United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	
DEPARTMENT OF VETERANS AFFAIRS, WESTERN NEW YORK VETERANS ADMINISTRATION HOSPITAL, Buffalo, NY, Employer	)	**Docket No. 07-1137** **Issued: September 20, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 21, 2007 appellant filed a timely appeal from a November 9, 2006 merit decision of the Office of Workers' Compensation Programs, affirming that she did not sustain a recurrence of disability beginning April 13, 2005, and a January 24, 2007 nonmerit decision, denying her request for an oral hearing. 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 April 13, 2005 causally related to her August 6, 2004 employment injuries; and (2) whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On August 6, 2004 appellant, then a 61-year-old nurse, sustained injury to her lower back and legs as a result of lifting a patient from the floor. She stated that the patient did not want to

stand up and when he buckled his knees she and a coworker tried to keep him from falling to the floor. The Office accepted appellant's claim for lumbosacral, left leg and thigh strains.

On April 19, 2005 appellant filed a claim alleging that she sustained a recurrence of disability on April 13, 2005. In an accompanying statement, she related that her legs had increasingly worsened which made it difficult for her to stand for long periods of time or walk any amount of time or distance. Appellant walked to work on one of her jobs and experienced pain after walking four blocks. She contended that her problems had not resolved since her employment-related injury. On April 13, 2005 her attending neurosurgeon advised her not to lift more than five pounds and recommended that she use a walker. On May 7, 2005 appellant accepted the employing establishment's April 13, 2005 job offer as a modified registered nurse based on physical restrictions set forth by Dr. Gregory J. Bennett, an attending Board-certified neurosurgeon.

On appellant's recurrence of disability claim form, the employing establishment stated that following the August 6, 2004 employment injuries, she had returned to full-time work with no accommodations or adjustments to her regular work duties due to the accepted employment injuries.

By letters dated May 13 to June 22, 2005, Delphine Ziolkowski, an employing establishment program specialist, controverted the claim. She stated that appellant also worked at the Roswell Park Cancer Institute as a nuclear medicine technician. Ms. Ziolkowski contended that appellant performed full-duty work for nine months but failed to relate any job duties or environment to any condition she sustained until she received the results of an unauthorized magnetic resonance imaging (MRI) scan. She further contended that a physical therapist's progress notes indicated that appellant was involved in an automobile accident on October 3, 2004 and that she subsequently sustained increased back pain.

By letter dated May 24, 2005, Bertha Ann Robinson, a nurse manager, questioned whether appellant's inability to perform full-duty work was due to her blood pressure or employment-related injury. She stated that, in August 2004, a physician believed that she could return to full-duty work as of August 27, 2004.

In an April 13, 2005 report, Dr. Bennett noted the increased size of appellant's disc herniation at L4-5 based on an April 1, 2005 MRI scan in comparison to an October 15, 1999 MRI scan. On physical examination, he reported intact strength throughout appellant's legs and noted that she walked slowly with moderate discomfort in the examination room. Dr. Bennett cautioned her against heavy stresses on the spine and against falls.

In a June 15, 2005 report, Dr. Bennett noted appellant's complaint of back and left leg pain and reported normal findings on physical examination. He diagnosed lumbar disc herniation at L4-5 and prescribed continued light-duty work for appellant for 12 weeks.

A July 27, 2005 report of Andrea R. Schmitt, a nurse practitioner, noted appellant's complaints of back and right leg pain and a tingling sensation in her lower extremity. Ms. Schmitt reported normal findings on physical examination. She diagnosed moderate radiculopathy of the lumbosacral spine and moderate lumbar disc herniation at L4-5. In a

July 27, 2005 prescription, Ms. Schmitt stated that appellant was not able to lift, push or pull more than five pounds. In addition, appellant could not return to full-duty lifting due to the diagnosed condition.

On August 25, 2005 the Office received reports dated September 18 to October 26, 2004 from Dr. Joseph F. Corigliano, a family practitioner, who opined that appellant sustained a lumbar strain and sciatica due to the August 6, 2004 injury. Dr. Corigliano indicated with an affirmative mark that the diagnosed conditions were caused by the August 6, 2004 employment injuries. He stated that appellant did not miss work due to this injury.

In an August 17, 2005 report, Dr. Kevin J. Gibbons, a Board-certified neurosurgeon, noted appellant's complaints of back and leg pain. He reported normal findings on physical examination and diagnosed right-sided lumbar disc herniation.

By letter dated September 14, 2005, the Office advised appellant to submit additional factual and medical evidence. The Office requested that the employing establishment respond to appellant's statements and provide information including her job description and physical requirements and whether she was performing regular full-time work prior to the alleged recurrence of disability.

