

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELINDA L. ALDEN and U.S. POSTAL SERVICE,
POST OFFICE, Buffalo, NY

*Docket No. 98-2442; Submitted on the Record;
Issued May 12, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that she sustained right upper extremity injury in December 1996 in the performance of duty, causally related to factors of her federal employment; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

On September 10, 1997 appellant, then a 30-year-old distribution clerk, filed a claim alleging that in December 1996 she developed bilateral shoulder pain, muscle spasms and tendinitis and that her hands kept falling asleep with the right hand numbness remaining. She also noted that she had experienced right shoulder pain since her November 1993 right rotator cuff repair. Appellant indicated that she first sought medical treatment on August 6, 1997; appellant stopped work on September 8, 1997 and did not return.

In support of her claim, appellant submitted several prescriptions, a physical therapy referral and return to work certificates. A physical therapy report, dated September 6, 1997, was submitted and a July 28, 1997 report from Dr. James B. Mark, a Board-certified orthopedic surgeon, indicated that appellant was first seen complaining of bilateral shoulder pain. Dr. Mark noted that appellant denied any specific trauma to the left shoulder, but noted that she reported pain posteriorly across her shoulder blades, weakness in her left upper extremity and occasional right shoulder discomfort. Physical examination was reported as being essentially negative and x-rays were noted as being negative without gross bony abnormalities. He diagnosed "Residual minimal discomfort and decreased [range of motion] on the right, [status post] rotator cuff repair. On the left side I would consider her to have some mild adhesive capsulitis, secondary to pain with a tight posterior capsule and infraspinatus tendinitis. Dorsal wrist ganglion, left hand. Subluxating extensor tendon." No discussion of causation was provided.

In a September 8, 1997 report, Dr. Mark noted that appellant was well known to him for complaints of both left shoulder and right shoulder problems. He noted that at that time appellant reported decreased left shoulder problems but continued right shoulder problems along

with right elbow and wrist problems, especially at night. Dr. Mark noted some passive right shoulder decrease in abduction and forward flexion and a positive Tinel's sign on the right wrist. He diagnosed "[status post] right shoulder rotator cuff repair. She has good strength against resistance and I do not feel she has return. However, having residual pain, secondary to her surgery and I think she probably has a possible right CTS [carpal tunnel syndrome] on the right hand side." Dr. Mark opined that appellant was temporarily totally disabled. Causation was not discussed.

Appellant's postmaster noted that appellant used no leave nor leave without pay (LWOP) due to her condition prior to September 8, 1997.

Appellant submitted a personal statement noting that her left shoulder ached and would freeze or lock up at night. She stated that in the preceding three to four months her strength was weakening and she felt like she was going to drop trays. Appellant claimed that when she sorted mail her muscles would tighten and her arms would ache and that she would subsequently experience difficulties with activities of daily living. She implicated repetitive movements required in her position. Appellant stated that, ever since her November 1993 surgery, her right shoulder and muscles had hurt and that at Christmas 1995 both shoulders hurt a lot. She claimed that during the preceding four to six months her right hand condition worsened.

In a report dated October 6, 1997, Dr. Mark delineated appellant's symptoms, indicated that she was complaining of bilateral elbow pain and noted that her right shoulder had improved. He noted that appellant had positive Tinel's and Phalen's signs on the right and he diagnosed carpal tunnel syndrome on the right, status post right shoulder rotator cuff tear with subsequent occasional acute flare-ups of tendinitis, bilateral epicondylitis and acute neck strain with spasm. Dr. Mark indicated that appellant was totally disabled, but causation was not discussed.

By letters dated October 9 and 21, 1997, the Office requested further information from appellant's treating physicians.

By report dated October 14, 1997, Dr. Olaf U. Lieberg, a Board-certified orthopedic surgeon, noted: "I have no evidence that the problem that [appellant] was seen in my office for on June 19, 1997 is work related. She states that she complained of shoulder pain radiating into the left breast for six months duration. [Appellant] had no definite history of injury. Just because she had a shoulder problem relating to her work in 1993, does not mean that this is also work related. I told her that. She changed physicians." He further noted that appellant's left shoulder x-rays were normal.

By decision dated January 26, 1998, the Office rejected appellant's claim finding that she had failed to establish fact of injury. The Office noted that the evidence of record did not establish that a medical condition had been diagnosed, causally related to the implicated factors of appellant's employment.

By letter dated February 25, 1998, but addressed and mailed to the Office instead of the Branch of Hearings and Review, appellant requested an oral hearing on the January 26, 1998 decision. The original envelope was not saved. The Office date stamped this request as being

received on March 2, 1998 and remailed it to the Branch of Hearings and Review postmarked March 11, 1998.

