

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LILIANE W. ASTRINOS and U.S. POSTAL SERVICE,
HUDSON POST OFFICE, Hudson, OH

*Docket No. 02-353; Submitted on the Record;
Issued June 19, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof in establishing that she was disabled for work intermittently from October 4 to November 11, 2000 due to sequela of an accepted September 26, 2000 concussion, head contusion and cervical strain; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's May 30, 2001 request for an oral hearing on the grounds that it was not timely filed.

The Office accepted that on September 26, 2000 appellant, then a 50-year-old distribution clerk, sustained a "head contusion, concussion and cervical strain" when a metal container door swung open, striking her on the head and neck. She completed her tour of duty on September 26, 2000 and worked her usual eight-hour tour on September 27 and 28, 2000. Appellant was awarded eight hours of continuation of pay each day for work absences on September 30, October 2 and 3, 2000. She used sick leave on September 29, October 5, 6, 7 and 10, 2000 and annual leave on September 28, October 10, 11 and 12, 2000. Appellant returned to light-duty work for six hours a day from October 12 to 21, 2000.

On November 12, 2000 appellant filed a claim for continuation of pay for work absences due to medical appointments from September 29 to November 11, 2000.¹ She submitted medical evidence regarding the claimed periods of disability for work.²

In a September 29, 2000 report, Dr. Hoai-Nghia Nguyen, an attending family practitioner, held appellant off work from September 29 to October 3, 2000 and released her to modified duty from October 4 to 7, 2000.

In a September 30, 2000 report, Dr. Marin, an internist providing consultation to the employing establishment, held appellant off work until an October 3, 2000 follow-up. He diagnosed a head contusion, concussion and a cervical muscle strain.

On September 30, 2000 appellant accepted a light-duty clerk position. That night, she was informed that her ex-husband and father of her 15-year-old daughter had passed away in California. Appellant flew to California on October 2, 2000 with her daughter to attend the funeral, returning by October 5, 2000.³

In an October 6, 2000 report, Dr. Donald L. Musholt, an attending osteopath, noted appellant's neck pain without objective neurologic signs. He noted that appellant did not attend physical therapy on October 3, 2000 "because she was out of town" at the funeral. Dr. Musholt prescribed medication and restricted lifting to 50 pounds or less, with no lifting above shoulder height.

In an October 6, 2000 report, Dr. Jianhua Wang, an attending family practitioner, held appellant off work from October 4 to 11, 2000, with a return to full duty on October 12, 2000. Dr. Wang noted that appellant's neck pain had not improved, but did not provide objective findings.⁴ In October 23 and 28, 2000 reports, he diagnosed "head injury/neck strain."

¹ A January 2001 treatment chronology prepared by appellant's health maintenance organization shows that appellant received physical therapy on October 31, November 3, 7, 10, 14, 17, 21, 28 and December 1, 2000. Appellant was examined by Dr. Ricardo Marin, an internist on November 2 and 7, 2000, by Dr. Dipti Shah, an attending internist, on November 29, 2000, by Dr. Elizabeth Salay, an attending internist, on December 15 and 16, 2000 and January 4, 2001. She received physical therapy on March 2, 3 and 9, 2001.

² The employing establishment controverted appellant's claim, asserting that her work absences were attributable to a conflict with her supervisors. In an October 3, 2000 letter, William J. Stanson, an employing establishment supervisor, recalled that on October 1, 2000 he observed that appellant clocked in early, then spent time socializing and taking care of personal business. He instructed appellant to attend to nonwork personal tasks prior to clocking in. Appellant then argued with Mr. Stanson, stated that she felt sick, wished to return home and then left the building. In an October 5, 2000 letter, Matthew M. Myers, an employing establishment supervisor, noted that appellant telephoned from home on October 1, 2000, asserting that her physician had held her off work that day. Mr. Myers instructed appellant to report for duty. She was then referred to Dr. Marin, who held her off work until an October 3, 2000 follow-up examination. However, appellant did not report for this examination as she was in California.

