

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUTH A. PRESSLEY and U.S. POSTAL SERVICE,
MAIN POST OFFICE, High Point, NC

*Docket No. 03-1194; Submitted on the Record;
Issued November 5, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error on her September 16, 1996 claim; (2) whether she sustained a recurrence of disability on or after January 25, 2000, due to her accepted October 14, 1999 employment injury; (3) whether the Office properly denied appellant's request for reconsideration of her October 14, 1999 claim; (4) whether she sustained an injury in the performance of duty on March 23, 2000; and (5) whether the Office properly denied appellant's request for reconsideration of her March 23, 2000 claim.

On September 16, 1996 appellant, a 48-year-old letter carrier, filed a traumatic injury claim alleging neck, head and back pain when her vehicle was struck by another motor vehicle while stopped.¹ The Office accepted the claim for lumbar and thoracic strains. Appellant returned to part-time work on September 21, 1996 and returned to full duty in October 1996. She had intermittent periods of disability during the period July 17, 1997 until March 27, 1998.

Appellant filed a recurrence of disability claim on April 20, 1998.

In a March 4, 1998 attending physician's report (Form CA-2), Dr. Richard L. Rauck, an attending Board-certified anesthesiologist with a subspecialty in pain medicine, diagnosed myofascial back, neck and headache pain which he attributed to the September 16, 1996 employment-related motor vehicle accident. Dr. Rauck concluded that appellant could not perform her usual duties, but was capable of performing light-duty work starting with four hours per day and working up to eight hours.

¹ The record consists of three different claims which appellant appealed at the same time and the Board consolidated under one docket number.

In a report dated April 29, 1998, Dr. Nick Chalfa, an attending Board-certified family practitioner, released appellant to return to work on February 7, 1997.

In a May 11, 1998 letter, the Office informed appellant that the evidence of record was insufficient to support her claim for a recurrence of disability as of April 20, 1998. She was advised as to the deficiencies and the evidence required to remedy those deficiencies.

In a letter dated May 29, 1998, Dr. Rauck noted that appellant was originally injured on September 16, 1996 and that, during her gradual return to full-time work, she was involved in another automobile accident on April 23, 1998. He opined that the April 23, 1998 accident exacerbated appellant's condition from her September 16, 1996 employment injury.

By decision dated June 30, 1998, the Office denied appellant's April 20, 1998 recurrence of disability claim. The Office denied her claim for compensation beginning February 28, 1998 and denied medical treatment for her lumbar and thoracic conditions.

In a July 16, 1998 letter, appellant requested an oral hearing which was subsequently cancelled at the request of appellant's representative.

Appellant's representative requested reconsideration by letter dated February 22, 1999, and submitted reports from Dr. Rauck. In a November 13, 1998 report, Dr. Rauck attributed appellant's current injuries to her September 16, 1996 employment injury. He noted that she was reinjured on April 23, 1998 and that her current work restrictions were due to the September 16, 1996 injury. In a December 29, 1998 report, Dr. Rauch noted that appellant was being treated "for cervical and lumbar strains sustained in a motor vehicle accident and certainly aggravated by two subsequent motor vehicle accidents." He concluded that appellant was capable of working part time with restrictions on lifting and walking.

In a merit decision dated May 10, 1999, the Office denied modification of the June 30, 1998 decision.

On August 3, 1999 appellant requested reconsideration which was denied in a merit decision dated October 1, 1999.

Subsequent to the October 1, 1999 denial, the Office received CA-17 forms detailing her physical restrictions, dated December 12, 1998 and March 10, 1999, an unsigned December 9, 1998 note from the Pain Control Clinic, a March 13, 2000 note by Dr. William F. Spillane, a Board-certified anesthesiologist, referring her for physical therapy and a November 19, 2001 report by Dr. Rauck. In a November 19, 2001 report, he detailed the history of appellant's employment injuries and nonemployment-related automobile accidents on April 23 and December 3, 1998. He diagnosed myofascial pain syndrome and lumbar radiculopathy due to her September 16, 1996 employment injury.

Appellant filed a recurrence of disability claim on December 7, 2001. On January 25, 2002 the Office informed her that "a denied claim cannot recur."

