U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHRYN J. ALLEN and U.S. POSTAL SERVICE,
POST OFFICE, Fort Worth, TX

Docket No. 00-1125; Submitted on the Record;
Issued October 2, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing; and (2) whether appellant has sustained a recurrence of disability on and after May 26, 1996 due to her accepted September 3, 1986 employment injury.

On August 22, 1988 appellant, then a 38-year-old clerk, filed an occupational disease claim (Form CA-2), alleging that on July 5, 1988 she first realized her employment duties caused her problems with her hands, wrists and fingers.[1] The Office accepted the claim for cervical spondylosis and temporary aggravation lateral epicondylitis, authorized anterior cervical discectomy and fusion at C5-7 and accepted subsequent postoperation headaches and placed appellant on the automatic rolls for temporary total disability by letter dated September 29 1989. Subsequently, the Office accepted vascular headaches.

On February 5, 1996 the Office referred appellant for vocational rehabilitation.

By letter dated February 27, 1996, the employing establishment offered appellant the position of limited-duty -- distribution clerk based upon the restrictions noted by Dr. William Blair, the impartial medical examiner.

In a letter dated April 3, 1996, Office advised appellant that the position offered by the employing establishment had been found suitable and advised her of the penalty provisions of 5 U.S.C. § 8106(c)(2). The Office provided appellant with 30 days to either accept the position or provide her reasons for rejecting the position.

In a letter dated April 29, 1996, appellant gave her reasons for refusing the position which included her inability to physically perform the position and that she was physically unable to drive 100 miles roundtrip to the employing establishment.

[1] Appellant noted that she first became aware of her disease on September 3, 1986.

By letter dated May 3, 1996, the Office determined that appellant's reasons for refusing the position were unacceptable and advised her of consequences of refusing suitable work. Appellant was given 15 days to accept the position and if she refused the offer, the Office would implement the penalty provisions of 5 U.S.C. § 8106(c)(2).

In a letter dated May 10, 1996, appellant accepted the employing establishment's job offer under protest and returned to work on May 20, 1996.

In a note dated June 27, 1996, Dr. Stephen R. Neece, an attending Board-certified neurological surgeon, stated that appellant "suffers from severe, debilitating migraine headaches caused by accepted Office case" which has caused her to miss work on May 22, May 24, May 30, May 31, June 6 and June 7, 1996.

On July 22, 1996 the Office issued a loss of wage-earning capacity determination that the limited-duty distribution clerk position fairly and reasonably represented appellant's wage-earning capacity.

On March 14, 1997 appellant filed a schedule award claim, which the Office denied in an April 3, 1997 decision.

On March 14, 1997 appellant filed a claim for intermittent recurrence of disability beginning May 18, 1996 and total disability starting November 5, 1996.

In a report dated July 2, 1997, Dr. Neece detailed the dates appellant had been totally disabled from performing her light-duty position. He noted:

> "In early 1993, [appellant] reported increasing difficulty with headaches. These clinically were migrainous in description and were noted on several office visits over the next two years. It was thought that her migraine headaches were directly related to and caused by her cervical disc disease. Historically then, the onset of these headaches follow the injury and consequences reported at the [employing establishment] on July 8, 1988."

Dr. Neece also noted that appellant reported that "driving and riding long distances definitely aggravates her condition, causing her painful muscle spasm."

In a duty status report (Form CA-17) dated July 21, 1998, Dr. Neece determined that appellant was totally disabled due to her neck pain and headaches due to her disc herniation and concluded that this disability was permanent.

By letter dated October 8, 1998, the Office advised appellant that the evidence of record was insufficient to establish her recurrence claim and advised her as to the type of medical and factual evidence required to support her claim.

In a November 10, 1998 report, Dr. Neece attributed appellant's migraine headaches to her cervical injury and resulting nerve damage as appellant had no family or personal history of migraines and the headaches began after her employment injury. He opined that her migraine headaches were "aggravated by the stressful work environment" and that "[s]he has tried to

perform her job but with these medically documented problems, she has been forced to miss several days of work." In concluding, Dr. Neece opined that appellant should "be classified for your use a (sic) fully incapacitated and forced to miss several days of work."