In a September 14, 2005 report, Ms. Schmitt noted normal findings on physical and neurological examination. She diagnosed moderate lumbosacral radiculitis. Ms. Schmitt recommended that appellant continue to avoid bending and lifting and pushing greater than five pounds. She found that appellant could perform light-duty work at the employing establishment as a registered nurse.

By letter dated September 17, 2005, appellant stated that she hurt her back on December 9, 1997 when she tripped over a lead shield. She started experiencing back discomfort in October 1999 and, at that time, an MRI scan demonstrated disc problems. Appellant had no further problems until the August 6, 2004 employment injury. She reiterated that her leg pain had worsened and that she had difficulty standing and walking.

By letter dated September 26, 2005, Ms. Ziolkowski reiterated that appellant lost no time from work following the August 6, 2004 injury. She returned to full unrestricted duties on August 27, 2004. Ms. Ziolkowski related that appellant worked part time, one to two days per week, at the employing establishment. She also worked full time at the Roswell Park Cancer Institute.

By decision dated November 3, 2005, the Office denied appellant's recurrence of disability claim. The evidence of record failed to establish that she sustained a recurrence of total disability beginning April 13, 2005 causally related to her August 6, 2004 employment injuries. On December 2, 2005 appellant requested a review of the written record by an Office hearing representative.

On December 13, 2005 the Office received Dr. Bennett's March 29, 2005 prescription. He diagnosed moderate radiculopathy of the lumbosacral spine. It also received progress notes dated November 1 and 18, 2004 from appellant's physical therapists which addressed her lumbar spine and lower extremity problems. Dr. Corigliano's February 21 and July 21, 2005 progress

notes stated that appellant suffered from hypertension, urinary tract infection and obesity. His June 27 and July 20, 2005 treatment notes addressed appellant's back pain, blood in her urine and her request for a handicap sticker.

A February 17, 2006 report of Natalie Passmore, a nurse practitioner, found that appellant sustained a lumbosacral disc herniation at L5-S1. A February 9, 2006 report of Dr. Zachary D. Grossman, a Board-certified radiologist, found that appellant had a normal radioiodine thyroid scan and radioiodine uptake.

By decision dated April 11, 2006, an Office hearing representative affirmed the November 3, 2005 decision. The hearing representative found that the medical evidence was insufficient to establish that appellant sustained a recurrence of disability beginning April 13, 2005 causally related to her August 6, 2004 employment-related injuries.

In a letter dated September 1, 2006, appellant requested reconsideration of the hearing representative's April 11, 2006 decision.

By decision dated November 9, 2006, the Office denied modification of the April 11, 2006 decision.

In a letter dated December 27, 2006, appellant requested an oral hearing before a hearing representative.

In a January 24, 2007 decision, the Office Branch of Hearings and Review denied appellant's request for an oral hearing. It found that the issue could be equally well addressed through a request for reconsideration by submitting evidence not previously considered establishing that she sustained a recurrence of disability on April 13, 2005 due to her August 6, 2004 employment injuries.

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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[1] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[2]

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

[1] 20 C.F.R. § 10.5(x).

[2] *Id.*

compensation is causally related to the accepted employment injury.[3] 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.[4] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury.[5] Moreover, the physician's conclusion must be supported by sound medical reasoning.[6]

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[7] 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.[8] 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.[9]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbar, left leg and thigh strains while in the performance of duty on August 6, 2004. She claimed that beginning April 13, 2005, her recurrent back and lower extremity problems were causally related to the accepted employment injuries. The Board finds that appellant has failed to submit sufficient medical evidence to establish that her claimed recurrent back and lower extremity problems were caused or aggravated by her accepted employment-related injury.

The reports of Dr. Bennett and Dr. Gibbons found that appellant sustained a herniated disc at L4-5. However, neither Dr. Bennett nor Dr. Gibbons provided an opinion on the causal relationship between appellant's disability beginning April 13, 2005 and her August 6, 2004 employment-related injuries. The physicians did not explain how or why this herniated disc was caused by the accepted injury. The Board has held that medical reports not supported by medical rationale are of limited probative value.[10]

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

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

[5] *Ricky S. Storms*, 52 ECAB 349 (2001); *see also* 20 C.F.R. § 10.104(a)-(b).

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

[7] *See Ricky S. Storms, supra* note 5; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

[8] For the importance of bridging information in establishing a claim for a recurrence of disability, *see Richard McBride*, 37 ECAB 748 at 753 (1986).

[9] *See Ricky S. Storms, supra* note 5; *Morris Scanlon*, 11 ECAB 384, 385 (1960).