Enclosed was a January 7, 1998 report from Dr. Marks, which repeated the prior findings noted in his previous reports. He noted that appellant's symptoms seemed to jump around.

By decision dated May 1, 1998, the Office denied appellant's request for an oral hearing noting that she was not entitled by right to a hearing as the request was postmarked March 11, 1998, which was an untimely request and finding that she could equally well have her concerns addressed by requesting reconsideration and by submitting further evidence to the Office with her request.

The Board finds that appellant has failed to establish that she sustained an injury or condition in the performance of duty, causally related to factors of her employment.

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;¹ (2) a factual statement identifying the employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition;² 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.³ The medical evidence required to establish causal relationship, generally, is 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,⁴ must be one of reasonable medical certainty,⁵ 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.⁶ Appellant has not met her burden of proof to establish her occupational claim in this case.

The medical evidence appellant submitted reported right shoulder problems related to a previous 1993 surgery and not to her 1996 federal employment. No specific 1996 right shoulder diagnosis was given, nor was a specific left shoulder diagnosis. The medical evidence of record

¹ See *Ronald K. White*, 37 ECAB 176, 178 (1985).

² See *Walter D. Morehead*, 31 ECAB 188, 194 (1979).

³ See generally *Lloyd C. Wiggs*, 32 ECAB 1023, 1029 (1981).

⁴ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁵ See *Morris Scanlon*, 11 ECAB 384-85 (1960).

⁶ See *William E. Enright*, 31 ECAB 426, 430 (1980).

also diagnosed bilateral epicondylitis and right CTS, but in no way related these conditions to factors of appellant's employment.

The only employment factor that appellant specifically implicated was the repetitive movements required by her various tasks, however, no medical report of record discusses any diagnoses in relationship to appellant's repetitive movements.

In fact, no medical report of record even discusses the causal relationship between any of appellant's diagnosed conditions and any factors of her federal employment. Consequently, no medical report of record is sufficient to meet appellant's burden of proof to establish her claim.

Accordingly, appellant has failed to meet her burden of proof.

The Board further finds that the Office did not abuse its discretion in denying appellant's timely request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part as follows:

"Before review under § 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."⁷

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.131(a). This paragraph which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing states in pertinent part as follows:

"A claimant is not entitled to an oral 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, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."⁸

In this case, appellant's request for an oral hearing was based upon the date stamp of the district Office.⁹

The Board notes that the Federal (FECA) Procedure Manual, Chapter 2.1601(4)(a) states:

⁷ 5 U.S.C. § 8124(b)(1)

⁸ 20 C.F.R. § 10.131(a).

⁹ Although timeliness is generally based upon the postmark of the envelope containing the request, *see, e.g., Douglas McLean*, 42 ECAB 759 (1991); *William J. Kapfhammer*, 42 ECAB 271 (1990); in this case the district Office did not retain the original stamped envelope and make it part of the case record.

“The request [for a hearing] is timely if it was mailed (as determined by the postmark) within 30 days of issuance of the district Office’s decision. If the claimant sent the request to the [district Office] (instead of [Hearings and Review]) and the envelope was not retained, then the request was timely filed if it was date stamped by the [district Office] within 30 days of issuance of the decision.

“[Hearings and Review] may deny requests date stamped by the [district Office] more than 30 days after the decision was issued on the basis that the date stamp showed untimely receipt and the claimant’s failure to send the request to [Hearings and Review], as specified in the appeal rights accompanying the decision, made it impossible to determine timeliness from the postmark.”¹⁰

In the instant case, appellant incorrectly mailed her oral hearing request to the district Office instead of the Branch of Hearings and Review and the Office failed to retain the original envelope. The Office date stamped appellant’s oral hearing request as being received on March 2, 1998 which is clearly more than 30 days after the January 26, 1998 decision and, therefore, in accordance with the above-noted Office procedures, the request must be considered untimely. As the request was untimely made, appellant was not entitled to a hearing under 5 U.S.C. § 8124(b)(1) as a matter of right.

However, the Branch of Hearings and Review, in its discretion, considered appellant’s hearing request in its May 1, 1998 decision and denied the request on the basis that appellant could pursue her claim by requesting reconsideration by the Office and by submitting additional evidence supporting that she sustained a right upper extremity injury as alleged.

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 probable deductions from known facts.¹¹ There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant’s hearing request.

Accordingly, the decisions of the Office of Workers’ Compensation Programs dated May 1 and January 26, 1998 are hereby affirmed.

Dated, Washington, D.C.
May 12, 2000

George E. Rivers

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601(4)(a) (June 1997).

¹¹ *Daniel J. Perea*, 42 ECAB 214 (1990).

Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member