By decision dated August 18, 1999, the Office denied appellant's recurrence claim. In support of its decision, the Office found Dr. Neece failed to provide a rationalized opinion supporting that her disability was due to her employment.

In a letter dated September 16, 1999 and postmarked September 20, 1999, appellant requested an oral hearing.

On November 2, 1999 the Office denied appellant's request for an oral hearing as being untimely.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... 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."[2] Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[3] Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.[4]

Section 10.616(a) of the Office's regulations[5] provides in pertinent part that the hearing request must be sent within 30 days of the date of issuance of the decision (as determined by the postmark or other carriers marking) of the date of the decision for which a hearing is sought.[6]

The Board has held that 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 and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[7] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act, which provided the right to a

[2] 5 U.S.C. § 8124(b)(1); *see William N. Downer*, 52 ECAB ___ (Docket No. 99-606, issued January 12, 2001).

[3] 20 C.F.R. § 10.615.

[4] *Samuel R. Johnson*, 51 ECAB ___ (Docket No. 99-1227, issued August 1, 2000).

[5] 20 C.F.R. § 10.616

[6] *Samuel R. Johnson*, *supra* note 4.

[7] *Henry Moreno*, 39 ECAB 475, 482 (1988).

hearing,[8] when the request is made after the 30-day period for requesting a hearing[9] and when the request is for a second hearing on the same issue.[10]

The Board finds that appellant has not met her burden of proof necessary to establish a recurrence of disability on and after May 23, 1996 due to her accepted September 3, 1986 employment injury.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[11]

In this case, appellant has failed to submit such rationalized medical opinion evidence. The medical evidence appellant submitted consists only of multiple reports from Dr. Neece, an attending Board-certified neurological surgeon, who offered a diagnosis of migraine headaches directly related to and caused by her cervical disc disease and concluded that "the onset of these headaches follow the injury and consequences reported at the [employing establishment] on July 8 1988." Dr. Neece attributed appellant's migraine headaches to her cervical injury and resulting nerve damage as appellant had no family or personal history of migraines and the headaches began after her employment injury. Dr. Neece failed to explain with medical rationale how her September 3, 1986 employment injury were the cause of her migraine headaches or how her light-duty job resulted in or aggravated appellant's disability to produce migraine headaches. Therefore, his report is insufficient to establish a causal relationship between appellant's claimed recurrence of disability and the 1991 injury.[12]

The Board has held that medical reports consisting solely of conclusory statements without supporting rationale are of little probative value.[13] In this case, Dr. Neece's reports merely declared and concluded that appellant's unaccepted condition of migraine headaches was related to the employment injury since there was no family history of migraines and they began after her injury. As no explanation or rationale was provided, these reports are of little probative

[8] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[9] *Delmont L. Thompson*, 51 ECAB ____ (Docket No. 97-988, issued November 1, 1999); Herbert *C. Holley*, 33 ECAB 140, 142 (1981).

[10] *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[11] *Albert C. Brown*, 52 ECAB ____ (Docket No. 98-2320, issued November 29, 2000); *Barry C. Peterson*, 52 ECAB ____ (Docket No. 98-2547, issued October 16, 2000)

[12] *See Kimper Lee*, 45 ECAB 565, 574 (1994) (finding that a physician's rationale that appellant's condition was related to a previous lifting injury because appellant reported no similar problem prior to that accepted injury was insufficient to establish a causal relationship).

[13] *William C. Thomas*, 45 ECAB 591 (1994).

value. In this case, Dr. Neece's reports have diminished probative value as he predicated his opinion on an unsubstantiated diagnosis not accepted by the Office.

The decisions of the Office of Workers' Compensation Programs dated November 2 and August 18, 1999 are hereby affirmed.

Dated, Washington, DC
October 2, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member