U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA F. DUFFLEY and U.S. POSTAL SERVICE,
POST OFFICE, Knoxville, Tenn.

Docket No. 96-340; Submitted on the Record;
Issued March 16, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained an injury to her neck and upper spine in the performance of duty on February 17, 1994, as alleged;[1] and (2) whether the Office properly denied appellant's request for a hearing under section 8124(b)(1).

On February 20, 1994 appellant, then a 38-year-old postal distribution clerk filed a notice of traumatic injury claim (Form CA-1) alleging that she injured her neck and upper back while lifting boxes onto a shelf overhead in the performance of duty.[2] The record shows that appellant did not stop work following the incident, but was placed on intermittent work restrictions/light duty during the duration of this claim. In a decision dated July 8, 1994, the Office rejected appellant's claim on the grounds that the evidence of record failed to demonstrate that appellant sustained an injury as alleged. Appellant requested reconsideration, and after further development of the record, the Office, in a decision dated October 24, 1994, denied appellant's request for reconsideration on the grounds that the information submitted on reconsideration was

[1] In the CA-1 form appellant originally alleged that she sustained an injury to her neck and upper spine in the performance of duty on February 20, 1994. The Office of Workers' Compensation Programs, however, has since determined and accepted appellant's actual date of injury to be February 17, 1994.

[2] The record shows that appellant filed a notice of recurrence of disability claim Form CA-2a, under claim number A6-585280, on March 3, 1994. Appellant alleged that she sustained a recurrence of disability due to her March 31, 1994, accepted employment-related cervicothoracic spine injury. The Office stated that appellant did not pursue her notice of recurrence of disability, but instead, filed a new and separate notice of traumatic injury claim Form CA-1 on February 20, 1994. In addition, the Office noted that appellant's claim for a recurrence of disability had been closed since appellant had filed a new traumatic injury claim Form CA-1, on that same day, February 20, 1994. If appellant wishes to pursue her notice of recurrence of disability claim Form CA-2a, filed February 20, 1994, she should contact the Office. The issue of recurrence of disability, is therefore, not before the Board at this time.

insufficient to warrant modification of its prior decision dated July 8, 1994.[3] Appellant then requested a hearing before an Office hearing representative pursuant to section 8124(b)(1) of the Federal Employees' Compensation Act. This request was denied by the Office on December 7, 1994. On April 2, 1995 appellant again requested reconsideration, and in a letter decision dated May 4, 1995, the Office accepted that appellant's symptoms were experienced after repeated overhead lifting on February 17, 1994 and that this was the date on which appellant advised her supervisor that she believed she was hurt.[4] The Office advised appellant that the medical evidence provided was neither supported by medical reasoning nor based on an accurate history. In addition, the Office found that this evidence was sufficient to warrant an attempt by the Office to assist appellant in obtaining medical opinion evidence of sufficient probative value to establish her claim for benefits. The Office also advised appellant to provide a detailed history of employment and nonemployment injuries related to the February 17, 1994 incident, a description of medical findings, a physician's rationalized medical opinion on whether appellant's complaints on or after February 21, 1994 were related to the employment injuries. Specifically, appellant was advised to have her physician discuss medical findings and how such findings support the opinion on causal relationship. Thereafter, in an undated letter received in the Office on May 25, 1995, appellant responded to the Office's May 4, 1995, request for additional information. In a merit decision dated August 16, 1995, the Office found that modification of the original decision was not warranted for the reason that fact of injury had not been established.

The Board finds that appellant has not met her burden of proof in establishing that she sustained an injury to her neck and upper spine in the performance of duty on February 17, 1994, as alleged.

An employee seeking benefits under the Act[5] 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.[6] 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.[7]

In order to determine whether a federal employee has sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been

[3] The Board's jurisdiction is limited to review of final decisions of the Office issued within one year of the filing of the appeal. As appellant's appeal is postmarked November 2, 1995, the Board lacks jurisdiction to review the decisions dated October 24, and July 8, 1994. 20 C.F.R. § 501.3(d).

[4] *See* note 1.

[5] 5 U.S.C. §§ 8101-8193.

[6] *Joe Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *David J. Overfield*, 42 ECAB 718 (1991); *Victor J. Woodhams*, 41 ECAB 345 (1989).

established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[8] In this case, the Office found that the claimed event, incident or exposure occurred at the time, place and in the manner alleged.

