

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

JACQUELYNN A. MARUFFO, Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,)
BAY PINES NATIONAL CEMETERY,)
Bushnell, FL, Employer**)

**Docket No. 06-261
Issued: May 1, 2006**

Appearances:

*Dean T. Albrecht, for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 14, 2005 appellant filed a timely appeal from an October 18, 2005 decision of the Office of Workers' Compensation Programs affirming the denial of her occupational disease claim and a July 1, 2005 decision denying her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that she sustained a neck or upper extremity condition in the performance of duty; and (2) whether the Office properly denied appellant's request for an oral hearing on the grounds that it was untimely filed.

FACTUAL HISTORY

On August 11, 2004 appellant, then a 54-year-old program support assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained injury to her neck, both shoulders and arms while in the performance of duty on or before April 1, 2004. Appellant did

not stop work. She attributed her condition to repetitive neck and upper extremity motion in performing her secretarial duties since 1991. Appellant asserted that her workstation was improperly designed and that she had to strain her neck to look at the monitor while typing. She also attributed her condition to performing general housekeeping duties from 1984 to 1997, handling of funeral urns weighing up to 20 pounds, prolonged standing at funeral services and placing funeral urns into graves. She noted that, from February to April 2004, she was the only one in her office and, beginning May 2004, she had assistance for only four hours a day.

In a July 6, 2004 report, Dr. David P. Kalin, an attending Board-certified family practitioner, opined that a 1975 neck injury in a motor vehicle accident caused herniated cervical discs with subsequent degenerative disc disease,¹ leading to upper extremity symptoms beginning in January 1996. She was diagnosed with mild bilateral carpal tunnel syndrome in November 1998, worse since 2002.² Appellant also experienced chronic, neck and right shoulder symptoms “especially related to repetitive rotation to the right in a workstation in which the computer terminal is to the right and not aligned with the keyboard.” Dr. Kalin diagnosed an exacerbation of chronic neck syndrome with herniated discs from C4-7, an exacerbation of chronic bilateral carpal tunnel syndrome, degenerative disc disease, chronic right shoulder syndrome with a supraspinatus tendon tear and effusion, osteoarthritis of the right acromioclavicular joint, bilateral medial epicondylitis, right C4-5 radiculopathy, degenerative joint disease and arthritis in both hands, a history of chronic low back syndrome and congenital scoliosis with spina bifida occulta. He stated that appellant “should avoid repetitive, strenuous or sudden movement of the neck,” lifting, reaching or repetitive activity with the right arm, and “any and all other activities which may aggravate her underlying condition.” Dr. Kalin stated “[w]ithin a reasonable degree of medical probability, [appellant] ha[d] developed an exacerbation of her preexisting work-related symptoms aggravated by her work activities.”

In an October 1, 2004 letter, the Office advised appellant that it had previously accepted bilateral carpal tunnel syndrome and that appellant underwent bilateral median nerve release. The Office afforded appellant 30 days to submit a report from her attending physician explaining how and why the claimed conditions were related to work factors. In a second October 1, 2004 letter, the Office requested that the employing establishment submit information regarding appellant’s work duties.

In an October 19, 2004 letter, Billy D. Murphy, an employing establishment official, provided a position description characterizing appellant’s clerical duties as “light,” with minimal lifting, pushing, pulling, bending or stooping. Mr. Murphy stated that appellant took 458 hours of sick and annual leave from October 1, 2003 to September 30, 2004 and attended weekly physical therapy sessions from January to July 2004. Mr. Murphy contended that appellant had daily assistance by a cemetery representative who was assigned the same tasks as appellant.

¹ Dr. Kalin reviewed magnetic resonance imaging (MRI) scans from July 20, 1993 to April 15, 2004 showing herniated discs at C4-5, C5-6 and C6-7 with significant degeneration at C5-6.

² April 30, 1999 and April 22, 2003 electrodiagnostic studies showed mild bilateral carpal tunnel syndrome and ulnar neuropathy.

By decision dated November 4, 2004, the Office denied appellant's claim on the grounds that fact of injury was not established. The Office found that appellant submitted insufficient evidence to establish that the event(s) occurred as alleged and no medical evidence that provided a diagnosis which could be connected to the claimed event(s). The Office noted that appellant was advised of the deficiencies in the evidence and of the type of additional evidence needed to establish her claim.

In a letter dated December 2, 2004 and postmarked June 9, 2005, appellant requested an oral hearing.

By decision dated July 1, 2005, the Office denied appellant's request for an oral hearing on the grounds that it was untimely filed. The Office found that appellant's letter requesting an oral hearing was postmarked on June 9, 2005, more than 30 days after issuance of the November 4, 2004 decision. The Office also denied appellant's request for an oral hearing on the grounds that the issues involved could be addressed equally well through the submission of new, relevant evidence accompanying a request for reconsideration.

In an August 4, 2005 letter, appellant requested reconsideration. She submitted additional evidence.

In an October 26, 2004 report, Dr. Kalin asserted that the Office was mistaken as appellant had not undergone median nerve releases. Appellant continued to have pain and paresthesias indicative of bilateral carpal tunnel syndrome "exacerbated by ongoing repetitive work activities." Dr. Kalin attributed appellant's herniated discs and degenerative cervical disc disease to the 1975 motor vehicle accident. He opined that "repetitive rotation of the neck in a malaligned workstation would promote accelerated degenerative arthritic changes of the neck ... and would explain an exacerbation of symptoms associated with chronic neck syndrome, disc herniations from C3-7 and progressive disc degeneration."³

In an August 24, 2005 letter, Mr. Murphy stated that appellant had retired. He contended that appellant ordered items to "improve her work site" and could have rearranged her workstation.⁴ Mr. Murphy confirmed that appellant did have to stand at funeral services for longer than 15 minutes. He asserted that appellant performed housekeeping duties "without consultation with her supervisor ... even after a janitorial contract was awarded."

