

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

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**JACQUELINE WEBB, Appellant**

**and**

**GENERAL SERVICES ADMINISTRATION,  
Washington, DC, Employer**

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**Docket No. 04-2298  
Issued: February 11, 2005**

*Appearances:*

*Michael E. Hendrickson, Esq., for the appellant  
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 22, 2004 appellant filed a timely appeal from a June 17, 2004 Office of Workers' Compensation Programs' decision denying her request for an oral hearing and a March 23, 2004 merit denial of her claim. 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 that she sustained a back condition in the performance of duty; and (2) whether the Office properly denied her request for an oral hearing.

**FACTUAL HISTORY**

Appellant, a 50-year-old program expert, filed a Form CA-2 claim for benefits on November 7, 2003, alleging that she had experienced back pain causally related to factors of her employment.

In a report dated July 24, 2003, Dr. Dina Darwish, Board-certified in internal medicine, stated:

“[Appellant] is a patient under our care. She is suffering from lower back pain which is exacerbated by an incorrect work chair. We previously ordered an ergonomically correct work chair for her in February 2003. In our opinion, it is imperative that this correction be made. [Appellant’s] condition will worsen requiring physical therapy and medical follow up.”

In reports dated August 26 and October 13, 2003, Dr. Robert W. Knapp, a chiropractor, excused appellant from work due to lower back pain. Appellant submitted results of magnetic resonance imaging (MRI) scans of the lumbar and cervical spine taken on July 3, 2003. The cervical spine MRI scan indicated disc space narrowing and small anterior osteophyte formation at C4-5. The report found a central disc herniation at C4-5 which indented the thecal sac anteriorly but did not cause significant stenosis and stated that the spinal cord was unremarkable with no destructive lesion or mass and no other abnormalities. The lumbar MRI scan revealed a disc dehydration predominantly at L4-5 and L5-S1, slightly at L3-4, with a central disc herniation at L4-5.

In a report dated August 28, 2003, Dr. Knapp diagnosed lumbar subluxation and myofascial pain, low back. He advised that sitting for long periods of time would affect the spine, which if ignored may cause permanent damage.

In a September 25, 2003 report, Dr. John W. Cochran, Board-certified in internal medicine, indicated that appellant had been followed for hemi facial spasm, symptomatic, which aggravated her clinical condition. In a report dated October 23, 2003, Dr. Darwish stated that he was treating appellant for chronic low back pain, anxiety and right hemi facial spasm. She opined that appellant would benefit from working at home, beginning in 10 days. Appellant also submitted October 27 and November 11, 2003 reports from Dr. Knapp’s office administrator which noted that she was being treated for back and neck pain. In addition, the record contains an October 30, 2003 impairment evaluation of appellant, not attributed to a physician, which stated that she had a five percent upper extremity impairment.

By letter dated January 8, 2004, the Office advised appellant that it required additional factual and medical evidence to determine whether she was eligible for compensation benefits. The Office asked appellant to submit a comprehensive medical report from her treating physician describing her symptoms and the medical reasons for her condition, and an opinion as to whether her claimed conditions were causally related to her federal employment. Appellant did not submit any additional medical evidence.

By decision dated March 23, 2004, the Office denied appellant’s claim, finding that she failed to submit medical evidence sufficient to establish that she sustained a back condition in the performance of duty.

By letter postmarked April 23, 2004, appellant requested an oral hearing. By decision dated June 17, 2004, the Office denied appellant’s request for an oral hearing. The Office stated that appellant’s request was postmarked April 23, 2004 which was more than 30 days after the

issuance of the Office's March 23, 2004 decision, and that she was therefore not entitled to a hearing as a matter of right. The Office nonetheless considered the matter in relation to the issue involved and denied appellant's request on the grounds that the issue was factual and medical in nature and could be addressed through the reconsideration process by submitting additional evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing that 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.<sup>2</sup> 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.<sup>3</sup>

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 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. The medical evidence required to establish causal relationship is usually rationalized medical 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 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.<sup>4</sup>

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed back osteoarthritic knee condition and her federal employment. This burden includes providing medical evidence from a physician who concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>5</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>3</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>4</sup> *Id.*

<sup>5</sup> *See Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

## *ANALYSIS -- ISSUE 1*

In the instant case, appellant has failed to submit any medical evidence containing a rationalized, probative opinion which relates her claimed back condition to factors of her employment. For this reason, she has not discharged her burden of proof to establish her claim that her back condition was sustained in the performance of duty.

