U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REGINA BOOKER and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

Docket No. 01-179; Submitted on the Record;
Issued September 14, 2001

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

On September 20, 1996 appellant, then a 36-year-old letter sorting machine clerk, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that numbness, tingling and throbbing in her left shoulder, arm, hand and wrist was caused by job duties. Appellant stopped work on August 22, 1996 and returned on August 27, 1996 in a modified capacity. The Office eventually accepted the claim for aggravation of preexisting spondylosis and cervical radiculopathy.

In an April 27, 1998 report, an Office medical adviser indicated that appellant was in need of surgical treatment for her accepted condition of aggravation of her preexisting cervical spondylosis and chronic cervical radiculopathy. He indicated that she sustained an injury to her head (concussion) on the job and it was reasonable, that from the injury of 1983 she developed cervical spondylosis. The doctor noted appellant's history of continuing neck problems that were treated conservatively, and began to worsen and become associated with neck and bilateral arm pain related to her work. He noted that appellant's symptoms were accepted as aggravation of preexisting cervical spondylosis and after further conservative care, a myelogram and post myelographic computerized tomography (abnormal at C4-5 and C6-7) surgery was performed (ACF with internal fixation C4-5 and C6-7). The Office medical adviser indicated that the evidence in the record supported the need for surgical treatment as occurred on April 21, 1997. He also indicated that the surgery was the result of the described aggravation of preexisting cervical spondylosis by the described work-related activities.

In an August 5, 1998 letter, the employing establishment sent a letter to appellant's treating physician, Dr. Ansell, requesting that he advise whether appellant could perform the following limited-duty position within certain restrictions. In an August 11, 1998 report, Dr. Ansell advised that appellant could perform limited duty for eight hours daily provided she could stand and stretch and move around briefly for 2 to 3 minutes every 30 minutes.

Appellant returned to work in a limited-duty capacity of eight hours a day on January 8, 1999 and cut her hours to four hours a day on January 14, 1999.

On March 4, 1999 appellant filed a claim for recurrence of disability (Form CA-2a) indicating that she was unable to work limited duty eight hours a day as of January 13, 1999. She indicated that her physician advised that she work four hours a day with restrictions.

In an April 12, 1999 report, Dr. Thorpe, a Board-certified orthopedic surgeon and an Office referral physician, noted appellant's history of injury and treatment, and findings on examination. He stated that there was no reason appellant could not work eight hours a day within certain restrictions.

In an April 30, 1999 decision, the Office denied appellant's claim for a recurrence of total disability as the medical evidence demonstrated that appellant was capable of performing the limited-duty job offered by the employing establishment, eight hours per day.

By letter dated April 20, 2000, appellant requested reconsideration and enclosed additional medical evidence comprised of diagnostic tests and medical reports. The diagnostic tests did not address the cause of the claimed recurrence of disability beginning January 13, 1999. Most of the medical reports submitted by appellant also did not address the cause of the claimed recurrence of disability beginning January 13, 1999.

However, in a March 14, 2000 report, Dr. Steven M. Sacks, an orthopedic surgeon, indicated that appellant continued to have cervical pain and swelling. He stated that appellant was evaluated by the surgeon and considered appropriate for surgical intervention; however, at this time, the patient declined surgery. Dr. Sacks indicated that appellant had continued pain which was relatively unrelenting and persistent discomfort was evident. He noted that another physician had recommended posterior cervical fusion with iliac crest bone graft and external fixation; however, appellant declined due to fear of surgery. Dr. Sacks indicated that appellant was able to work four hours a day as she was unable to pursue more beyond this as ongoing neck pain was likely with persistent forward flexion required during her job. He recommended no more than four hours of this individual on a daily basis. Dr. Sacks indicated that appellant's problem was job related, and her pain was likely due to the initial injury in 1996 as well as many years of persistent microtrauma with lifting, pulling and pushing during the course of the job. In either case, he indicated that appellant's pain resulted from job-related activities.

In a July 24, 2000 decision, the Office denied merit review of appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant to the issue of a recurrence on January 13, 1999 and was not sufficient to warrant a review of the prior decision.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed her appeal with the Board on September 25, 2000, the Board lacks jurisdiction to review the Office's most recent merit decision dated August 30, 1999. Consequently, the only

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

decision properly before the Board is the Office's July 24, 2000 decision denying appellant's request for reconsideration.

The Board finds that the Office improperly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her 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 awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), 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.[2]

In the present case, relevant and pertinent new medical evidence did accompany appellant's request for reconsideration. This is important since the underlying issue in the claim, whether appellant had a recurrence of total disability on January 13, 1999 such that she was unable to perform her light-duty position is essentially medical in nature.

While appellant submitted numerous diagnostic tests and narrative medical reports from treating physicians, most of these did not address whether her claimed recurrence of disability beginning January 13, 1999 was causally related to her employment injury. Thus, these reports were not relevant as they did not address causal relationship of the claimed recurrence of disability.

However, in his March 14, 2000 report, Dr. Sacks stated that appellant could not work more than four hours a day. He also indicated that her problem was job related and likely due to the initial injury in 1996 as well as many years of persistent microtrauma with lifting, pulling and pushing up and down during the course of the job. He further opined that, in either case, appellant's pain resulted from her job-related activities. This report is new and it is relevant to the issue of whether appellant could no longer work eight hours a day because the doctor opines that appellant cannot work eight hours daily due to her employment injury.

[2] 20 C.F.R. § 10.608(b) (1999).

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence, which may be necessary to discharge her burden of proof.[3] The requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[4]

The Board finds that Dr. Sack's March 14, 2000 report is relevant and pertinent new evidence not previously considered by the Office and sufficient to require a merit review under 20 C.F.R. § 10.606(b)(2). Thus, the Office's denial of appellant's request for review of the merits of her claim constituted an abuse of discretion. Consequently, the case must be remanded for the Office to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, the Office shall issue a merit decision on the claim.

The decision of the Office of Workers' Compensation Programs dated July 24, 2000 is hereby reversed and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
September 14, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

[3] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[4] *See* 20 C.F.R. § 10.606(b)(3).