

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LISA M. LANZ and U.S. POSTAL SERVICE,
McFARLAND POST OFFICE, McFarland, WI

*Docket No. 03-1517; Submitted on the Record;
Issued January 13, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant sustained an injury in the performance of duty on July 29, 2002; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act as untimely filed.

On September 5, 2002 appellant, then a 39-year-old rural carrier associate, filed a notice of traumatic injury (Form CA-1) alleging that, on July 29, 2002, while performing her duties she hurt her back when she was "transferring a box holder from one box to another."

Appellant submitted several medical reports. In a September 19, 2002 report by Dr. Thomas T. Midthun, a Board-certified family practitioner, who stated that "We have been feeling that the injury was an aggravation of a previously [sic] injury in April." Dr. Midthun reported his findings on examination and diagnosed upper mid and low back pain and replied "yes" to the box labeled "work related." He stated that appellant could return to work with restrictions of lifting no more than 20 pounds and needed to change positions every half hour.

In October 10 and 24, and November 21, 2002 reports by Dr. Midthun, he diagnosed mid and lower back pain and returned appellant to work with continued lifting restrictions and changing positions every half hour.

In addition, appellant submitted November 12, 2002 progress notes by Dr. Cynthia M. Bender a Board-certified physiatrist, stating that appellant "has a somewhat complicated pain history dating back to April 8, 2002 when she was involved in a motor vehicle accident." Dr. Bender stated that appellant was currently working light duty and had had at least 12 sessions of physical therapy. She recommended a trial of Gua Sha and to return back in two weeks to see how she is doing under that plan.

By letter dated December 4, 2002, the Office requested that appellant provide additional information, specifically, a detailed description of how the injury occurred, a description of any prior similar disability or symptoms and particularly, a physician's opinion supported by a medical explanation as to how the reported work incident caused or aggravated the claimed injury. The Office explained that the physician's opinion was crucial to her claim and allotted her 30 days to submit the requested information.

In response, appellant submitted various documents. A report from Dr. Bender dated November 26, 2002 discussed improvement to appellant's neck after a session of "Gua Sha."

A December 13, 2002 report from Dr. Daniel S. Marley, a Board-certified family practitioner, gave the date of injury as April 8, 2002 and stated that "I have only one small notation of [July 29, 2002] in [appellant's] chart, during a visit with her physical therapist. Her primary injury occurred April 8, 2002, and the reported injury on July 29, 2002 was not reported to me specifically." Dr. Marley further stated that "I saw the patient on August 6, 2002 and I knew of worsening back pain as she was doing more physical activity at work, but no mention was made, at least as reported in my notes, of an injury July 29, 2002. I have filled out the form for the injury from April 8, 2002." Also received was a December 13, 2002 attending physician's report, Form CA-20, by Dr. Marley who completed the form based on a history of an April 8, 2002 incident.

Appellant submitted several progress notes. In an October 24, 2002 progress note, Dr. Midthun noted, "[Appellant] still has tightness across the upper and mid back, although the pain there is largely gone. At 1/10 to 2/10 in the low back, but she still has periods of spasm and tightness." In a November 7, 2002 progress note, Dr. Midthun stated that "[Appellant] has full range of motion of the back with some discomfort at the extremes." In a November 26, 2002 progress note, Dr. Bender noted that appellant's neck had loosened up after one session of Gua Sha. In a December 16, 2002 progress note, Dr. Marley noted that appellant's chart contained a form completed by a physical therapist giving a history of injury of "moved a box holder to another and hurt upper and lower back." Dr. Marley stated that that was the only time he knew of a specific reference to an injury on July 29, [2002]. Dr. Marley further stated that "I indicated to [appellant] that I saw her last for [an April 8, 2002 injury] and at that time I clearly stated that this was a [w]ork[ers'] [c]omp[ensation claim] extending from her motor vehicle accident in April 2002." Dr. Marley went on to say that "I do not have any data or any specific history of a specific injury from July 29, 2002. All I can do is fill out the form for the original injury April 8, 2002."

By decision dated January 7, 2003, the Office denied appellant's claim for failure to establish fact of injury. The Office found that appellant was a federal employee, who filed a timely claim for compensation and that the claimed incident occurred at the time, place and in the manner alleged. However, the Office found that no medical evidence was submitted to demonstrate that appellant sustained an injury as a result of the July 29, 2002 employment incident. Therefore, fact of injury was not established.

By letter dated February 6, 2003, postmarked February 7, 2003 and received by the Office on February 10, 2003, appellant requested an oral hearing before an Office hearing representative.

By decision dated March 4, 2003, the Office denied appellant's request for a hearing, finding that the request was filed more than 30 days from the January 7, 2003 decision and that the issue in this case could equally well be addressed by requesting reconsideration from the Office and submitting evidence not previously considered which established that she sustained an injury as alleged.

