

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MITCHELL W. TRACY and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, NORTH ISLAND, San Diego, CA

*Docket No. 02-2273; Submitted on the Record;
Issued February 14, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained an injury in the performance of duty; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing as untimely filed.

On February 4, 2002 appellant, then a 46-year-old aircraft mechanic, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that he sustained moderate to severe pain in his right elbow, right forearm and upper back as a result of his federal employment. Specifically, he noted that his back pain got worse while doing overhead work and work that required repetitive lifting, turning and "torching." In support of his claim, appellant submitted a January 30, 2002 letter from Dr. Jill D. Chapman, a chiropractor, noting that appellant had restrictions of no repetitive use of pneumatic drill, no forceful pushing/pulling maneuvers and no prolonged overhead work. In a brief note dated February 1, 2002, Dr. Chapman indicated that appellant was being treated in her office for a cervical thoracic subluxation. The record also contains a dispensary permit dated January 30, 2002 wherein a nurse indicated that appellant was to restrict activity until February 6, 2002 by doing no overhead work, no lifting over 10 pounds and no repetitive motion of the right hand or arm.

By letter dated March 14, 2002, the Office asked appellant to submit further information. No further evidence was timely submitted and by decision dated April 15, 2002, the Office denied appellant's claim as fact of injury had not been established.

By letter dated May 16, 2002 and received by the Office on May 21, 2002, appellant

requested an oral hearing. By decision dated July 1, 2002, the Office denied his request for a hearing as untimely.¹

The Board finds that the evidence is insufficient to establish that appellant sustained an injury in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁵ The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence. 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 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.⁶

In the instant case, appellant made a statement as to the factors of employment that caused or contributed to his condition. However, appellant failed to submit any rationalized

¹ Appellant submitted additional evidence after the Office's decision of July 1, 2002. The Board's jurisdiction, however, is limited to reviewing the evidence that was before the Office at the time of its final decision. The Board, therefore, has no jurisdiction to review any evidence submitted to the record after the Office's April 15, 2002 decision. 20 C.F.R. § 501.2(c); *Jennifer L. Sharp*, 48 ECAB 209, 210 (1996).

² 5 U.S.C. §§ 8101-8193.

³ *Thomas L. Hogan*, 47 ECAB 323 (1996); *Elaine Pendelton*, 40 ECAB 1143, 1145 (1989).

⁴ *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 1143, 1145 (1989).

⁵ *Dennis M. Mascarenas*, 49 ECAB 215, 217 (1997).

⁶ *Id.*

medical evidence establishing the presence or existence of a condition for which compensation was claimed or medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant. There is no physician's opinion in the record. Although appellant submitted reports by Dr. Chapman, a chiropractor, these reports are of no probative medical value. Section 8102(2) of the Act provides that the term "physician" ... includes chiropractors 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."⁷ Although Dr. Chapman indicated that appellant was being treated for a cervical thoracic subluxation, she did not indicate and there is no evidence that an x-ray was taken which led to this diagnosis. Therefore, she is not considered a physician under the Act and her reports are of no probative medical value.⁸ The Board further notes that Dr. Chapman's reports do not link appellant's condition to his federal employment. Finally, neither of Dr. Chapman's letters constitute rationalized evidence, as there is no indication as to how she diagnosed a cervical thoracic subluxation, nor is there any explanation as to why she placed appellant on restrictions. An award of compensation may not be based on surmise, conjecture or speculation.⁹ Appellant has not submitted rationalized medical evidence establishing that he had a condition causally related to his employment and accordingly, the Office properly denied his claim.

The Board further finds that the Office properly denied appellant's hearing request as untimely filed.

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office's final decision.¹⁰ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.¹¹ In addition, the regulations interpreting the Act make clear that the request for a hearing must contain a postmark or other carrier's mark that falls within 30 days following the issuance of the decision.¹²

Appellant's letter requesting a hearing was dated May 16, 2002 and was received by the Office on May 21, 2002, over 30 days after the April 15, 2002 decision. Therefore, appellant was not entitled to a hearing as a matter of right.

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

⁷ 5 U.S.C. § 8101(2).

⁸ See *Jack B. Wood*, 40 ECAB 95, 109 (1988).

⁹ *Bertha J. Soule*, 48 ECAB 314, 319 (1997).

¹⁰ 5 U.S.C. § 8124(b).

¹¹ See 20 C.F.R. § 10.616(a)(1999); *Charles J. Prudencio*, 41 EAB 499, 501 (1990).

¹² 20 C.F.R. § 10.616(a).

authority in deciding whether to grant a hearing.¹³ The Offices procedures, which require the Office to exercise its discretion to grant or deny a hearing request when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.¹⁴

The Office, in its July 1, 2002 decision, noted that appellant's request for a hearing was untimely filed and that consideration of the issue could be equally well resolved through a request for reconsideration. Therefore, the Office properly exercised its discretion in denying appellant's request for a hearing.

The decisions of the Office of Workers' Compensation Programs dated July 1 and April 15, 2002 are hereby affirmed.

Dated, Washington, DC
February 14, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ *Linda J. Reeves*, 48 ECAB 373 (1997).

¹⁴ *Id.*; *Henry Moreno*, 30 ECAB 475 (1988).