On June 18, 2002 appellant's counsel requested that her three claims be consolidated and that the Office expand the accepted conditions.

On November 15, 2002 appellant's counsel requested reconsideration of the Office's decision denying her recurrence claim. In a February 20, 2003 nonmerit decision, the Office denied appellant's request for reconsideration on the basis that the request was untimely and failed to establish clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).² The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.³ The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision.

The Office properly determined that appellant failed to file a timely application for review of her 1996 claim. Her letter, dated November 15, 2002, requesting reconsideration was filed more than a year after the Office issued its last merit decision on October 1, 1999 and, therefore, appellant's request was untimely.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error.⁴ To show clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.⁶ Evidence, which does not raise a substantial question concerning the correctness of the Office's decision, is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed as to produce a contrary conclusion.⁸ This entails a limited review by the Office of how the evidence submitted, with the reconsideration request, bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁹

The Board finds that Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error on her September 16, 1996 claim.

In the instant case, appellant's counsel requested reconsideration on November 15, 2002 and the evidence received subsequent to the October 1, 1999 denial included CA-17 forms dated

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607(a); *see also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁴ 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECBA 663, 665 (1997).

⁵ *Shakeer Davis*, 52 ECAB 448 (2001); *Leona N. Travis*, 43 ECAB 227 (1991).

⁶ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁷ *Leona N. Travis*, *supra* note 5.

⁸ *Jadine Jackson*, 53 ECAB ___ (Docket No. 01-1473, issued February 20, 2002).

⁹ *James A. England*, 47 ECAB 115 (1995).

December 12, 1998 and March 10, 1999, an unsigned December 9, 1998 note from the Pain Control Clinic, a March 13, 2000 report by Dr. Spillane and a November 19, 2001 report by Dr. Rauck. The Board notes that appellant's recurrence of disability claim was denied on the basis that there was no evidence showing that her disability was related to her accepted condition. Dr. Spillane concluded that appellant was permanently impaired due to her myofascial pain which he attributed to her September 16, 1996 employment injury and that this condition was aggravated by subsequent nonemployment-related automobile accidents. Similarly, Dr. Rauck attributes appellant's condition and disability to her September 16, 1996 employment injury and subsequent automobile accidents. Neither Drs. Rauck nor Spillane provided a rationalized medical opinion explaining how appellant's condition was causally related to her accepted September 16, 1996 employment injury as opposed to the intervening nonemployment-related accidents. This evidence does not raise a substantial question as to the correctness of the denial of her claim. Moreover, even if she had submitted a rationalized medical opinion, this would not be enough to show clear evidence of error. The record is devoid of any evidence supporting any procedural error or raising a substantial question as to the correctness of the Office decision to deny her recurrence claim.

The clear evidence of error standard is a difficult standard to meet. The evidence in this case is not of sufficient probative value to *prima facie* shift the weight of the evidence in appellant's favor. Accordingly, the Office properly denied the request for reconsideration in this case.

The Board finds that appellant failed to establish a recurrence of disability on and after January 25, 2000 due to her accepted October 14, 1999 employment injury. The Board also finds that Office properly denied her request for merit review.

On October 14, 1999 appellant filed a traumatic injury claim alleging that she strained her back while lifting a parcel.¹⁰ The Office accepted the claim for a lumbosacral strain. Appellant was released to work on November 18, 1999.

Appellant filed a recurrence of disability claim on January 25, 2000.

In duty status reports (Form CA-17) dated May 30 and June 28, 2000, Dr. Rauck diagnosed myofascial pain and indicated that appellant was capable of working six hours per day with restrictions.

On April 25, 2001 the Office informed appellant that the evidence was insufficient to support her recurrence of disability claim and advised her as to the medical and factual evidence necessary to support her claim.

By decision dated June 18, 2001, the Office denied appellant's recurrence claim on the basis that the evidence was insufficient to support a causal relationship between her myofascial pain and the accepted employment injury.

¹⁰ This was assigned claim number 06-739171.

On March 26, 2002 appellant requested reconsideration and submitted a November 19, 2001 report by Dr. Rauck in support of her request. Dr. Rauck diagnosed chronic myofascial pain due to her employment injuries. He indicated that appellant was disabled, but was capable of working with restrictions.