The second component of fact of injury is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment event, incident or exposure, the employee must submit rationalized medical opinion, based on a complete factual and medical background, supporting such a causal relationship.[9]

In the present case, there is insufficient rationalized medical opinion evidence to support that appellant suffered an injury or disability causally related to any workplace factors. In a progress note dated August 23, 1994, Dr. James Kimbro Maguire, Jr., a Board-certified orthopedic surgeon stated that appellant holds her head with normal posture, and that there is normal range of cervical spinal motion. He indicated that appellant's reflexes were 2+, equal and symmetric bilaterally, and that she had no focal motor or sensory abnormalities. He went on to say that appellant did have some tenderness at about the C7 level, that axial compression of her head makes her symptoms worse and that distraction really does not help. Dr. Maguire also stated that he did not take any x-rays because he had a report from the referral physician, Dr. Joel B. Ragland, an internist, indicating that he had read some x-rays of appellant's thoracic and cervical spine and that these were unremarkable. He noted that there was a magnetic resonance imaging (MRI) report "done of the thoracic and cervical spine at St. Mary's Medical Center indicating only mild degenerative changes in the cervical and thoracic spine with very mild scoliosis but no evidence of nerve root compression." Dr. Maguire opined that he did not believe appellant was a surgical candidate and that only left oral medication and physical therapy as potential treatment. Dr. Maguire's report neither provided a diagnosis for appellant's symptoms nor a rationalized medical opinion explaining how and why the lifting of boxes onto a shelf overhead caused, aggravated or contributed to appellant's claimed symptoms. Dr. Maguire's medical report is therefore speculative, equivocal and of diminished probative value. This report is insufficient to meet appellant's burden of proof.

Additionally, appellant has submitted numerous medical reports and forms from the physicians of record: Dr. Ragland, an internist, Dr. Anthony Lyon, a Board-certified family practitioner, Dr. John L. Law, an internist, Dr. Dick Stallings, Dr. Burt Toney, Board-certified in family practices and in emergency medicine, and Dr. Jo Sweet, Board-certified in internal medicine. However, these physicians either provided an inaccurate date of injury, or no date of injury at all. They did not present an awareness of the February 17, 1994 incident, or give an opinion addressing whether any medical condition arose out of the incident, or a rationalized medical opinion from an attending physician on causal relationship. As such, none of the

[8] *Elaine Pendleton,, supra* note 6.

[9] *Kathryn Haggerty*, 45 ECAB 383 (1994).

physicians of record provided a rationalized medical opinion, based upon reasonable medical certainty, that there was a causal connection between appellant's neck and upper back symptoms and any specific workplace factors. As indicated above, these physicians do not provide medical reasoning explaining how the lifting of boxes onto a shelf overhead caused, aggravated or contributed to appellant's claimed symptoms. Therefore, none of the medical reports submitted are sufficient to establish appellant's claim for benefits.[10]

[10] *Id.*

The Board has held that an award of compensation may not be based on surmise, conjecture or speculation, or appellant's belief of causal relationship. The mere fact that a disease or condition manifests itself or worsens during a period of employment[11] or that work activities produce symptoms revelatory of an underlying condition[12] does not raise an inference of causal relationship between the condition and the employment factors. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is sufficient to establish causal relationship. Causal relationship must be established by rationalized medical opinion evidence.[13] As appellant failed to provide sufficient medical evidence to establish that she sustained an injury as a result of the February 17, 1994 employment incident, the Office properly denied appellant's claim for compensation.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124(b)(1).

Section 8124(b)(1) of the Act provides that, "Before review under section 8128(a) ... a claim 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 her claim before a representative of the Secretary."[14]

In the instant case, appellant is not entitled to a hearing as a matter of right since the request for a hearing under section 8124 was not made until after the appellant had sought reconsideration of her claim under section 8128. The Office considered the matter but found that appellant was not entitled to a hearing as a matter of right under section 8124(b)(1) as the appellant had previously exercised her right to reconsideration under 5 U.S.C. § 8128 and the Office properly exercised its discretion in deciding not to otherwise grant appellant's hearing request.

The decisions of the Office of Workers' Compensation Programs dated August 16 and May 5, 1995, and December 7, 1994 are affirmed.

Dated, Washington, D.C.
March 16, 1998

David S. Gerson
Member

[11] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[12] *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

[13] *Victor J. Woodhams*, *supra* note 7.

[14] 5 U.S.C. § 8124(b)(1).

