United States Department of Labor
Employees' Compensation Appeals Board

KATHERINE RYU, Appellant	)	
and	)	**Docket No. 04-1096**
	)	**Issued: November 29, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Flushing, NY, Employer	)	

Appearances:
Katherine Ryu, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 18, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 23, 2003 which denied her claim for disability on and after April 13, 2001 due to her November 13, 1998 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case. Appellant also appealed an Office decision dated January 14, 2004 which denied her request for a hearing as untimely. Pursuant to the same regulation, the Board has jurisdiction over this nonmerit decision.[1]

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she sustained a recurrence of total disability on and after April 13, 2001 due to her November 13, 1998 employment injury; and (2) whether the Office properly denied her request for a hearing under section 8124 of the Federal Employees' Compensation Act.

[1] Appellant submitted additional evidence after the Office's January 14, 2004 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On November 13, 1998 appellant then a 48-year-old distribution clerk, sustained a cervical strain, right rotator cuff sprain and lumbar sprain due to lifting a rest bar at work.[2] She received appropriate compensation from the Office for periods of disability. In April 2000 appellant returned to light-duty work for the employing establishment as a distribution clerk.[3] On May 10, 2001 appellant filed a claim alleging that her work stoppage on April 13, 2001 constituted a recurrence of total disability due to her November 13, 1998 employment injury.[4]

In a report dated April 27, 2001, Dr. Tsai C. Chao, an attending physician Board-certified in physical medicine and rehabilitation, noted that appellant reported developing left hand pain in early 2001 because, due to her right upper extremity condition, she sorted mail to higher cases mostly with her left upper extremity. He noted that on examination appellant exhibited severe swelling of her left hand. Dr. Chao diagnosed traumatic arthritis of the left hand, myofascial pain of the neck and right shoulder and frozen right shoulder. He indicated that appellant was totally disabled and stated, "In my opinion, with reasonable degree of medical certainty, the patient's left hand pathology was causally related to the compensable stressful repetitive sorting letters to higher cases using her left upper limb due to her existing right shoulder pain, if the history provided by patient was accurate."

In a report dated March 6, 2002, Dr. Chao provided a lengthy description of the treatment of appellant's condition since July 1999. He diagnosed cervical sprain and strain with multiple cervical disc herniations and right-sided cervical radiculopathy, status post right shoulder rotator cuff repair with recurrent right shoulder impingement syndrome, traumatic arthritis of the left hand and chronic lower back pain. Dr. Chao stated that appellant was partially disabled and concluded, "In my opinion, with reasonable degree of medical certainty, the patient's physical injuries were causally related to the November 13, 1998 injury at the workplace and to the April 27, 2001 consequential injury, if history provided by the patient was accurate.[5]

The Office referred appellant to Dr. Lester Lieberman, a Board-certified orthopedic surgeon, for an examination and opinion regarding whether she sustained a recurrence of total disability on and after April 13, 2001 due to her November 13, 1998 employment injury. In a report dated March 7, 2002, Dr. Lieberman determined that appellant's right rotator cuff and cervical sprains had completely resolved. He noted that she had practically normal range of motion in the right upper extremity and posited that "whatever disability she had in her neck and

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[2] At the time of the injury, appellant was working in a light-duty position for four hours per day due to neck and back injuries caused by a nonwork-related vehicular accident on July 5, 1997. On October 28, 1999 appellant underwent a surgical repair of her right shoulder, including an acromioplasty, distal clavicle resection, excision of subacromial bursa and supraspinatus tendon repair.

[3] The position did not require appellant to lift or to push or pull more than 10 pounds.

[4] She later suggested that her condition deteriorated after she continued to used her right upper extremity to handle mail and that her left upper extremity began to hurt after she used it more often to handle mail in order to avoid irritating her painful right upper extremity.

[5] Dr. Chao provided a similar account of appellant's condition in a report dated September 24, 2003.

her lower back" was secondary to the nonwork-related vehicular accident of 1997. Dr. Lieberman stated that appellant was capable of performing full-duty work as a postal clerk.[6]

In a report dated May 28, 2002, Dr. Chao indicated that he had reviewed Dr. Lieberman's March 7, 2002 report and disagreed with it in a number of respects. Dr. Chao asserted that the test performed by Dr. Lieberman were not appropriate for analyzing whether appellant had impingement syndrome of her right shoulder. He indicated that he performed a much more thorough examination of appellant's right shoulder which showed that she continued to have disabling residuals of her November 13, 1998 employment injury.

In May 2002, the Office determined that there was a conflict in the medical opinion between Dr. Chao and Dr. Lieberman regarding whether appellant sustained a recurrence of total disability on and after April 13, 2001 due to her November 13, 1998 employment injury. It referred appellant to Dr. Ernest D. Seldman, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on this matter.

In a report dated May 28, 2002, Dr. Seldman determined that appellant did not sustain a recurrence of total disability on and after April 13, 2001 due to her November 13, 1998 employment injury. Dr. Seldman provided a discussion of appellant's November 13, 1998 employment injury and the treatment of this condition since that time. He reported the findings of his examination of appellant, noting that she had full range of motion in her neck and lumbar spine. Dr. Seldman reported findings for range of motion of appellant's shoulders, indicating that right shoulder strength was four to five in relation to the left shoulder. He diagnosed status post lumbosacral strain, status post cervical strain, and status post rotator cuff injury of the right shoulder. Dr. Seldman indicated that the cervical and back conditions had resolved and stated, "The condition of the right shoulder received maximum benefits from surgery as well as physical therapy with excellent recovery and minimal restriction of range of motion and minimal weakness in relation to the opposite side." He indicated that appellant may have had recurrent symptoms on May 10, 2001 but that "it has been resolved presently."[7] Dr. Seldman indicated that appellant could perform full-duty work as a postal clerk with no lifting over 20 pounds.

