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

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| **LOURDES SARATE, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1397** |
| | ) | **Issued: February 9, 2006** |
| **U.S. POSTAL SERVICE, POST OFFICE, Oakland, CA, Employer** | ) | |

*Appearances:*
*Lourdes Sarate, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On June 21, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated March 4, 2005, denying an oral hearing before the Branch of Hearings and Review, and September 15, 2004, denying her recurrence of disability claim. Pursuant to 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 recurrence of disability beginning June 23, 2004 causally related to her accepted employment injury; and (2) whether the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

### ***FACTUAL HISTORY***

On August 19, 1998 appellant, then a 33-year-old flat sorter machine operator clerk, filed an occupational disease claim alleging that her right ankle got stuck in a machine while at work

on July 31, 1990 and that residuals of this injury had continued over the years.[1] On November 5, 1998 the Office accepted the claim for an aggravation of a right heel retrocalcaneal exostosis and a right ankle bone fracture fragment. The Office authorized appellant's July 27, 1998 surgery for removal of right heel exostosis and right ankle ununited old fracture fragment and paid appropriate compensation. Following her surgery, appellant returned to regular work on October 13, 1998.

In a letter dated June 21, 2004, appellant advised that her right ankle had been bothering her and requested that her claim be reopened for compensation as she would be undergoing medical treatment. She had to wear a short cast on her right ankle from June 23 to July 14, 2004 and would be unable to work or drive as her leg was to remain elevated. X-rays of her right ankle/foot dated April 14, 1998, March 23, 1999, October 4, 2001 and May 5, 2003 were submitted together with a June 21, 2004 disability certificate from Dr. Suzanne Ishii, a podiatrist. She advised that appellant would be totally disabled from work and driving from June 23 to July 14, 2004 due to pain related to prior right ankle trauma.

In a June 30, 2004 letter, the Office advised appellant that it was developing her claim as a recurrence of disability. The Office advised appellant to submit factual and medical information, including a rationalized medical report with a diagnosis, to establish whether her current disability or medical treatment was related to the original work injury or employment factors.

In a June 28, 2004 attending physician's report, Form CA-20, Dr. Ishii diagnosed Achilles tendinitis and foot/ankle tendinitis. By checking the appropriate box, Dr. Ishii opined that the diagnosed conditions were not caused or aggravated by employment activity as appellant reported a history of severe pain and there was no history or evidence of concurrent or preexisting injury or disease or physical impairment.

In a September 15, 2004 decision, the Office denied the recurrence claim due to insufficient factual and medical evidence.

In a form letter dated January 25, 2005 and received by the Office February 7, 2005, appellant requested an oral hearing.

In a March 4, 2005 decision, the Office's Branch of Hearings and Review denied appellant's request for an oral hearing finding that it was untimely filed and could equally well be addressed through a reconsideration request.[2]

[1] Appellant indicated that she initially filed a notice of traumatic injury in 1990 but that her supervisor at the time did not forward the claim to the Office.

[2] On June 6, 2005 the Office received additional evidence from appellant. This evidence, however, has not been reviewed by the Office in reaching a decision and the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c). Appellant may resubmit such evidence to the Office through the reconsideration process. *See* 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

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

A "recurrence of disability" means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[3] If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken, and an appropriate new claim should be filed.[4]

A person who claims a recurrence of disability 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 employment injury.[5] Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her employment injury.[6] 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.[7]

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[8] In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.[9] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[10]

## ***ANALYSIS -- ISSUE 1***

The Office accepted that appellant sustained an aggravation of a right heel retrocalcaneal exostosis and a right ankle bone fracture fragment as a result of a July 31, 1990 injury and

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[3] 20 C.F.R. § 10.5(x).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (May 1997); *Donald T. Pippin*, 54 ECAB 631 (2003).

[5] *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

[6] *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993).

[7] *Alfredo Rodriquez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

[9] For the importance of bridging information in establishing a claim for a recurrence of disability, *see Robert H. St. Onge*, 43 ECAB 1169 (1992); *Shirloyn J. Holmes*, 39 ECAB 938 (1988); *Richard McBride*, 37 ECAB 748 (1986).

