

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALERA FOSTER and DEPARTMENT OF THE AIR FORCE,
61ST MEDICAL SQUADRON/SGP, El Segundo, CA

*Docket No. 98-1331; Submitted on the Record;
Issued February 1, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, 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 in the performance of duty, as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits.

On March 24, 1997 appellant, then a 45-year-old administrative secretary, filed a notice of occupational disease and claim for compensation, Form CA-2, alleging she experienced pain, severe burning and cramps in the neck, back and shoulders while in the performance of duty. Appellant stated that the injury was caused by an ergonomically incorrect workstation. She noted that her chair and desk were not the proper heights for her to utilize the computer and typewriter. Appellant stopped work on March 11, 1997.

In support of her claim, appellant also provided medical evidence. In a January 10, 1997 note, Dr. Ronald E. Glousman, a Board-certified orthopedic surgeon, diagnosed cervical strain and ordered an ergonomic evaluation of her workstation. In a March 13, 1997 report, Dr. Drayton Graham, a Board-certified internist, noted that appellant had a "slip and fall" at a gym about three years earlier from which she stated she recovered although she reported a "recurrence of similar symptoms with her current complaints." In a May 13, 1997 report, Dr. Graham diagnosed progressive neck, shoulder and upper back pain. He noted mild to moderate tenderness of both trapezius at the shoulder girdle. In an April 1, 1997 report, Dr. Graham again diagnosed trapezius myofascitis and noted work-related stress. On April 24, 1997 Dr. Graham noted that appellant was capable of returning to her clerical job as long as she avoided prolonged sitting, standing or bending. In a May 15, 1997 report, Dr. Emmanuel N. Mba, a Board-certified obstetrician and gynecologist, certified that appellant was disabled from May 7 until May 15, 1997 and was unable to engage in prolonged sitting or standing.

On July 22, 1997 the Office denied the claim. The Office determined that appellant failed to establish that she had a medical condition causally related to factors of her employment

or an employment injury which disabled her. In a letter dated July 21, 1997 and received by the Office on July 24, 1997, appellant requested a review of the written record and submitted new medical evidence.

In support, appellant provided the results of a magnetic resonance imaging (MRI) test, dated April 24, 1997 which revealed evidence of small central disc bulges. Dr. Glousman noted in his reports dated April 14 and May 23, 1997 persistent pain about the paracervical muscle that was aggravated with flexion, rotation and bending. He further added that the “ongoing symptoms in the cervical and lumbar spine are associated with work activities which primarily involves sedentary work and computer work for the Department of Labor.” Dr. Graham reported on June 11, 1997 cervical and trapezius myofasciitis. He stated that appellant reported having a back injury due to a fall at work about three years earlier from which she asserted that she did not completely recover. Dr. Graham opined that appellant was totally disabled and incapable of performing her work. He recommended that she retire so that she could avoid “the factors that aggravated her pain at work.” Dr. Gregory Willett, a Board-certified psychiatrist, noted on June 27, 1997, that appellant was able to work only part time because her work space was too small. He opined that appellant had disabling post-traumatic stress disorder due to an “intolerable” employment situation. He also opined that appellant was 50 percent disabled due to recurrent back, shoulder and neck pain.

By decision dated January 6, 1998, the hearing representative denied the claim. The hearing representative determined that, although the claimed incidents occurred, as alleged, appellant failed to present rationalized medical evidence explaining why the claimed occupational disease was causally related to the factors of her federal employment.

On January 9, 1998 appellant, through her attorney, requested reconsideration. In support of her reconsideration request, appellant submitted the reports of Drs. Graham, Glousman and Cranford L. Scott. In a report dated October 8, 1997 and received by the Office on January 21, 1998, Dr. Graham diagnosed mild-to-moderate tenderness of both trapezii at shoulder girdle with spasm. He concluded that appellant was unable to carry out her usual and customary work duties due to persistent pain. In a report dated October 6, 1997 and received by the Office on January 21, 1998, Dr. Glousman diagnosed persistent symptomatic cervical strain and cervical radiculitis. Regarding industrial causation, he stated that the patient’s current complaints were in part due to her postural and ergonomic factors associated with work activities. He added that “absent any other mechanism which complainant has not brought forth to my attention, the current symptoms, findings on examination and need for medical care are attributable to her work-related injury sustained while working for the federal government.” In a report dated October 1, 1997 and received by the Office on January 21, 1998, Dr. Scott, a Board certified internist, examined appellant and diagnosed musculoskeletal pains with muscle spasms of her neck, shoulders, thoracic and dorsolumbar and paraspinous areas. Regarding causation, he noted that the history of the injury was consistent with the approximate causation. He noted that the “ergonomically undesirable and inappropriate workplace contributed to precipitation, acceleration and aggravation of the preexisting traumatic injury.”

