U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of JAYNE STEEN and DEPARTMENT OF VETERANS AFFAIRS, RALPH M. JOHNSON VETERANS HOSPITAL, Charleston, SC

*Docket No. 01-2015; Submitted on the Record;*
*Issued March 19, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS

The issues are: (1) whether appellant met her burden of proof in establishing that her back condition was causally related to the September 2, 2000 incident; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a written review of the record by an Office hearing representative.

On September 2, 2000 appellant, then a 44-year-old licensed practical nurse, performed the Heimlich maneuver on a patient who was choking. She stated that the next day, she woke with severe back pain.[1]

In a March 20, 2001 decision, the Office denied appellant's claim for compensation on the grounds that, although the evidence of record supported that she experienced the claimed event, the evidence did not establish that a condition had been diagnosed in connection with the event. In an April 24, 2001 letter, appellant's attorney requested a written review of the record by an Office hearing representative. In a June 28, 2001 decision, the Office denied appellant's request for a hearing as untimely. The Office further determined that appellant's request could be equally well addressed by submitting additional medical evidence to the Office and requesting reconsideration.

The Board finds that appellant had not established that her back condition is causally related to the September 2, 2001 incident.

A person who claims benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of her claim. Appellant has the burden of

[1] Appellant resigned from the employing establishment on September 5, 2000 after the employing establishment informed her that her temporary employment would be terminated because she had not reported her other concurrent jobs on her application for a position at the employing establishment.

[2] 5 U.S.C. §§ 8101-8193.

establishing by reliable, probative and substantial evidence that her medical condition was causally related to a specific employment incident or to specific conditions of employment.[3] As part of such burden of proof, rationalized medical opinion evidence showing causal relation must be submitted.[4] The mere fact that a condition manifests itself or worsens during a period of employment does not raise an inference of causal relationship between the condition and the employment.[5] Such a relationship must be shown by rationalized medical evidence of causal relation based upon a specific and accurate history of employment incidents or conditions, which are alleged to have caused or exacerbated a disability.[6]

In a September 20, 2000 report, Dr. Michael L. Coon, a chiropractor, stated that appellant complained of back pain which she related to performing the Heimlich maneuver on a patient. He noted that appellant was referred by Dr. Craig Harris, an anesthesiologist, for treatment by manipulation or manual therapy. In subsequent reports, Dr. Coon discussed appellant's back pain but did not provide a diagnosis of her condition. He did not provide any opinion on whether appellant's condition was causally related to the September 2, 2000 incident.[7]

In a September 22, 2000 report, Dr. Harris stated that appellant had acute lower back pain with sciatica. In a September 26, 2000 report, Dr. Harris indicated that appellant had severe lower back pain with pain radiating down the sciatic nerve to the right foot.

In a September 29, 2001 report, Dr. Richard C. Holgate, an internist, stated that a magnetic resonance imaging (MRI) scan showed minimal degeneration and a right-sided herniation at L4-5 with annular tear and displacement of the right L5 nerve root. He also noted a left-sided annular tear without nerve root displacement, herniation, protrusion or nerve root compression.

In a series of progress reports, Dr. Harris discussed appellant's pain and his treatment for the pain. However, Dr. Harris did not give any opinion on whether appellant's back condition had been caused by the September 2, 2000 incident. In a December 29, 2000 report, Dr. Harris stated that appellant's lower back pain was secondary to the annular tear. Yet he did not relate the annular tear to the September 2, 2000 incident. Appellant therefore has not submitted rationalized medical evidence that established that the September 2, 2000 employment incident was causally related to appellant's herniated L4-5 disc.

The Board further finds that the Office properly denied appellant's request for a review of the written record by an Office hearing representative.

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[3] *Margaret A. Donnelly*, 15 ECAB 40, 43 (1963).

[4] *Daniel R. Hickman*, 34 ECAB 1220, 1223 (1983).

[5] *Juanita C. Rogers*, 34 ECAB 544, 546 (1983).

[6] *Edgar L. Colley*, 34 ECAB 1691, 1696 (1983).

[7] Section 8101(2) of the Act recognizes a chiropractor as a physician "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist...." Therefore, even if Dr. Coon had made a diagnosis of appellant's condition, it would not be considered medical evidence unless he diagnosed a spinal subluxation, as shown by x-ray.

Section 8124(b)(1) of the Act[8] dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... 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." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings."[9] In this case, the Office issued its decision on March 20, 2001. Appellant's attorney did not request a hearing until April 24, 2001, which was beyond the 30-day time limit for requesting a hearing. Appellant, therefore, is not entitled to a hearing as a matter of right.

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. 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 hearing; when the request is made after the 30-day period established for requesting a hearing; or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent. In the present case, the Office noted that appellant's request for review could be equally addressed by requesting reconsideration and submitting additional evidence. 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 deductions from known facts.[10] The Office did not abuse its discretion in this case in denying appellant's request for a written review of the record by an Office hearing representative because she could achieve the same end by requesting reconsideration and submitting new medical evidence.

[8] 5 U.S.C. § 8124(b)(1).

[9] *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

[10] *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs, dated June 28 and March 20, 2001, are hereby affirmed.

Dated, Washington, DC
March 19, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member