Appellant submitted two reports from Dr. Darwish, who related findings of chronic low back pain, anxiety and right hemi facial spasm. She opined that appellant would benefit from working at home, beginning in 10 days. Dr. Darwish advised that lower back pain was exacerbated by an incorrect work chair and indicated that her office had ordered an ergonomically correct work chair for appellant in February 2003. Neither of Dr. Darwish's reports included a probative, rationalized medical opinion demonstrating how sitting in a chair either ergonomically correct or incorrect would cause a back injury. Dr. Cochran submitted a summary report dated September 25, 2003 which indicated that appellant had been followed for hemi facial spasm, symptomatic, which aggravated her clinical condition. Dr. Cochran's opinion, however, is of limited probative value as it does not contain any medical rationale explaining how or why appellant's claimed back condition was currently affected by or related to factors of employment.<sup>6</sup> The weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of a physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.<sup>7</sup> None of the reports appellant submitted sufficiently described appellant's job duties or explained the medical process through which such duties would have been competent to cause the claimed condition. Appellant also submitted reports from Dr. Knapp, a chiropractor, but these contained no indication that his findings were obtained from x-rays which revealed subluxation of the spine. Thus, they do not constitute medical evidence pursuant to section 8101(2).<sup>8</sup> Further, the reports from Dr. Knapp's office administrator do not constitute medical evidence, as she is not a physician under the Act. Finally, although the MRI scan reports taken July 3, 2003 indicate that appellant had herniated discs in her lumbar and cervical spine, there is no accompanying report from a physician explaining how these diagnoses are related to factors of her employment.<sup>9</sup> Accordingly, appellant did not submit probative, rationalized medical evidence to establish that her claimed back condition was causally related to her employment.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that her condition was caused, precipitated or aggravated by her employment is

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<sup>6</sup> *William C. Thomas*, 45 ECAB 591 (1994).

<sup>7</sup> *See Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>8</sup> 5 U.S.C. § 8101(2).

<sup>9</sup> The five percent upper extremity impairment rating is not relevant, as appellant has not filed a claim for a schedule award and the report is not signed by a physician.

sufficient to establish causal relationship.<sup>10</sup> Causal relationship must be established by rationalized medical opinion evidence and appellant failed to submit such evidence.

The Office advised appellant of the evidence required to establish her claim; however, appellant failed to submit such evidence. Consequently, appellant has not met her burden of proof in establishing that her claimed back condition was causally related to her employment. The Board, therefore affirms the Office's March 23, 2004 decision denying benefits for her claimed back condition.<sup>11</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) 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.<sup>12</sup> A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.<sup>13</sup> The Office has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>14</sup> In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

In the present case, because appellant's April 23, 2004 request for a hearing was postmarked more than 30 days after the Office's March 23, 2004 termination decision, she is not entitled to a hearing as a matter of right. The Office considered whether to grant a discretionary hearing and correctly advised appellant that she could pursue her claim through the reconsideration process. As appellant may address the issue in this case by submitting to the Office's new and relevant evidence with a request for reconsideration, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing.<sup>16</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.6(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a).

<sup>12</sup> 5 U.S.C. § 8124 (b)(1).

<sup>13</sup> 20 C.F.R. § 10.131 (a)(b).

<sup>14</sup> *William E. Seare*, 47 ECAB 663 (1996).

<sup>15</sup> *Id.*

<sup>16</sup> The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. E.g., *Jeff Micono*, 39 ECAB 617 (1988).

**CONCLUSION**

The Board finds that appellant has failed to meet her burden of proof in establish that her claimed back condition was sustained in the performance of duty. The Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 17 and March 23, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 11, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member