By decision dated January 28, 1998, the Office denied appellant’s reconsideration request without conducting a merit review. The Office found that appellant’s attorney’s arguments were

cumulative and repetitious. The Office noted that the deficiency in appellant's claim related to medical evidence. The Office further noted that, although appellant's attorney indicated that he was providing additional medical evidence in support of reconsideration, the opinions of Drs. Scott, Glousman and Graham were not in the file or attached with the reconsideration request.

The Board finds that appellant has not met her burden of proof in establishing that she sustained an employment injury in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act¹ 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 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.² 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.³

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) a 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 was causally related to the employment factors identified by claimant. 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 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 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.⁴

In the instant case, the hearing representative determined that appellant established the first component of fact of injury, the occurrence of employment factors, such as improper placement of a monitor, a nonadjustable chair, a lack of wrist support and a cramped work space. However, the hearing representative then found that appellant submitted no medical opinion

¹ 5 U.S.C. §§ 8101-8193.

² *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁴ *Id.*

specifically addressing whether work factors caused or aggravated her claimed condition or otherwise establishing that the diagnosed condition was causally related to employment factors or conditions. As noted above submission of such medical evidence is part of appellant's burden of proof. Although Dr. Glousman diagnosed cervical strain and generally concluded that these conditions were associated with work activities, he did not provide a rationalized medical opinion, based upon reasonable medical certainty, that there was a causal connection between appellant's condition and any specific workplace factors.⁵ For example, Dr. Glousman did not provide medical reasoning explaining how her job caused or aggravated a specific medical condition.⁶ Dr. Graham diagnosed cervical and trapezius myofascitis and generally indicated that appellant's employment aggravated her condition but also failed to provide a rationale linking her medical condition with her employment. As appellant has failed to present a rationalized medical opinion, appellant, therefore, has failed to meet her burden of proof in establishing fact of injury.⁷ Likewise Dr. Willett did not provide medical rationale explaining how and why any particular condition was caused or aggravated by specific employment factors. In fact, both Drs. Graham and Glousman noted that appellant had a prior back injury and indicated that her current symptoms were consistent with those of the earlier injury. Neither doctor specifically addressed whether appellant's current symptoms may have been solely due to the prior condition.

The Board further finds that the case is not in posture for decision regarding whether the Office abused its discretion by refusing to reopen appellant's claim for consideration of the merits. The Board finds that the Office did not consider the evidence submitted in support of appellant's reconsideration request.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁸ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁹

The Board finds that appellant submitted new evidence to require a merit review under section 10.138(b)(1) of the Act.¹⁰

⁵ *Thomas L. Hogan*, 47 ECAB 323, 328-29 (1996).

⁶ *Id.*

⁷ *See Victor J. Woodhams*, *supra* note 3.

⁸ 20 C.F.R. § 10.138(b)(1).

⁹ 20 C.F.R. § 10.138(b)(2).

¹⁰ *William A. Couch*, 41 ECAB 548, 552-53 (1990).

The Act¹¹ provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.¹² Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision, it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.¹³ As Board's decisions are final as to the subject matter appealed,¹⁴ it is crucial that all evidence relevant to that subject matter which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.

In the instant case, the Office did not review evidence received prior to the issuance of its January 28, 1998 final decision, *i.e.*, Dr. Graham's October 8, 1997 letter, Dr. Glousman's October 6, 1997 report and Dr. Scott's October 1, 1997 report.¹⁵ The Board, therefore, must set aside the Office's January 28, 1998 order and remand the case to the Office to consider the evidence, which was properly submitted by appellant prior to the January 28, 1998 order. Following this and other such development deemed necessary, the Office shall issue an appropriate decision.

¹¹ 5 U.S.C. §§ 8101-8193.

¹² 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.130; *see generally* Federal (FECA) Procedure Manual, Part 2, Chapter 2-1602.8, Reconsideration, *Receipt of New Evidence in Burden of Proof Cases* (January 1990).

¹³ *See* 20 C.F.R. § 501.2(c).

¹⁴ 20 C.F.R. § 501.6(c).

¹⁵ The record contains identical letters from appellant's attorney dated January 9, 1998 in which he requested reconsideration and stated that new evidence was attached. The reconsideration request received by the Office on January 16, 1998, however, contained no new evidence. New medical evidence, however, accompanied the reconsideration request received by the Office on January 21, 1998.

The decision of the hearing representative dated January 6, 1998 is hereby affirmed. The decision of the Office of Workers' Compensation Programs dated January 28, 1998 is hereby set aside and the case is remanded for further action as set forth in this decision.

Dated, Washington, D.C.
February 1, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member