On June 11, 2002 the Office denied appellant's modification request of the June 18, 2001 decision.

By nonmerit decision dated November 27, 2002, the Office denied appellant's request for reconsideration of the denial of recurrence claim related to her October 14, 1999 employment injury.

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹¹

None of the medical reports that appellant submitted, in support of her claim for a recurrence of disability beginning January 25, 2000, attributed her disability to her October 14, 1999 employment injury. In duty status reports dated May 30 and June 28, 2000, Dr. Rauck diagnosed myofascial pain and indicated that she was capable of working six hours per day. Dr. Rauck, in a November 19, 2001 report, diagnosed chronic myofascial pain which he attributed to her employment injuries. He also concluded that appellant was capable of working with restrictions due to her disability. In a March 26, 2002 report, Dr. Rauck attributed appellant's myofascial pain to her employment injuries and opined that she was capable of working with restrictions. He attributed appellant's disability to myofascial pain, a condition which has not been accepted by the Office as employment related. Moreover, Dr. Rauck failed to provide a rationalized opinion explaining how appellant's condition was related to her accepted October 14, 1999 employment injury. Appellant has not met her burden of proof.

The Board finds that the Office properly denied appellant's request for merit review on her October 14, 1999 claim.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.¹³ To be entitled to a merit

¹¹ *Ronald A. Eldridge*, 53 ECAB ____ (Docket No. 01-67, issued November 14, 2001).

¹² Under 5 U.S.C. § 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

¹³ 20 C.F.R. § 10.606(b)(2).

review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.¹⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.¹⁵

The Office, in denying appellant's application for review, properly noted that no new medical evidence was submitted and appellant's attorney failed to submit new information or legal arguments not previously considered and, thus, did not require a reopening of the case for merit review.

The Board also finds that appellant failed to establish an injury in the performance of duty on March 23, 2000 and properly denied her request for merit review on this claim.

On March 23, 2000 appellant filed a traumatic injury claim alleging that she injured her upper back while reaching for a parcel.¹⁶ The employing establishment noted that appellant has been on light duty for a prior back claim and that she has been on light duty for the past two years due to a nonemployment-related back injury.

Appellant submitted a March 23, 2000 duty status report (Form CA-17), signed by Dr. David Fisher, a Board-certified emergency medicine physician, which attributed her muscle spasm to reaching for a parcel.

In a letter dated April 14, 2000, the Office requested additional information. It noted that the employing establishment related "a history of back problems, some of which is related to a prior work injury and some of which is due to a nonjob-related condition."

Appellant subsequently submitted duty status reports dated May 30, June 28 and July 25, 2000 from Dr. Rauck in which he diagnosed myofascial pain.

By decision dated August 4, 2000, the Office denied appellant's claim on the basis that she failed to establish that she sustained an injury in the performance of duty.

Appellant requested reconsideration in a letter dated May 23, 2001 and subsequently submitted evidence in support of her request.

¹⁴ 20 C.F.R. § 10.607(a).

¹⁵ 20 C.F.R. § 10.608(b)(2).

¹⁶ This was assigned claim number 06-2004787. On the back of the form the employing establishment indicated that appellant had been placed on light duty working six hours per day due to a nonwork-related back injury.

In a March 23, 2000 emergency room report, Dr. Fisher diagnosed a history of back pain and muscle spasms. He noted that appellant's medical history included chronic back problems from a 1996 motor vehicle accident. Dr. Fisher related the injury as occurring when appellant reached for a package and then began to have pain on her left upper arm, right side of her neck and both legs. Under impression, Dr. Fisher stated:

“My impression is that [appellant] does not have a significant injury to cause her to have all of her symptoms today. She had a normal physical examination and, therefore, because I do not have hard physical findings or a history to explain why she has her complaints, only that she has a chronic pain in her back from a car accident in 1996, that most likely, if she has injuries, they are related to an exacerbation of the chronic back pain that she already has.”

In reports dated June 1, July 1, September 16 and 21 and November 29, 2000, Dr. Ryan Potter, a Board-certified anesthesiologist with a subspecialty in pain medicine, and Dr. Rauck diagnosed myofascial pain syndrome. In a subsequent report dated June 19, 2001, Drs. Potter and Rauck diagnosed myofascial pain syndrome and lumbosacral radiculopathy.

