

**United States Department of Labor
Employees' Compensation Appeals Board**

LISA A. WASHINGTON, Appellant

and

**SMITHSONIAN INSTITUTE, Edgewater, MD,
Employer**

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**Docket No. 03-2187
Issued: April 26, 2004**

Appearances:
Lisa A. Washington, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 8, 2003 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated June 5 and March 21, 2003. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established a period of disability on or after June 4, 2001 due to her accepted employment injury of low back strain; (2) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on or after June 18, 2001, causally related to her accepted employment-related back injury; (3) whether appellant has met her burden of proof in establishing that she developed an emotional condition due to factors of her federal employment; and (4) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

FACTUAL HISTORY

Appellant, then a 43-year-old management specialist, filed a notice of occupational disease on February 26, 2002 alleging that she developed depression, anxiety and low back pain due to factors of her federal employment. Appellant stated that she was first aware of her condition on January 19, 2000 and first realized the relationship to her employment on May 31, 2001. Appellant described what she believed to be discriminatory treatment on the part of the employing establishment. She did not describe any physical work duties or injury which she felt caused or contributed to her back condition.¹ Appellant stopped work on June 1, 2001 and utilized annual leave until her resignation effective June 15, 2001.

Appellant began employment in the private sector as a branch director on June 11, 2001 and worked through June 18, 2001. She resigned this private sector position on July 5, 2001.

In a letter dated June 14, 2002, the Office requested additional information regarding appellant's employment activities, which she believed contributed to her condition, all previous orthopedic injuries and a comprehensive medical report. The Office stated: "We have received a medical report from your physician; however, it is not sufficient to support your claim because the evidence does not indicate that either the back or emotional condition is related to federal employment. Please provide an additional report, which specifically discusses the following: "relationship of the claimed medical conditions for low back pain and stress to [f]ederal employment."²

Following the Office's request for additional factual and medical evidence, appellant submitted medical treatment notes. By decision dated July 25, 2002, the Office accepted appellant's claim for "severe back strain (unspecific site)." The Office did not address the emotional aspect of appellant's claim in the July 25, 2002 decision.

Appellant filed a claim for leave buy-back for the time period June 4 to 15, 2001. She filed a notice of recurrence of disability on November 1, 2002 alleging that January 19, 2000, was the first time she became depressed. Appellant stated that her recurrence of disability began on May 31, 2001 and that she stopped work on June 15, 2001.³ Appellant described the injury she sustained as "depression, anxiety" and again listed the factors that she felt contributed to her emotional condition and mentioned that she developed back pain on May 15, 2001 and sought treatment on May 31, 2001 for a stiff neck.

By decision dated March 21, 2003, the Office denied appellant's claim for recurrence on June 15, 2001 finding that she failed to submit sufficient medical evidence to establish a causal relationship between her accepted severe back strain and her current "back" condition. The

¹ Appellant noted on May 31, 2001 she sought medical treatment for a stiff neck.

² This statement and request is the only mention of appellant's emotional condition claim in the developmental letter.

³ Appellant did not work in her date-of-injury position after June 4, 2001. She worked in the private sector from June 11 to 18, 2001 and resigned her position as branch manager on July 5, 2001.

Office further addressed the issues of whether appellant had implicated compensable factors of employment in her emotional condition claim. The Office concluded, “The claim for compensation for recurrence of May 31, 2001, is denied for the reason that the evidence of file fails to establish that the claimed recurrence is causally related to the approved injury of January 18, 2000.”⁴

In an undated letter postmarked April 23, 2003, appellant requested an oral hearing noting that the Office had not addressed her claims for anxiety and depression. By decision dated June 5, 2003, the Branch of Hearings and Review denied appellant’s request for an oral hearing on the grounds that it was not timely filed within 30 days from the Office’s March 21, 2003 decision. The Branch of Hearings and Review further found that issues in appellant’s case could be equally well addressed by requesting reconsideration.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employee’s Compensation Act⁵ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an “employee of the United States” within the meaning of the Act and 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 or specific condition, for which compensation is claimed is causally related to the employment injury.⁶

ANALYSIS -- ISSUE 1

On July 25, 2002 the Office accepted appellant’s claim for severe back strain unspecified site beginning January 18, 2000. As noted above appellant has the burden of proof in establishing that any alleged period of disability is causally related to her accepted employment injury.