[10] *See Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

Dr. Bennett's June 15, 2005 prescription directed appellant to perform light-duty work for 12 weeks. He did not explain how her disability for work beginning April 13, 2005 was causally related to her accepted injury, which was accepted for strains to her legs and back. The Board finds that the medical evidence from Dr. Bennett is of diminished probative values as he did not adequately address the issue of causal relation.[11]

Dr. Corigliano found that appellant sustained a lumbar strain and sciatica. He indicated with an affirmative mark that her conditions were caused by the August 6, 2004 employment injuries. Dr. Corigliano noted that appellant did not miss work due to her accepted injury. It is well established that a report which only addresses causal relationship with a checkmark without more by way of medical rationale explaining how the incident caused the injury, is insufficient to establish causal relationship and is of diminished probative value.[12] Dr. Corigliano did not opine whether appellant was disabled on or after April 13, 2005 due to her accepted injury.

Dr. Corigliano's July 21, 2005 progress note listed hypertension, urinary tract infection and obesity. He addressed her back pain, blood in her urine and her request for a handicap sticker. These reports are of limited probative value as they address conditions not accepted by the Office. Dr. Corigliano did not address whether appellant had any current lumbar or lower extremity conditions or disability causally related to her August 6, 2004 employment injury.

Dr. Corigliano's September 18 and October 20 and 26, 2004 reports found that appellant sustained a lumbar strain and sciatica. In a February 21, 2005 progress note, he opined that she also had hypertension and obesity. In a December 3, 2004 report, Dr. Bennett found that appellant sustained lumbar radiculopathy at the L5-S1 level on the right. His March 29, 2005 prescription stated that she had moderate radiculopathy of the lumbosacral spine. This evidence predates the alleged recurrence of disability beginning on April 13, 2005. This evidence is therefore not relevant to the issue of whether her disability after April 13, 2005 is related to the August 6, 2004 employment injury.

The reports and prescription of Ms. Schmitt and Ms. Passmore, nurse practitioners, and the progress notes from appellant's physical therapists, do not constitute probative medical evidence. Neither a nurse practitioner[13] nor a physical therapist[14] is "a physician" as defined under the Federal Employees' Compensation Act. Therefore, these reports do not constitute competent medical evidence to support appellant's claim.

[11] *Id.*

[12] *Id.*

[13] *See Sean O Connell*, 56 ECAB ___ (Docket No. 04-1746, issued December 20, 2004). *See also* 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

[14] *See David P. Sawchuk*, 57 ECAB ___ (Docket No. 05-1635, issued January 13, 2006).

Appellant failed to submit rationalized medical evidence establishing that her disability beginning on April 13, 2005 resulted from the effects of her employment-related lumbar, left leg and thigh strains. The Board finds that she has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that 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.[15] Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[16] The Office's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[17]

Additionally, the Board has held that the Office, in its broad discretionary authority in the administration of the Act,[18] 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.[19] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[20] Moreover, the Board has held that the Office has the discretion to grant or deny a hearing when the request is for a second hearing on the same issue.[21]

ANALYSIS -- ISSUE 2

The Office issued a decision on November 3, 2005, finding that appellant did not sustain a recurrence of disability beginning April 13, 2005 causally related to her August 6, 2004 employment injuries. She requested and received a review of the written record on April 11, 2006 which affirmed the Office's November 3, 2005 decision. Appellant then requested reconsideration of the November 3, 2005 and April 11, 2006 decisions from the Office on September 1, 2006. By decision dated November 9, 2006, the Office denied modification of its prior decisions. Appellant requested another hearing before an Office hearing representative by

[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. § 10.615.

[17] *Id.* at § 10.616(a).

[18] 5 U.S.C. §§ 8101-8193.

[19] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[20] *Teresa M. Valle*, 57 ECAB ___ (Docket No. 06-438, issued April 19, 2006). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

[21] *See Steven A. Anderson*, 53 ECAB 367, 369-70 (2002); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

letter dated December 27, 2006. This hearing request was denied by the Office on January 24, 2007. The Board finds that appellant was not entitled to a hearing as a matter of right because she had previously received a hearing on the same issue[22] and had previously requested reconsideration of the Office's November 3, 2005 and April 11, 2006 decisions.[23] As appellant previously obtained review before the Branch of Hearings and Review and review by the district Office on reconsideration, the Office properly found that she was not entitled to a hearing as a matter of right.

The Board finds that the Office properly exercised its discretion in determining that appellant's case could be addressed equally well by requesting reconsideration and submitting evidence not previously considered to the district Office. An abuse of discretion is generally shown through proof of manifest error or a clearly unreasonable exercise of judgment.[24] The Office properly advised appellant that she could seek reconsideration with additional evidence. It did not abuse its discretion in denying her request for a second hearing.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability beginning April 13, 2005 causally related to her August 6, 2004 employment injuries. The Board further finds that the Office properly denied appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2007 decision of the Office of Workers' Compensation Programs is affirmed as modified. The Office's November 9, 2006 decision is affirmed.

Issued: September 20, 2007
Washington, DC

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[22] *Id.*

[23] *See Teresa M. Valle*, *supra* note 20.

[24] *See Delmont L. Thompson*, 51 ECAB 155 (1999).