By decision dated September 23, 2003, the Office denied appellant's claim on the grounds that she did not establish a recurrence of total disability on and after April 13, 2001 due to her November 13, 1998 employment injury. The Office determined that the weight of the medical evidence on the matter rested with the rationalized opinion of the impartial medical specialist, Dr. Seldman.[8]

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[6] Dr. Lieberman indicated that appellant might have experienced an unspecified "strain secondary to the recurrence on May 10, 2001" but that this condition had resolved. By referring to the May 10, 2001 date, Dr. Lieberman apparently was referring to the date that appellant filed her recurrence of total disability claim.

[7] He indicated that appellant did not have any residuals of two prior vehicular accidents.

[8] After this decision, the record was supplemented to include a fitness-for-duty report in which Dr. Robert Israel, a Board-certified orthopedic surgeon, indicated that appellant did not have any disability from work. Dr. Chao produced another report, dated November 29, 2003, in which he took issue with the findings of Dr. Lieberman.

By letter dated and postmarked November 25, 2003, appellant requested an oral hearing before an Office hearing representative. By decision dated January 14, 2004, the Office denied appellant's hearing request as untimely. The Office noted that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that she could request reconsideration and submit medical evidence showing that her claimed disability was causally related to employment factors.

LEGAL PRECEDENT -- ISSUE 1

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[9]

ANALYSIS -- ISSUE 1

In the present case, appellant claimed that she sustained a recurrence of total disability on April 13, 2001 due to her November 13, 1998 employment injury, cervical strain, right rotator cuff sprain and lumbar sprain. At the time, appellant was working in a light-duty position for the employing establishment which did not require lifting, pushing or pulling more than 10 pounds.

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[10] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[11]

The Office determined that there was a conflict in the medical opinion on this matter between Dr. Chao, an attending physician Board-certified in physical medicine and rehabilitation, and Dr. Lieberman, a Board-certified orthopedic surgeon who served as an Office referral physician. In a report dated March 7, 2002, Dr. Lieberman determined that appellant did not sustain a recurrence of total disability due to her November 13, 1998 employment injury. In

[9] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[10] 5 U.S.C. § 8123(a).

[11] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

contrast, Dr. Chao indicated in a May 28, 2002 report that appellant did sustain such a recurrence of total disability in April or May 2001.[12]

The Office therefore referred appellant to Dr. Ernest D. Seldman, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding her recurrence of total disability claim. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

The Board finds that the Office properly relied on the well-rationalized opinion of Dr. Seldman in determining that appellant did not establish that she sustained a recurrence of total disability on and after April 13, 2001 due to her November 13, 1998 employment injury. The Board has carefully reviewed the opinion of Dr. Seldman and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Seldman's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[14]

In his May 28, 2002 report, Dr. Seldman diagnosed status post lumbosacral strain, status post cervical strain, and status post rotator cuff injury of the right shoulder and indicated that the cervical and back conditions had resolved. He acknowledged that appellant continued to have right shoulder problems but indicated that these were not sufficient to totally disable her from her light-duty work.[15] Dr. Seldman explained his opinion by noting that the physical findings did not show any continuing cervical or back problems and by indicating that appellant had gained good results from her right shoulder surgery. He stated that appellant might have experienced a flare-up of symptoms in May 2001, but he noted that these symptoms were of a limited nature and that there was no employment-related recurrence of total disability at that time.

Therefore, appellant did not show a disabling change in the nature and extent of her injury-related condition. She also did not show a change in the nature and extent of her light-duty job requirements.

[12] In a report dated April 27, 2001, Dr. Chao suggested that appellant sustained a left hand injury as a consequence of the November 13, 1998 employment injury, but he did not further discuss this matter in later reports and it appears that he mainly felt appellant was disabled due to continuing employment-related right shoulder problems.

[13] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[14] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[15] Dr. Seldman indicated that appellant could perform full-duty work as a postal clerk with no lifting over 20 pounds.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office 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."[16] 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.[17]

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 authority in deciding whether to grant a hearing.[18] 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,[19] when the request is made after the 30-day period for requesting a hearing,[20] and when the request is for a second hearing on the same issue.[21]

ANALYSIS -- ISSUE 2

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated October 23, 2003 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing before an Office representative in a letter dated and postmarked November 25, 2003. Hence, the Office was correct in stating in its January 14, 2004 decision that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's October 23, 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 January 14, 2004 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that she could request reconsideration and submit medical evidence showing that her claimed disability was causally related to employment factors. 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

[16] 5 U.S.C. § 8124(b)(1).

[17] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[18] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[19] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[20] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[21] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[22] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on and after April 13, 2001 due to her November 13, 1998 employment injury. The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

ORDER

IT IS HEREBY ORDERED THAT the January 14, 2004 and October 23, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[22] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).