By decision dated July 12, 2002, the Office denied modification of the August 4, 2000 decision.

Appellant requested reconsideration of the denial of her claim on November 15, 2002 and March 4, 2003. She also requested that the Office consolidate her three claims for adjudication.

In a March 17, 2003 nonmerit decision, the Office denied appellant's request for reconsideration. The Office found that appellant failed to submit any evidence or advance any legal argument and, therefore, merit review was not warranted.

The Board finds that appellant has failed to establish that she sustained an injury in the performance of duty.

An employee seeking benefits under the Act¹⁷ has the burden of establishing that she sustained an injury while in the performance of duty.¹⁸ In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether “fact of injury” has been established. Generally, “fact of injury” consists of two components, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident that is alleged to have occurred. The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.¹⁹

¹⁷ 5 U.S.C. §§ 8101-8193.

¹⁸ *Michelle Salazar*, 54 ECAB ____ (Docket No. 03-623, issued April 11, 2003).

¹⁹ *Charles E. Colquitt*, 54 ECAB ____ (Docket No. 02-1009, issued February 5, 2003).

The Office accepted that the March 23, 2000 incident occurred as alleged, that she reached for a parcel of mail. The Office, however, found the medical evidence of record insufficient to establish a causal relationship between a diagnosed condition and the incident.

In the instant case, appellant was informed that she needed to submit a comprehensive medical report from her treating physician explaining how the alleged work incident 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 the March 23, 2000 work incident caused her injury.

Appellant did not submit sufficient medical evidence to establish that she sustained a back injury in the performance of duty. She submitted duty status reports from Dr. Rauck, dated May 30, June 28 and July 25, 2000, in which he diagnosed myofascial pain. Appellant later submitted a March 23, 2000 emergency room report by Dr. Fisher and reports from Dr. Potter dated June 1, July 1, September 16 and 21 and November 29, 2000. Dr. Fisher concluded that appellant did “not have a significant injury to cause her to have all of symptoms today” and noted that appellant had chronic back pain, due to a 1996 automobile accident, and “most likely, if she has injuries, they are related to an exacerbation of” her chronic back pain. Dr. Potter diagnosed myofascial pain with no opinion as to the cause of this condition. The Board finds that this evidence is of diminished probative value regarding whether appellant sustained an employment-related injury in that the medical reports do not provide a rationalized opinion on causal relationship.²⁰ Appellant therefore, did not submit a rationalized medical evidence relating her claimed condition to employment factors.

An award of compensation may not be based on surmise, conjecture, speculation or upon appellant’s own belief that there is causal relationship between his claimed condition and his employment.²¹ To establish causal relationship, appellant must submit a physician’s report, in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration as well as findings upon examination of appellant and her medical history, state whether the employment injury caused or aggravated appellant’s diagnosed conditions and present medical rationale in support of his opinion. Appellant failed to submit such evidence in this case and, therefore, has failed to discharge her burden of proof.

The Board further finds that the Office properly denied merit review of its prior decision of appellant’s November 15, 2002 and March 4, 2003 requests for reconsideration.

Appellant did not set forth any legal arguments or submit any new and relevant evidence with her November 15, 2002 and March 4, 2003 requests for reconsideration. She also did not argue that the Office erroneously applied or interpreted a point of law. Appellant only expressed her belief that her three claims should be consolidated as her condition was related to all three injury claims. The relevant issue in this case is whether appellant sustained an injury in the

²⁰ *Linda I. Sprague*, 48 ECAB 386 (1997) (Medical evidence that does not offer any opinion regarding the cause of an employee’s condition is of diminished probative value on the issue of causal relationship).

²¹ *Donald W. Long*, 41 ECAB 142 (1989).

performance of duty on March 23, 2000. The Office found in the August 4, 2000 decision that appellant had failed to establish that she sustained an injury in the performance of duty. The evidence submitted on reconsideration was insufficient to warrant further merit review.

The decisions of the Office of Workers' Compensation Programs dated March 17 and February 20, 2003 and November 27, July 12 and June 11, 2002 are hereby affirmed.

Dated, Washington, DC
November 5, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member