Appellant’s attending physician, Dr. Patricia Jett, a Board-certified family practitioner, completed a form report on July 19, 2001 and diagnosed stress reaction, depression and anxiety as well as lumbar disc disease. She indicated with a checkmark “yes” that these conditions were due to appellant’s employment activity. Dr. Jett indicated that appellant had a concurrent or preexisting condition of severe back strain and further stated: “Patient’s back made worse when under stress secondary contraction of back muscles.” She indicated that appellant was totally disabled June through September 4, 2001.

The Board has held that an opinion on causal relationship, which consists only of a physician checking “yes” to a medical form report question on whether the claimant’s condition was related to the history given is of little probative value. Without any explanation or rationale

⁴ The only injury approved was “severe back strain (unspecified site).”

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

for the conclusion reached, such report is insufficient to establish causal relationship.⁷ Dr. Jett's July 19, 2001 report, indicates that appellant's preexisting or concurrent back condition was related to her employment. However, she failed to provide any medical reasoning explaining how or why she reached the conclusion that appellant's total disability was due to her diagnosed back condition rather than to her concurrent emotional condition. As the Office has only accepted appellant's back condition as causally related to her employment, any disability alleged must be due to the accepted back condition to warrant compensation. Without medical reasoning from Dr. Jett, this report is not sufficient to establish a period of disability due to the accepted employment injury.

In a narrative report dated October 28, 2002, Dr. Jett reported that she first examined appellant on January 18, 2000 and first diagnosed a back condition on February 10, 2000. She stated that appellant's preexisting back condition was aggravated due to stress, which was causing increased musculoskeletal strain and spasm of her back. Dr. Jett did not provide any specific periods of disability. As there is no period of disability described in this report it is not sufficient to establish that appellant was disabled on June 4, 2001 due to her accepted employment injury.

LEGAL PRECEDENT -- ISSUE 2

A recurrence of disability is defined as a spontaneous material change in the employment-related condition without an intervening injury.⁸ Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability commencing on or after June 18, 2001 and her accepted employment injury.⁹ This burden includes the necessity of furnishing 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 employment factors and supports that conclusion with sound medical reasoning.¹⁰

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained a "severe back strain (unspecific site)" in the July 25, 2002 decision. Severe back strain is the only condition accepted by the Office as arising from appellant's employment and under the definition of a recurrence -- a spontaneous material change in the employment-related condition without an intervening injury -- the only condition, from which appellant could appropriately claim a recurrence of disability.

⁷ *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

⁸ 20 C.F.R. § 10.5(x) and (y). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1) (January 1995).

⁹ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

¹⁰ *See Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

On November 1, 2002 appellant alleged that she sustained a recurrence of her January 19, 2000 injuries on May 31, 2001 and submitted medical evidence.¹¹ Appellant stopped work on June 4, 2001 following her alleged recurrence of disability. In support of her claim, appellant submitted a series of reports from Dr. Jett. On May 31, 2001 Dr. Jett noted that appellant complained of neck pain, however, she indicated that appellant's findings were due to her emotional condition. On June 5, 2001 Dr. Jett indicated that appellant sought treatment for pain in the neck, her emotions and back pain. On June 18, 2001 appellant was anxious and nervous due to her new job. She noted on July 5, 2001 that appellant resigned her new job because she felt there was too much stress. The record contains several treatment notes diagnosing neck or back pain. However, none of these notes provides an opinion that appellant's back condition on or after May 31, 2001 was causally related to her accepted employment condition beginning on January 19, 2000. These notes are not sufficient to meet appellant's burden of proof in establishing a causal relationship between appellant's current back condition and her accepted employment injury of January 19, 2000, of severe back strain unspecified site. Dr. Jett's notes do not provide a history of injury and do not explain how and why appellant continued to experience chronic back pain after stopping work on June 4, 2001. As there is no rationalized medical opinion evidence establishing a causal relationship between appellant's current condition and her accepted employment injury, this medical evidence is not sufficient to establish appellant's claim of a recurrence of her accepted back injury on or after June 18, 2001.