[10] *See Ricky S. Storms*, 52 ECAB 349 (2001).

retroactively authorized appellant's July 27, 1998 surgery for such conditions. Appellant returned to regular duty on October 13, 1998. She subsequently requested a recurrence of disability beginning June 23, 2004.

The evidence submitted does not establish that her condition beginning June 23, 2004 resulted from the accepted work injury. In a June 21, 2004 letter, appellant indicated that her ankle had been bothering her and that she would have to wear a short cast and could not work from June 23 to July 14, 2004. She did not, however, indicate to what she attributed the worsening of her ankle condition or why she believed it was related to the accepted injury of July 31, 1990. Appellant was advised about the necessity of providing medical evidence in support of her claim.

Appellant did not submit any rationalized medical evidence establishing that her claimed recurrence of disability beginning June 23, 2004 is causally related to the July 31, 1990 accepted employment injury.[11] X-ray reports of appellant's ankle/foot do not offer any opinion on the causal relationship between appellant's medical condition and her employment. Thus, the reports are of diminished probative value. On June 21, 2004 Dr. Ishii indicated that appellant's foot pain, which she later attributed to as being Achilles tendinitis and foot/ankle tendinitis, was related to her prior right ankle trauma. However, Dr. Ishii did not provide any rationale to explain why appellant's current medical condition and need for treatment was causally related, either directly or through aggravation, precipitation or acceleration, to the employment injury, which occurred approximately 14 years earlier. Dr. Ishii did not explain the basis of her opinion with medical reasoning.[12] In a June 28, 2004 attending physician's report, she indicated that appellant's foot/ankle conditions were not causally related to her employment.

Other medical reports submitted by appellant do not specifically address whether she has any diagnosed condition that is causally related to her accepted injury. Therefore, appellant has not submitted sufficient medical evidence to establish her claim.

An award of compensation may not be based on surmise, conjecture or speculation or a claimant's belief of causal relationship. The mere fact that a disease or condition manifests itself or worsens during a period of employment or that work activities produce symptoms revelatory of an underlying condition does not raise an inference of causal relationship between the condition and the employment factors. Neither the fact that a claimant's condition became apparent during a period of employment nor the belief that the condition was caused, precipitated or aggravated by the employment is sufficient to establish causal relationship.[13]

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[11] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[12] *Donald W. Wenzel*, 56 ECAB ___ (Docket No. 05-146, issued March 17, 2005); *Juanita Pitts*, 56 ECAB ___ (Docket No. 04-1527, issued October 28, 2004) (where the Board has held that 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 conditions and the specific employment factors identified by the claimant).

[13] *Thomas A. Faber*, 50 ECAB 566 (1999); *Samuel Senkow*, 50 ECAB 370 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

As appellant failed to submit the necessary factual and rationalized medical evidence to establish that her claimed recurrence of disability is causally related to the accepted employment injury, the Office properly denied her claim for compensation.

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

Section 8124(b) of the Act, 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."[14]

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.[15] Even where the hearing request is not timely filed, the Office may, within its discretion, grant a hearing and must exercise this discretion.[16]

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

The Office denied appellant's recurrence claim by decision dated September 15, 2004. Appellant then requested an oral hearing from the Branch of Hearings and Review on a form letter dated January 25, 2005 and received by the Office on February 7, 2005. By decision dated March 4, 2005, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely.

In the instant case, the Office properly determined that appellant's January 25, 2005 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's September 15, 2004 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.

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, 2005 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 the issue in the case could equally be handled through the reconsideration process. The Board notes that the issue of whether appellant sustained a recurrence of disability is a medical question and she can submit additional medical evidence regarding her claim. 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

[14] 5 U.S.C. § 8124(b)(1); *see also* 20 C.F.R. § 10.616(a).

[15] *See Gerard F. Workinger*, 56 ECAB ___ (Docket No. 04-1028, issued January 18, 2005); *Tammy J. Kenow*, 44 ECAB 619 (1993).

[16] *Id.*

probable deduction from established facts.[17] 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 has not met her burden of proof to establish that she sustained a recurrence of disability. 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 March 4, 2005 and September 15, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 9, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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