A. Peter Kanjorski
Alternate Member

Willie T.C. Thomas, Alternate Member, dissenting:

The primary issue in this case is whether appellant has submitted sufficient medical evidence in this case to establish that she sustained an injury as alleged. The controversy over the date the alleged injury occurred has been resolved in appellant's favor by the Office of Workers' Compensation Programs and I fully accept its determination on that issue.

The record discloses that appellant initially filed a traumatic injury claim alleging that at 1:30 a.m. on October 14, 1993 she sustained lower neck and upper back injuries while lifting mail onto pie racks. The Office accepted that claim for cervicothoracic strain. A medical report in the record dated October 20, 1993 by Dr. Joseph Palatinus describes that injury as follows:

> "SUBJECTIVE: [Appellant] comes for follow-up. She apparently was seen in the Parkwest Emergency Department on October 17, 1993, for a lifting injury sustained on October 14, 1993. [Appellant] has been using Meclomen and Norflex and feels improved but not back to normal.
>
> "OBJECTIVE: [Appellant] is a well-developed lady who indicates pain in the upper thoracic and paracervical area especially on the left side. There is no acute spasm evident. There is good range of motion of the neck with some increase in pain. Neurologically, she is normal with intact reflexes, sensation and strength.
>
> "ASSESSMENT: Resolving cervicothoracic sprain.
>
> "PLAN: [Appellant] was advised to continue the Meclomen and the Norflex which was prescribed. She feels she has enough. [Appellant] was sent back to work with no lifting over10 pounds and no work reaching above the shoulder. She was advised she does not have to return, but she should come back on October 27, 1993, if she is not back to normal at which time she should do regular work."

Regarding appellant's current claim, the Office accepted that appellant experienced symptoms after repeated overhead lifting on February 17, 1994 and that this was the date that she advised her supervisor that she believed she sustained an injury. Therefore the focus of this dissent begins with the contemporaneous medical evidence closest to the date of the alleged injury. In this connection, the record contains a report from a physician at the Student Health Services of the University of Tennessee dated February 21, 1994. The report noted "back pain (cervical) x 1 day -- has had recent sprain (cervical)."

Under symptoms, the physician reported:

> "Strained upper back two months ago, saw MD, treated [complaints] two weeks,

> improved. Restrained past week while lifting overhead at work (Post Office). No numbness or weakness in arms. "[Illegible] point tenderness over spinous processes from C 7 to upper thoracic spine. Good [illegible], good strength in arm."

Under assessment the physician diagnosed spinal sprain/strain. He prescribed Naprosin Parafon Forte and directed appellant to recheck with him in 10 days. Appellant returned on March 2, 1994. The same physician noted strain (spinal) states no improvement. Under symptoms the physician reported that appellant continues to have pain as previously. He noted that appellant reported her pain was aggravated by lifting overhead in performing her duties at the post office. The physician diagnosed chronic strain. He referred appellant for further evaluation and probable physical therapy.

In a report dated March 4, 1994, Dr. Lee Toney, a physician working at ParkMed, an Urgent Medical Care & Occupational Health Clinic, reported appellant came in with the chief complaint of pain in the left shoulder area. He noted appellant reported a past history of cervicothoracic strain in October 1993 and that the pain recurred after lifting boxes weighing 25 to 30 pounds over her head onto a conveyor belt. Dr. Toney's impression was "left posterior shoulder girdle strain." He noted that appellant had already been placed on Parafon DSC and Naprosyn by her family physician. He instructed her to continue the medication. He also prescribed Celestone Soluspan 1 cc IM and noted that appellant would be scheduled for physical therapy three times weekly. Dr. Toney further noted that appellant could return to work but was instructed to avoid pulling and overhead lifting and to return in seven days for reevaluation.

From my evaluation of the contemporaneous evidence surrounding the date of the accepted incident, February 17, 1994, I must conclude that the medical evidence from the University of Tennessee Student Health Services and ParkMed Urgent Medical Care & Occupational Health Clinic that appellant has submitted sufficient medical evidence with prior history of injury and treatment in October 1993 and reinjury on February 17, 1994 to establish that she sustained a traumatic injury while performing lifting duties, namely left posterior shoulder girdle strain. None of the medical evidence in the record is inconsistent with appellant's account of how the injury occurred or the medical treatment she received.

For the foregoing reasons I would reverse the decisions of the Office of Workers' Compensation Programs dated August 16, May 5 and December 7, 1994 and return the case record to the Office for payment of medical expenses and for payment of all periods of wage loss.

Willie T.C. Thomas
Alternate Member