In a narrative report dated October 28, 2002, Dr. Jett stated that appellant's preexisting back condition exhibited increased musculoskeletal strain and spasm on February 10, 2000. She stated that x-rays demonstrated coccygeal separation of S1-2 and that a magnetic resonance imaging scan in October 2000, demonstrated bulging discs at L3-4, L4-5 and L5-S1 as well as radial tears. Dr. Jett did not attribute appellant's back condition to any specific physical employment duties, but instead stated that her back was "acting up secondary to stress." As noted above, the Office has not accepted that appellant's employment resulted in an emotional condition and, therefore, any back condition arising as a consequence of appellant's emotional condition cannot be accepted as a recurrence of disability.

LEGAL PRECEDENT -- ISSUE 3

To establish appellant's occupational disease claim that she has sustained an emotional condition in the performance of duty appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.¹² 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

¹¹ The record establishes that appellant initially stopped work on June 4, 2001 at the employing establishment. She then returned to work in the private sector on June 11, 2001 as a branch manager and stopped work in this position on June 18, 2001. Appellant did not resign from her private sector position until July 5, 2001. *Dana Bruce*, 44 ECAB 132, 142 (1992).

¹² *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

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.¹³

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.¹⁴

ANALYSIS -- ISSUE 3

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding, which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and, which working conditions are not deemed factors of employment and may not be considered.¹⁵ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.¹⁶ Although the Office addressed some aspects of appellant's emotional condition claim for the first time in the March 21, 2003 decision, as the Office had not previously developed,¹⁷ addressed¹⁸ nor accepted appellant's initial emotional condition claim, the findings regarding appellant's emotional condition in the March 21, 2003 decision, are not appropriately reached.

The Office must properly address the emotional condition aspect of appellant's initial claim for compensation, must provide appellant with notice of the defects in the evidence she has submitted and allow her an opportunity to address these defects prior to issuance of a decision. After undertaking the necessary development of appellant's emotional condition claim, the Office should issue an appropriate decision.

¹³ *Id.*

¹⁴ *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

¹⁵ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁶ *Id.*

¹⁷ 20 C.F.R. § 10.121.

¹⁸ 20 C.F.R. § 10.126.

LEGAL PRECEDENT -- ISSUE 4

Section 8124(b) of the Act,¹⁹ 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."²⁰

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.²¹ Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.²²

ANALYSIS -- ISSUE 4

In the instant case, the Office properly determined appellant's April 23, 2003 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's March 21, 2003 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with the Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as she had other review options available.

CONCLUSION

The Board finds that appellant has failed to establish a period of disability due to her initial claim for compensation on or after May 31, 2001 as there is no rationalized medical opinion evidence supporting this claim. The Board further finds that she failed to submit the necessary medical opinion evidence to establish that she sustained a recurrence of her accepted back injury on or after June 18, 2001 as the evidence fails to establish a causal relationship between her accepted employment injury of severe back strain and her current diagnoses or periods of disability. The Board further finds that as the Office has not issued an appropriate final decision regarding appellant's outstanding claim for an emotional condition and remands the case for the Office to further develop this aspect of appellant's claim and issue an appropriate decision. The Board further finds that the Branch of Hearings and Review did not abuse its

¹⁹ 5 U.S.C. §§ 8101-8193.

²⁰ 5 U.S.C. § 8124(b)(1).

²¹ *Tammy J. Kenow*, 44 ECAB 619 (1993).

²² *Id.*

discretion by denying appellant's request for an oral hearing as her request was untimely and as she had other review options available.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 5, 2003 is affirmed. The March 21, 2003 decision is affirmed as modified.

Issued: April 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member