In a September 21, 2005 letter, appellant stated that she ordered a wrist rest, footrest, anti-glare screen and trackball mouse, all approved by Mr. Murphy. She asserted that data entry duties using a document stand required her to turn her head to the right even if the monitor were directly in front of the keyboard. Appellant contended that she was assigned to perform janitorial duties. She also attributed her condition to answering a multiline telephone.

³ In a July 6, 2004 slip, Dr. Kalin prescribing an "ergonomically correct clerical workstation, computer and keyboard alignment.

⁴ In a May 16, 2002 email to Mr. Murphy, appellant noted that a safety officer evaluation her workstation ergonomics and recommended either a new workstation or a flat screen monitor that could be placed directly in front of the computer keyboard. Appellant stated that she preferred to keep her desk. Mr. Murphy responded that she needed central office approval and must select items from the contracted vendor.

Appellant also submitted internet literature and other documents on workstation ergonomics.⁵

By decision dated October 18, 2005, the Office modified the November 4, 2004 decision to accept that appellant performed repetitive clerical duties and some janitorial work. The Office found, however, that the medical evidence was insufficient to establish a causal relationship between those work factors and the claimed neck and upper extremity conditions.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act⁶ 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 limitation; that an injury was sustained while 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.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁸

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) 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 generally rationalized medical opinion 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

⁵ Appellant also submitted a December 29, 2003 slip from Dr. Jeanne Sellers, a chiropractor, recommending an ergonomic workstation with a monitor and keyboard directly in front of appellant. As Dr. Richter did not address the critical issue of causal relationship, her opinion is not relevant to appellant's case. Also, as Dr. Sellers did not indicate that she diagnosed a spinal subluxation by x-ray, she does not qualify as a physician for the purposes of this case and her opinion carries no probative medical value. 5 U.S.C. § 8101(2) defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by stated law. Section 8101(3) of the Act, which defines services and supplies, limits reimbursable chiropractic services to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. 5 U.S.C. § 8101(3). See *Thomas W. Stevens*, 50 ECAB 288 (1999); *George E. Williams*, 44 ECAB 530 (1993).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁸ See *Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

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.⁹

ANALYSIS -- ISSUE 1

Appellant alleged that she developed chronic syndromes of the neck and upper extremities due to repetitive motion and janitorial duties. The Office accepted that appellant performed such duties, but denied her claim on the grounds that the medical evidence was not sufficient to establish that these work factors caused or aggravated any medical condition. She submitted reports from Dr. Kalin, an attending Board-certified family practitioner, who explained in a July 6, 2004 report that appellant sustained herniated cervical discs in a 1975 motor vehicle accident, with consequential degenerative disc disease leading to bilateral upper extremity symptoms. He opined that appellant's data entry duties aggravated or exacerbated right shoulder pain, chronic neck syndrome and bilateral carpal tunnel syndrome. Thus, Dr. Kalin stated that appellant's work duties caused pain related to underlying conditions. However, the fact that work activities produce symptoms revelatory of an underlying condition, does not raise an inference of an employment relationship.¹⁰

In an October 26, 2004 report, Dr. Kalin opined that "repetitive rotation of the neck in a malaligned workstation would promote accelerated degenerative arthritic changes of the neck ... and" exacerbate chronic neck syndrome. However, he did not explain how repetitive neck rotation would aggravate or contribute to appellant's preexisting degenerative disc disease. Dr. Kalin's opinion is insufficiently rationalized to meet appellant's burden of proof in establishing causal relationship.¹¹

Therefore, appellant has not established that she sustained a neck or upper extremity condition in the performance of duty, as she submitted insufficient rationalized medical evidence to establish the asserted causal relationship.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that "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."¹² Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹³ Although there is no right to a review of the

⁹ *Solomon Polen*, 51 ECAB 341 (2000).

¹⁰ *Judith A. Peot*, 46 ECAB 1036 (1995).

¹¹ See *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Frank D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. §§ 10.616, 10.617.

written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹⁴

ANALYSIS -- ISSUE 2

In the present case, pursuant to the Office's November 4, 2004 denial of her claim, appellant requested an oral hearing in a letter dated December 2, 2004 and postmarked June 9, 2005. Section 10.616 of the federal regulations provides that a request for a review of the written record or an oral hearing "must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision, for which a hearing is sought."¹⁵ However, appellant's letter was not postmarked until June 9, 2005, significantly more than 30 days after issuance of the November 4, 2004 decision. Thus, it is clear that appellant's request for a review of the written record was not timely filed.

As appellant did not request a hearing within 30 days of the November 4, 2004 decision, she is not entitled to a hearing as a matter of right. The Office must then exercise its discretion to determine whether appellant's request for a review of the written record should be granted. In its July 1, 2005 decision, the Office considered the issue involved and found that appellant could pursue it equally well through submitting new, relevant evidence on reconsideration. Therefore, the Office properly exercised its discretion in denying appellant's request for a review of the written record.

CONCLUSION

The Board finds that appellant has not established that she sustained a neck or upper extremity condition in the performance of duty as alleged. The Board further finds that the Office properly denied appellant's request for an oral hearing.

¹⁴ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

¹⁵ 20 C.F.R. § 10.616(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 18 and July 1, 2005 are affirmed.

Issued: May 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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