

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANA NICASTRO and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, Anchorage, AK

*Docket No. 00-890 Submitted on the Record;
Issued February 12, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
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 properly denied appellant's request for a review of the written record under section 8124 of the Federal Employees' Compensation Act.

On May 26, 1999 appellant, then a 34-year-old special agent, filed a notice of occupational disease and claim for compensation alleging that she sustained right wrist tendinitis and cervical thoracic dysfunction, with stiffness of right wrist, upper right shoulder, neck and lower back from working on her computer at work. On the reverse side of the form, the employing establishment stated that appellant did not stop work.

By letter dated July 8, 1999, the Office requested additional evidence from appellant, including a comprehensive medical report from her treating physician. By another letter dated July 8, 1999, the Office requested additional factual information from the employing establishment.

On July 16, 1999 the record was supplemented with office notes dated May 24, 1999 from Dr. Mary Demers who diagnosed right wrist tendinitis and cervical thoracic dysfunction.

By letter dated July 29, 1999, appellant replied to the Office's July 8, 1999 request for additional evidence. However, she did not submit the requested medical documentation. Appellant stated that she performs computer tasks of typing and manipulating the computer mouse daily, five days a week for four to six hours a day. She also stated that she does not participate in sports or any other activities that involve similar repetitive hand and wrist movements.

By letter dated August 13, 1999, the employing establishment responded to the Office's July 8, 1999 request for additional information. The employing establishment provided a copy of appellant's position description.

By decision dated September 18, 1999, the Office denied appellant's claim for failure to establish fact of injury. The Office found that appellant, a federal employee, filed a timely claim for compensation and that she experienced the claimed employment factors. However, the Office found that the evidence of record failed to demonstrate that a diagnosed condition was causally related to those employment factors.

By letter dated October 21, 1999, appellant requested a review of the written record by a hearing representative. By decision dated November 16, 1999, the Office's Branch of Hearings and Review denied appellant's request on the grounds that it was not filed within 30 days of the Office's last merit decision issued on September 18, 1999. The Office stated that it had considered the matter in relation to the issue involved and further denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence on reconsideration to establish that her injury was causally related to the identified factors of employment.

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained an injury in the performance of duty as alleged.

An employee seeking benefits under the Act 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 filed within the applicable time limitations 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 is causally related to the employment injury."¹ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.²

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 is causally related to the employment factors identified by the claimant.

In this case, appellant has not submitted sufficient medical evidence to establish that her claimed condition is causally related to the implicated employment factors. The record contains

¹ *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

² *David J. Overfield*, 42 ECAB 718, 721 (1991).

treatment notes from Dr. Demers which merely related appellant's complaint of right wrist pain and cervical dysfunction. There are no narrative reports from Dr. Demers which provide a full history, set forth findings on examination or provide a rationalized medical opinion relating any findings to appellant's federal employment, specifically her computer work as alleged. The Office advised appellant to submit additional medical evidence, including a rationalized medical opinion on the issue of causal relationship. The Board finds that appellant has not met her burden of proof based on the medical evidence of record.

The Board further finds that the Office properly denied appellant's request for a review of the written record under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a review of the written record before an Office hearing representative, provides in pertinent part: "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."³ 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.⁴

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, 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.⁵ Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,⁶ when the request is made after the 30-day period for requesting a hearing⁷ and when the request is for a second hearing on the same issue.⁸

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated September 18, 1999 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated October 21, 1999. Therefore, the Office was correct in finding in its November 16, 1999 decision that appellant was not entitled to a hearing as a matter of right because her request for a

³ 5 U.S.C. § 8124(b)(1).

⁴ *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

⁵ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁶ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁷ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁸ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

review of the written record was not made within 30 days of the Office's September 18, 1999 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office in its November 16, 1999 decision properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that the case could be resolved by submitting additional evidence to establish that she sustained a work-related injury. The Board has held that 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 deduction from established facts.⁹ In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a review of the written record under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated November 16 and September 18, 1999 are hereby affirmed.

Dated, Washington, DC
February 12, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).