³ In an October 5, 2000 letter, the employing establishment asserted that appellant could not have been disabled for work during the period from September 30 to October 3, 2000 as she was able to fly to and from California and attend the funeral.

⁴ October 11, November 2 and 22, 2000 x-rays showed minimal degenerative disc disease at C5-6.

In a November 2, 2000 report, Dr. Marin prescribed work limitations through November 30, 2000 and limited appellant to working no more than five hours a day, five days a week. She then accepted a light-duty offer as a distribution and window clerk within these restrictions.

In a November 29, 2000 report, Dr. Dipti Shah, an attending internist, diagnosed an acute cervical strain. He restricted appellant to working no more than six hours a day, five days a week through December 15, 2000.

In a December 5, 2000 letter, the Office advised appellant of the additional medical evidence needed to establish her claim for work-related periods of disability. The Office noted that appellant had submitted conflicting reports regarding the claimed dates of disability and her work restrictions. The Office advised appellant that a rationalized explanation of these discrepancies, as well as detailed support for a causal relationship between the claimed periods of disability and the accepted injury, were “crucial to [her] claim.”

In a December 15, 2000 report, Dr. Elizabeth Salay, an attending internist, noted tightness in the cervical and trapezius musculature and diagnosed chronic cervical pain. She held appellant off work from December 16 to 20, 2000 and prescribed duty restrictions through January 17, 2001.

In a January 17, 2001 report, Dr. Marin diagnosed a cervical sprain. He prescribed work restrictions through February 17, 2001 of no lifting, pushing or pulling over 10 pounds. He reiterated this diagnosis in an April 7, 2001 chart note.

In a March 28, 2001 report, Dan Day, a physician’s assistant whose reports were reviewed and initialed by a staff physician, diagnosed cervical and trapezius muscular strains and noted work restrictions through May 27, 2001, of lifting less than 25 pounds and pulling or pushing less than 40 pounds.

By decision dated April 27, 2001, the Office denied appellant’s claim for continuation of pay to reimburse 45 hours of sick leave used from September 29 to November 11, 2000. The Office found that there were no objective findings to support that she was disabled for work during that interval due to the September 26, 2000 head injury. The Office further found that appellant submitted no medical rationale explaining the need for the work restrictions prescribed on September 29, October 6, 12, 23 and November 2 and 29, 2000. The Office found appellant entitled to continuation of pay to reimburse 3.46 hours of annual leave used for an October 12, 2000 appointment. The Office noted that appellant may be entitled to receive up to four hours each for October 6, 12, 23 and November 21, 2000 appointments and for physical therapy on October 31, November 3, 7 and 10, 2000. The Office found, however, that appellant submitted insufficient evidence to support a causal relationship between those appointments and the accepted injury to support reimbursement.

Appellant disagreed with this decision and in a letter dated May 29, 2001 and postmarked May 30, 2001, requested an oral hearing before a representative of the Office’s Branch of Hearings and Review. Appellant asserted that she would enclose a copy of an April 30, 2001 request for an oral hearing, but did not submit such evidence.

In a June 27, 2001 report, Mr. Day diagnosed cervical and trapezius strains. He restricted appellant to lifting less than 35 pounds, no reaching above the shoulder and no pushing or pulling more than 50 pounds through August 5, 2001.

In a July 26, 2001 report, Dr. Musholt noted that he declined appellant's October 6, 2000 request that he extend approval of her work absence from October 3 through October 5, 2000 to cover the time she was in California.

By decision dated September 17, 2001, the Office denied appellant's request for an oral hearing on the grounds that it was not timely filed within 30 days of the April 27, 2001 decision. The Office conducted a limited review of appellant's request and further denied her request on the grounds that the issues involved could be addressed equally well accompanying a valid request for reconsideration.⁵

Regarding the first issue, the Board finds that appellant has not established that she was disabled for work from October 4 to November 11, 2000 due to the accepted September 26, 2000 head injury.

