

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAISY MARTINEZ and U.S. POSTAL SERVICE,
POST OFFICE, San Juan, PR

*Docket No. 00-955; Submitted on the Record;
Issued May 21, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant established that she sustained an employment-related condition; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a hearing.

On May 5, 1999 appellant, then a 49-year-old flat sorting machine operator, filed an occupational disease claim, alleging that factors of employment caused carpal tunnel syndrome and cervical and dorsolumbar myositis. She stated that she first became aware that the illness was employment related on September 27, 1983. In an attached statement, appellant alleged that repetitive finger and hand movement and lifting duties throughout her postal career caused her condition. She submitted supporting medical evidence and the employing establishment submitted evidence regarding prior claims filed by appellant. By letter dated July 16, 1999, the Office informed appellant of the type evidence needed to support her claim. She was given approximately 30 days to respond. In an August 6, 1999 letter, appellant informed the Office that she had medical appointments on August 10 and 16, 1999 and requested an extension to provide medical evidence. By decision dated August 27, 1999, the Office denied her claim on the ground that she failed to establish that her medical condition was caused or aggravated by employment activity. On August 30, 1999 appellant submitted additional medical evidence and on October 7, 1999 requested a hearing and submitted additional evidence. In a December 3, 1999 decision, an Office hearing representative denied her request on the grounds that it was not timely filed. In a letter postmarked December 14, 1999, appellant filed her appeal with the Board. By letter dated January 20, 2000, she requested reconsideration and submitted additional evidence. In a decision dated February 17, 2000, the Office vacated the August 27, 1999 decision, finding that appellant had established that she sustained employment-related carpal tunnel syndrome and bilateral ulnar nerve entrapment. The Office further found that she had not established a causal relationship between her cervical fibromyositis and lumbosacral myositis.

Appellant filed her appeal with the Board on December 14, 1999 and on January 20, 2000 requested reconsideration with the Office and submitted new evidence. It is well established that the Board and the Office may not exercise concurrent jurisdiction over the same

issue in the same case and, therefore, any decision of the Office on the request for reconsideration would be null and void.¹ The Board notes further that it is unable to review the additional medical evidence submitted by appellant as part of her request for reconsideration before the Office. Under section 501.2(c) of the Board's Rules of Procedure (20 C.F.R. § 501.2(c)), the Board is precluded from reviewing evidence which was not before the Office at the time it issued its final decision.

The Board finds that appellant failed to establish that she sustained an employment-related condition.

The record in this case indicates that appellant filed a notice of traumatic injury, Form CA-1, on August 3, 1983, indicating that she injured her left shoulder while lifting a mail tray. She filed a second CA-1 form on September 27, 1983, indicating that she injured her lower back when lifting a mail tray.² On November 24, 1987 appellant filed an occupational disease claim, alleging that finger numbness and pain were employment related. She stated that she first became aware that the illness was employment related on October 27, 1987. On January 11, 1988 appellant filed a recurrence claim, alleging that she sustained a recurrence of disability due to the September 27, 1983 injury. She did not stop work. Appellant next filed the May 5, 1999 occupational disease claim.

The medical evidence that was before the Office at the time of the August 27, 1999 decision³ includes duty status reports dated September 29 and October 3, 1983 in which Dr. Dwight Santiago, an internist, diagnosed thoracolumbosacral fibromyositis and provided restrictions to appellant's physical activity. Electromyographic (EMG) and nerve conduction studies dated November 17, 1987 revealed axonal degeneration of bilateral ulnar (motor) nerves and bilateral C6-7 radiculopathy, greater on the left. Dr. Luis E. Faura Clavell⁴ provided a treatment note dated November 17, 1987 in which he noted appellant's complaints of pain, numbness and tingling of the right hand. In a December 10, 1987 treatment note, he reported her complaints of a tender neck and back, noted findings on examination and provided restrictions to her activity. On February 18, 1988 Dr. Clavell diagnosed cervical radiculopathy and advised that she have a permanent sitting job. In a report dated May 12, 1988, he noted that appellant had been under his care since November 13, 1987 and advised that, because the EMG indicated C6-7 radiculopathy, appellant should use not repetitive movements. Dr. Clavell provided treatment notes dated May 16, 1988 and November 23, 1989 in which he reiterated his findings and also provided reports dated August 16, 1993 in which he advised that appellant complained of recurring pain from working at the sorting machine. He diagnosed a recurrence of cervical and dorsolumbar myositis and indicated that she could not work from September 1 to 3, 1993. In a report dated September 28, 1993, Dr. Clavell indicated that she had fully recovered.

¹ *Douglas E. Billings*, 41 ECAB 880 (1990). The Board notes, however, that the Office is not precluded from reissuing the February 17, 2000 decision.

² The record indicates that this claim was accepted and adjudicated by the Office under file number 020519028.

³ The Board's review of the evidence is limited to consideration of the evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

⁴ Dr. Clavell's credentials are not known.

An x-ray of the cervical spine dated December 7, 1998 demonstrated spondyloarthritic and discogenic changes with narrowing at C5-6 and C6-7 intervertebral spaces. EMG and nerve conduction studies on December 9, 1998 revealed bilateral carpal tunnel and bilateral ulnar entrapment at the Guyon. In a report dated December 16, 1998, Dr. Wildo Vargas, a physiatrist, diagnosed bilateral carpal tunnel syndrome and cervical myositis. In a work restriction evaluation dated April 28, 1999, Dr. Vargas indicated that appellant could work eight hours per day with restrictions, opined that she had reached maximum medical improvement but advised that repetitive hand use would worsen her condition.

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 the factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the 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 factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, showing a causal relationship between the claimed conditions and the identified factors. The belief of appellant that the condition was caused or aggravated by the identified factors is not sufficient to establish causal relation.⁵

The record before the Board contains medical evidence in which carpal tunnel syndrome and myositis are diagnosed. In none of the reports, however, does the respective physician provide an opinion regarding the cause of these conditions. Dr. Clavell noted appellant's complaints of pain while working at the sorting machine and Dr. Vargas advised that she should not use repetitive hand motions. The Board finds that these reports do not rise to the level needed to establish causal relationship. Appellant, therefore, failed to establish that she sustained an employment-related occupational disease.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a hearing as untimely.

In the present case, the Office denied appellant's request for a hearing on the grounds that it was untimely. In its December 3, 1999 decision, the Office stated that appellant was not, as a matter of right, entitled to a hearing since her request had not been made within 30 days of its August 27, 1999 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue of whether she sustained an employment-related condition could be addressed through a reconsideration application.

The Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act,⁶ has the power to hold hearings in

⁵ *Lourdes Harris*, 45 ECAB 545 (1994).

⁶ 5 U.S.C. §§ 8101-8193.

certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁷ In the present case, appellant's request for a hearing on October 7, 1999 was made more than 30 days after the date of issuance of the Office's prior decision dated August 27, 1999 and, thus, appellant was not entitled to a hearing as a matter of right. Hence, the Office was correct in stating in its December 3, 1999 decision that appellant was not entitled to a hearing as a matter of right because her request was not made within 30 days of the Office's August 27, 1999 decision.

While the Office also has the discretionary power to grant a hearing request when a claimant is not entitled to a hearing as a matter of right, the Office, in its December 3, 1999 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.⁸ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

The decisions of the Office of Workers' Compensation Programs dated December 3 and August 27, 1999 are hereby affirmed.

Dated, Washington, DC
May 21, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

⁷ *Henry Moreno*, 39 ECAB 475 (1988).

⁸ *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).