U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. WELLINGTON and DEPARTMENT OF THE ARMY, U.S. ARMY AVIATION & MISSILE COMMAND, Redstone Arsenal, AL

Docket No. 01-181; Submitted on the Record;
Issued September 27, 2001

DECISION and ORDER

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

The issues are: (1) is whether appellant has sustained an injury in the performance of duty and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a).

On February 18, 2000 appellant, then a 39-year-old supply clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 3, 1999 she sustained a herniated disc when she bent down to pick up a box that was already packed.

By letter dated March 22, 2000, the Office advised appellant that additional information was required and requested that she fill out the attached list of questions and return it to the Office.

In a computerized tomography scan dated October 20, 1999, Dr. John R. Collins diagnosed far lateral disc protrusion at L3-4.

Dr. Eddie G. Gaines, Jr., an attending physician, diagnosed back pain in treatment notes for the period September 7, 1999 through March 21, 2000. On September 7, 1999, appellant related "that she was doing some lifting at one of her jobs and noted some back pain" which progressively worsened over the next few days.

In an October 15, 1999 report, Dr. Larry M. Parker noted appellant had been having back pain, left leg pain and severe muscle spasms, which had gotten worse over the past six months and diagnosed lumbar radiculitis, left lower extremity.

In decision dated April 27, 2000, the Office denied appellant's claim on the basis that she failed to establish that a condition had been diagnosed in connection with the claimed September 3, 1999 event.

In a letter dated June 20, 2000, appellant requested a written appeal of her claim.

In a letter dated June 29, 2000, appellant requested reconsideration and indicated that the medical records could be forwarded for review.

In a nonmerit letter decision dated July 31, 2000, the Office denied appellant's request for reconsideration on the basis that she raised no substantive legal question nor submitted any new and relevant evidence.[1]

The Board finds that appellant has not established that she sustained an injury in the performance of duty.

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.[2]

When an employee claims that he or she sustained an injury in the performance of duty he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. The employee must also establish that such event, incident or exposure caused an injury. Once an employee establishes an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation, is causally related to the accepted injury.[3]

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, must be one of reasonable medical certainty 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. The weight of medical evidence is determined by its reliability, its probative

[1] Appellant submitted evidence subsequent to the Office's July 31, 2000 decision. However, the Board does not have jurisdiction to review evidence that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

[2] *Gary J. Watling*, 52 ECAB ___ (Docket No. 00-634, issued March 1, 2001).

[3] *Leon Thomas*, 52 ECAB ___ (Docket No. 00-671, issued January 4, 2001).

value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[4]

Regarding the first component, appellant alleged that on September 3, 1999 she sustained an injury to her back while picking up a box she had packed. The employing establishment did not controvert the claim. The Board finds that appellant relayed a consistent history and concludes that the alleged incident did occur at the time, place and in the manner alleged.

The Board finds, however, that the medical evidence of is not sufficient to establish that the employment incident caused a compensable injury.

In the instant case, appellant was informed that she needed to submit a comprehensive medical report from her treating physician explaining how work factors or incidents in her employment caused or contributed to her claimed condition. However, none of the medical reports in the record provided a rationalized medical opinion explaining why particular work factors identified by appellant caused her claimed injury.

Dr. Gaines diagnosed back pain and noted in his September 7, 1999 report that appellant stated she had been doing "some lifting at one of her jobs and noted some back pain" which progressively worsened over the next few days. Dr. Gaines did not note what day appellant injured her back or what job. He did not offer a rationalized medical opinion as to how appellant's employment caused or aggravated her condition.

Dr. Parker diagnosed lumbar radiculitis, left lower extremity but did not elaborate or attempt to provide a causal relationship between that condition and the factors of appellant's federal employment.

An award of compensation may not be based upon surmise, conjecture or speculation or upon appellant's belief that there is a causal relationship between her condition and her employment.[5] To establish causal relationship, appellant must submit a physician's report, in which the physician reviews the factors of federal employment identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and appellant's medical history, state whether these employment factors caused or aggravated appellant's diagnosed condition.[6] Appellant failed to submit such evidence and, therefore, failed to discharge her burden of proof.

Next the Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of the merits of his claim under 5 U.S.C. § 8128(a).

Under section 8128(a) of the Federal Employees' Compensation Act,[7] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in

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[4] *James Mack,* 43 ECAB 321 (1991).

[5] *William S. Wright,* 45 ECAB 498 (1993).

[6] *Id.*

[7] 5 U.S.C § 8128(a).

accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[8] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

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

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[9]

In the instant case, appellant submitted no new relevant and pertinent evidence in support of her June 20, 2000 request for written appeal of her claim or her June 29, 2000 reconsideration request. Accordingly, the Office properly denied appellant's request for review on the merits.

The July 31 and April 27, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 27, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

[8] 20 C.F.R. § 10.606(b) (1999).

[9] 20 C.F.R. § 10.608(b).