

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY SPILLERS and U.S. POSTAL SERVICE,
MAIN POST OFFICE, New Orleans, LA

*Docket No. 98-1761; Submitted on the Record;
Issued April 25, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that she sustained a recurrence of disability on or after June 27, 1997 causally related to her September 15, 1995 accepted lumbar strain injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

On September 21, 1995 appellant, then a 42-year-old claims/inquiry tracer clerk, filed a notice of traumatic injury and claim for compensation, Form CA-1, alleging that, on September 15, 1995 she sprained her back while in the performance of duty. Appellant was treated at the Louisiana State University Hospital's Emergency Room on September 17, 1995. In a September 22, 1995 report, Dr. Norman Chutkan, an orthopedist, diagnosed lumbar sacral sprain and indicated that appellant could resume her full duties. Appellant stopped work on September 15, 1995 and returned to work on September 21, 1995. The Office accepted the claim for lumbosacral strain.

On October 12, 1995 appellant was involved in a nonwork-related car accident, which further aggravated her back condition. Dr. Douglas A. Swift, a physician Board-certified in preventive medicine, diagnosed a lumbar disc bulge and concluded that appellant could not resume full-duty work. On October 12, 1995 the employing establishment offered appellant a limited-duty job offer, which she accepted. Dr. Edward S. Connolly, a neurosurgeon, provided a neurosurgical consultation on February 9, 1996 and based on a magnetic resonance imaging (MRI) test and examination, diagnosed no nerve root compression, no evidence of radiculitis or radiculopathy. On May 29, 1996 in a duty status report, Form CA-17, Dr. Swift indicated that appellant could resume regular full-time work.

On October 8, 1997 appellant filed a notice for recurrence of disability stating that, on June 27, 1997, she sustained a recurrence of disability. Appellant explained that when she arrived at work, she noticed that her left leg was "twitching" and that her lower back pain was "inflammatory." Appellant further stated that she "deal[s] with irate customers on the

[tele]phone everyday and sometimes my body just get[s] [sic] stressed out with pains.” The employing establishment indicated that appellant did not stop work.

By letter dated November 3, 1997, the Office notified appellant that it had received her claim for recurrence of disability and advised her to submit a physician’s opinion, with a supporting explanation as to the causal relationship between the current disability/condition and the original injury. Appellant did not respond.

By decision dated December 3, 1997, the Office denied appellant’s claim for recurrence of disability on the grounds that the evidence was insufficient to establish that the claimed recurrence was causally related to the September 15, 1995 accepted lumbar strain injury. The Office found that there was no 1997 medical evidence contained in the record.

In a letter dated and postmarked January 3, 1998, appellant requested a hearing before an Office hearing representative.

By decision dated February 26, 1998, the Office denied appellant’s request for a hearing as she had not requested one within 30 days after the issuance of the December 3, 1997 decision. The Office further determined that the case could have been equally well addressed by requesting reconsideration from the district office and submitting evidence not previously considered.¹

The Board finds that appellant has not established that her condition on or after June 27, 1997 was causally related to the accepted September 15, 1995 employment injury.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.² This burden of proof 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 the employment injury and supports that conclusion with sound medical reasoning.³ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or on an appellant’s unsupported belief of causal relation.⁴

¹ Following the February 26, 1998 Office decision, on May 22, 1998 the Office received medical evidence not previously considered, including clinic notes dated September 24, November 11 and December 9, 1997, from Dr. James C. Butler. Appellant also submitted an MRI of the lumbar spine dated October 28, 1997. Appellant also submitted this evidence and a new report dated April 14, 1998, with her appeal to the Board. The Board cannot consider evidence on appeal that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); 20 C.F.R. § 501.2(c).

² *John E. Blount*, 30 ECAB 1374, 1379 (1979).

³ *See Jose Hernandez*, 47 ECAB 288, 294 (1996); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

⁴ *Ausberto Guzman*, 25 ECAB 362 (1974).

In the instant case, appellant has not submitted rationalized medical opinion evidence showing that the alleged recurrence of disability on or after June 27, 1997 was causally related to the September 15, 1995 accepted work injury. As the Office properly found, appellant submitted only medical evidence from 1995 and 1996. The record contains no treatment or office notes from 1997, the year in which the alleged recurrence of disability occurred. Consequently, appellant has failed to meet her burden of proof as she has submitted no medical evidence relevant to the claimed date of recurrence of disability.⁵

The Board further finds that the Office properly denied appellant's request for a hearing.

Section 8124(b) of the Federal Employees' Compensation Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of the issuance of the decision before a representative of the Secretary.⁶ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁷ As appellant's January 3, 1998 request for a hearing was dated more than 30 days after the Office's December 3, 1997 decision, appellant was not entitled to a hearing as a matter of right.⁸

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise its discretion.⁹ In the present case, the Office exercised its discretion and denied the request for a hearing on the grounds that appellant could pursue the issues in question by requesting reconsideration and submitting additional medical evidence. Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's request for a hearing under section 8124 of the Act.¹⁰

⁵ *Carolyn F. Allen*, 47 ECAB 240, 245 (1995); *Jose Hernandez*, 47 ECAB 288, 293 (1996).

⁶ *See* 5 U.S.C. § 8124(b).

⁷ *James D. Zurcher*, 48 ECAB 274, 281 (1997); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990); *see also* 20 C.F.R. § 10.131.

⁸ The request was postmarked 31 days after issuance of the December 3, 1997 decision.

⁹ *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁰ *See Lawrence C. Parr*, 48 ECAB 445, 451 (1997).

The decisions of the Office of Workers' Compensation Programs dated February 26, 1998 and December 3, 1997 are affirmed.

Dated, Washington, D.C.
April 25, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member