were also submitted.

[5] The Board notes that appellant would also be exposed to several of these compounds when using shampoo, body soap, nail polish remover, home cleaners and over-the-counter pain remedies.

[6] Limiting bending, twisting, lifting over 15 pounds and prolonged standing.

By decision dated January 11, 2000, the Office denied appellant's application for reopening of her case for a further review on its merits finding that the evidence submitted was repetitious or was irrelevant and therefore was insufficient to warrant a reopening of appellant's case for further review on its merits.

The Board finds that appellant has failed to establish that she sustained reactive airway disease in the performance of duty, causally related to factors of her federal employment.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;[7] (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed;[8] and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[9] The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,[10] must be one of reasonable medical certainty[11] 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.[12]

Appellant has not submitted such rationalized medical evidence supporting her claim in this case.

Appellant submitted some medical reports previously submitted and considered by the Office and the Board, and she submitted only a March 1, 1999 report in which Dr. Riker stated that he had no way of knowing whether the exposures after December 2, 1996 caused, aggravated, accelerated or precipitated any condition other than based on [appellant's] subjective complaints. As Dr. Riker cannot positively support causal relation of appellant's condition as of November 18, 1998 with any specific factors of her federal employment, this report is, therefore, not rationalized medical opinion supporting her allegations. Moreover, the duplicate medical reports have no new probative value, the statements from coworkers are specific to them and not

[7] *See Walter D. Morehead*, 31 ECAB 188, 194 (1979).

[8] *See Ronald K. White*, 37 ECAB 176, 178 (1985).

[9] *See generally Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

[10] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[11] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[12] *See William E. Enright*, 31 ECAB 426, 430 (1980).

to appellant and the material of general application has no probative value in appellant's specific case.[13]

As appellant has failed to submit new and probative factual evidence establishing her occupational exposure to hazardous chemicals and has failed to provide new and probative medical evidence supporting that these documented exposures resulted in a physical condition causing disability, she has failed to establish her claim.

Further, the Board finds that the Office did not abuse its discretion by denying appellant's request for further consideration of her case on its merits under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act[14] does not give a claimant the right upon request or impose a requirement upon the Office to review a final decision of the Office awarding or denying compensation.[15] Section 8128(a) of the Act, which pertains to review, vests the Office with the discretionary authority to determine whether it will review a claim following issuance of a final Office decision. Section 8128(a) of the Act states:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> > (1) end, decrease or increase the compensation previously awarded; or
> >
> > (2) award compensation previously refused or discontinued."[16]

Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128,[17] the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations the Office has stated that it will reopen a claimant's case and review the case on the merits under 5 U.S.C. § 8128(a) upon request by the claimant whenever the claimant's application for review meets the specific requirements set forth in §§ 10.606 through 10.609 of Chapter 20 of the Code of Federal Regulations revised as of April 1, 1999.

[13] *See George A. Johnson*, 43 ECAB 712 (1992).

[14] 5 U.S.C. § 8101 *et seq*; *see* 5 U.S.C. § 8128(a).

[15] *Compare* 5 U.S.C. § 8124(b)(1) which entitles a claimant to a hearing before an Office hearing representative as a matter of right provided that the request for a hearing is made within 30 days of a final Office decision and provided that the request for a hearing is made prior to a request for reconsideration.

[16] 5 U.S.C. § 8128(a).

[17] *See Charles E. White*, 24 ECAB 85, 86 (1972).

The Federal Register dated November 25, 1998 announced that effective January 4, 1999, certain changes to 20 C.F.R. Parts 1 to 399 would be implemented.[18] These changes are specifically enumerated in the volume of 20 C.F.R. Parts 1 to 399 revised as of April 1, 1999. Regarding the revised Office procedures involving the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), the changes effective January 4, 1999 are enumerated as follows:

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[19] the Office's regulations provide that a claimant must:

(1) submit such application for reconsideration in writing; and

(2) set forth arguments and contain evidence that either:

> (i) shows that the Office erroneously applied or interpreted a specific point of law;
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> (ii) advances a relevant legal argument not previously considered by the Office; or
>
> (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[20]

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.[21] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[22] 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.[23]

Section 10.608 (a) states that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2). If reconsideration is granted, the case is

[18] The Board and the Office agree that January 4, 1999 became the effective date of the changes announced in the November 25, 1998 federal register as it was the first business day following the January 1, 1999 holiday and as there was no indication that there was any intended delay for implementation of these enumerated changes.

[19] 5 U.S.C. §§ 8101-8193.

[20] 20 C.F.R. § 10.606(b)(1), (2).

[21] 20 C.F.R. § 10.607(a).

[22] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[23] *See Mohamed Yunis, supra* note 22; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

reopened and the case is reviewed on its merits.[24] This section, however, continues to state in paragraph (b) that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.

In the instant case, with her request for merit reconsideration under section 8128(a) appellant submitted multiple reports repetitive of evidence previously submitted to the record, including Dr. Riker's July 17, 1998 report; Dr. Feldman's July 13, 1998 and April 29, 1996 letters and his April 7, 1996 Certification of Health Care Provider form; Dr. Gelb's December 4, 1996 letter; and Dr. Nixon's September 21, 1996 report, September 16, 1996 disability slip and September 12, 1996 prescription. As this evidence was previously submitted to the record and considered by the Office, the Board notes that this evidence is cumulative. Consequently, this evidence does not constitute a basis for reopening a claim for further merit review under 20 C.F.R. § 10.606(2)(i-iii).

However appellant also submitted some new evidence, including Dr. Feldman's March 3, 1999 and June 21, 1998 letter and June 21, 1999 disability slip; Dr. Riker's December 7, 1998 letter with associated chart note, a July 17, 1998 letter with a July 16, 1998 chart note and a chart note dated September 11, 1996; September 26, 1988 pulmonary test results; an article from Parade magazine; and an article from a publication called Family Safety and Health.

Dr. Feldman's June 21, 1999 disability slip and his March 3, 1999 and June 15, 1998 letters have no probative value with respect to this claim as the disability slip does address causal relation with employment factors and his letters merely stated that appellant was under his care for a chronic condition without identifying what that condition is. Therefore, this evidence is irrelevant to appellant's respiratory injury claim. Dr. Riker's December 7, 1998 letter and chart note are substantially similar to his previously considered July 17, 1998 letter and therefore are repetitive in content and consequently are not new probative evidence. The 1988 pulmonary test results were already considered by the Board in its previous decision, were not relevant to appellant's condition in 1996 and hence are not relevant probative new evidence. The December 7, 1998 report is further repetitive in nature. Dr. Riker's July 16, 1998 chart note reiterates a history already documented in the record and hence is cumulative in nature and repetitive. Finally, the excerpts from publications are of general application and have no probative value in this specific case.[25]

As none of this new evidence submitted has any new probative value, it is insufficient to warrant a reopening of appellant's claim for a further review of her case on its merits. Therefore, under 20 C.F.R. § 10.608(b) the Office properly denied appellant's application for reopening her case for a review on its merits.

In the present case, appellant has not established that the Office abused its discretion in its January 11, 2000 decision by denying her request for a review on the merits of its October 19,

[24] 20 C.F.R. § 10.608(a); *see also* § 10.609(a-c).

[25] *See Kathy Marshall (Dennis Marshall)*, 45 ECAB 827 (1994).

1998 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 advance a point of law not previously considered by the Office or failed to submit 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.[26] Appellant has made no such showing here.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated January 11, 2000 and April 30, 1999 are hereby affirmed.

Dated, Washington, DC
July 13, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

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