An individual who claims benefits under the Federal Employees' Compensation Act⁶ has the burden of establishing the essential elements of a compensation claim, including the fact that an injury occurred in the performance of duty as alleged and that disability for employment was sustained as a result thereof.⁷

In the present case, appellant has established that she filed a timely claim and that she sustained a personal injury on September 26, 2000. The Office accepted that she sustained a concussion, head contusion and cervical strain, as diagnosed by Dr. Marin, a consulting internist, on September 30, 2000. The Office also granted appellant a total of 24 hours continuation of pay covering work absences on September 30, October 2 and 3, 2000, based on Dr. Marin's opinion.

However, appellant did not submit sufficient rationalized medical evidence to establish disability for work on and after October 4, 2000 due to the September 26, 2000 head injury. Beginning on October 6, 2000, appellant's physicians diagnosed cervical pain and prescribed work restrictions, in the absence of objective findings other than tightness in the paracervical musculature.

In an October 6, 2000 report, Dr. Musholt, an attending osteopath, diagnosed neck pain with no objective neurologic abnormalities. Dr. Wang, an attending family practitioner, also diagnosed neck pain on October 6, 2000, again in the absence of objective findings. Both Drs. Musholt and Wang noted work restrictions, as did Dr. Marin reports from November 2, 2000 through April 7, 2001. Dr. Shah, an attending internist, diagnosed an acute cervical strain

⁵ Following issuance of the Office's September 17, 2001 decision, appellant submitted additional medical and factual evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983).

as of November 29, 2000 and prescribed work restrictions through December 15, 2000. Dr. Salay, an attending internist, found tightness in the paracervical and trapezius musculature on December 15, 2000 examination, diagnosed chronic cervical pain and prescribed restrictions. Mr. Day, a physician's assistant whose reports were countersigned by a physician, diagnosed cervical and trapezius muscle strains in March 28 and June 27, 2001 reports and recommended work restrictions through August 5, 2001.

No physician of record explained why appellant would be totally disabled for work for any period after October 3, 2000 as a result of the September 26, 2000 head injury. Absent a rationalized medical opinion in support of their conclusions, their reports are of very limited probative value.⁸

The Board notes that appellant was advised by a December 5, 2000 letter, that it was "crucial" that she submit a detailed report from her attending physician explaining how and why the September 26, 2000 injury would cause a continuing medical condition or any periods of disability for work. However, appellant did not submit such evidence.

Consequently, appellant has failed to establish her entitlement to continuation of pay on and after October 4, 2000 as she submitted insufficient rationalized medical evidence to support causal relationship.

Regarding the second issue, the Board finds that the Office properly denied appellant's May 30, 2001 request for an oral hearing on the grounds that it was untimely filed.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁹ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely made after the 30-day period established for requesting a hearing, or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.¹⁰

In this case, the Office issued its decision denying appellant's claim for continuation of pay on April 27, 2001. Appellant's letter requesting reconsideration was dated May 29 and postmarked May 30, 2001. Both the May 29 and May 30, 2001 dates are more than 30 days after issuance of the April 27, 2001 decision. Therefore, the Office properly found that appellant's request for an oral hearing was untimely.

⁸ See *Connie Johns*, 44 ECAB 560, 569 (1993), citing *Philip J. Deroo*, 39 ECAB 1294, 1298 (1988) (finding that a physician's opinion on causal relationship must be one of reasonable medical certainty, supported by affirmative evidence, explained by medical rationale and based on a complete and accurate medical and factual background).

⁹ 5 U.S.C. § 8124(b)(1).

¹⁰ *Henry Moreno*, 39 ECAB 475 (1988).

The Office then exercised its discretion and conducted a limited review of appellant's request and the supporting evidence and determined that the critical issue of causal relationship could be addressed equally well pursuant to a valid request for reconsideration. The Board finds that the Office's exercise of discretion was proper under the law and facts of this case. Consequently, the Office's September 17, 2001 decision denying appellant's May 30, 2001 request for reconsideration was proper.

The decisions of the Office of Workers' Compensation Programs dated September 17 and April 27 2001 are hereby affirmed.

Dated, Washington, DC
June 19, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member