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a back injury in the performance of duty on July 29, 2002.

An employee seeking benefits under the Act 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 filed within the applicable time limitations 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."¹ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.²

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 which is alleged to have occurred.³ In the instant case, there is no dispute that the claimed incident occurred at the time, place and in the manner alleged.

The second component of fact of injury is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.⁴ The Office found that the medical evidence was insufficient to support that appellant sustained an injury as a result of the incident.

In support of her claim, appellant submitted a September 19, 2002 report by Dr. Midthun who stated that the injury was an aggravation of a prior injury on April 8, 2002. Dr. Midthun diagnosed upper mid and low back pain and stated that it was work related yet failed to provide a history of a July 29, 2002 employment incident, or to causally relate an injury to such incident. In fact he stated that he considered appellant's condition to be related to a prior injury in April

¹ *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

² *David J. Overfield*, 42 ECAB 718, 721 (1991).

³ *Elaine Pendleton*, *supra* note 1.

⁴ *Kathryn Haggerty*, 45 ECAB 383 (1994); see 20 C.F.R. § 10.110(a).

2002. Therefore, the report is insufficient to establish appellant's traumatic injury claim. In October 10 and 24, and November 7, 2002 progress notes, Dr. Midthun gives a date of injury as July 29, 2002, but failed to provide a history of injury, or to causally relate a diagnosed condition to such an incident. The progress notes are insufficient to establish appellant's claim.

In a November 12, 2002 progress note, Dr. Bender stated that appellant's history dates back to April 8, 2002 and notes that appellant filed a workers' compensation claim on July 29, 2002. He failed to provide a history of injury, or to provide rationale explaining the causal nexus between the upper and mid back conditions and the July 29, 2002 employment incident. In a November 26, 2002 progress note, Dr. Bender noted that appellant had "one session of Gua Sha" and on examination has quite a bit of response. Dr. Bender failed to provide a diagnosis or to address the July 29, 2002 employment incident and or any conditions arising therefrom. Dr. Bender's progress notes are insufficient to establish appellant's claim.

In a December 13, 2002 report and progress note of the same date, Dr. Marley gave a date of injury as April 8, 2002 and stated that a July 29, 2002 injury was not reported directly to him. Dr. Marley stated that he became aware of the July 29, 2002 date on appellant's chart during a visit with her physical therapist. Dr. Marley stated that his treatment of appellant was for an April 8, 2002 injury, which is not the subject of this appeal. He failed to address a July 29, 2002 incident or to causally relate a diagnosed condition to such an incident. Therefore, Dr. Marley's December 13, 2002 report does not support appellant's claim for an injury sustained in the performance of duty on July 29, 2002. On a December 13, 2002 attending physician's report, Dr. Marley addressed an April 8, 2002 incident of a motor vehicle accident but failed to address a July 29, 2002 incident or relate a condition to that date. The attending physician's report is insufficient to establish appellant's claim, as the doctor discusses treatment for another injury occurring on April 8, 2002. As there is no rationalized medical evidence to causally relate her condition to the July 29, 2002 incident, the Board finds that appellant has failed to meet her burden of proof.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act as untimely filed.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, provides in pertinent part: "Before 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."⁵ 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.⁶

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

⁵ 5 U.S.C. § 8124(b)(1).

⁶ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁷ 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,⁸ when the request is made after the 30-day period for requesting a hearing.⁹

In the present case, appellant's request for an oral hearing was made more than 30 days after the date of issuance of the Office's prior decision dated January 7, 2003 and, thus, appellant was not entitled to an oral hearing as a matter of right. Appellant requested a review of the written record in a letter postmarked February 7, 2003, which was the 31st day. Therefore, the Office was correct in finding in its March 4, 2003 decision that appellant was not entitled to an oral hearing as a matter of right because her request was not made within 30 days of the Office's January 7, 2003 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its March 4, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for an oral hearing on the basis that the case could be resolved by submitting additional evidence to establish that she sustained an injury as a result of the July 29, 2002 employment incident. The Board has held that 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 deduction from established facts.¹⁰ In the present case, the evidence of record does not indicate that the Office committed any unreasonable act in connection with its denial of appellant's request for an oral hearing which could be found to be an abuse of discretion. For these, reasons, the Office properly denied appellant's request for an oral hearing under section 8124 of the Act.

⁷ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁸ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁹ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹⁰ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions dated March 4 and January 7, 2003 of the Office of Workers' Compensation Programs are affirmed.¹¹

Dated, Washington, DC
January 13, 2004

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

¹¹ The Board notes that subsequent to the issuance of the Office's January 7, 2003 decision, appellant submitted evidence which was not previously before the Office. This represents new evidence which cannot be considered by the Board for the first time on appeal. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Appellant may resubmit this evidence to the Office, together with a written formal request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b).