United States Department of Labor
Employees' Compensation Appeals Board

EVELYN SIMS, Appellant	)	
and	)	**Docket No. 05-477**
	)	**Issued: July 25, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Dallas, TX, Employer	)	

Appearances:
Evelyn E. Sims, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 20, 2004 appellant filed an appeal from December 31, 2003, March 2, June 30, August 11 and December 7, 2004 merit decisions of the Office of Workers' Compensation Programs, finding that she did not establish a recurrence of disability and a November 5, 2004 decision, denying her request for a hearing under 5 U.S.C. § 8124. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the November 5, 2004 decision denying a hearing.

ISSUES

The issues are: (1) whether appellant has established that she sustained a recurrence of disability on April 1, 2003 causally related to her June 13, 2001 employment injury; and (2) whether the Office properly denied appellant's request for a hearing under section 8124.

FACTUAL HISTORY

On June 19, 2001 appellant, then a 54-year-old licensed vocational nurse, filed a claim for an injury occurring on June 13, 2001 when she caught a patient who was falling. The Office

accepted the claim for cervical, thoracic and lumbar strain. Appellant had intermittent periods of temporary total disability from June 14 to October 17, 2001.

On April 1, 2003 appellant filed a claim for compensation (Form CA-7) requesting compensation from that date onwards. She submitted a form report dated April 9, 2003 from Dr. Huntly G. Chapman, a Board-certified orthopedic surgeon, who noted findings of cervical, thoracic and low back pain and checked "yes" that the condition was caused or aggravated by employment. He found that appellant was partially disabled from June 14 to October 17, 2001. In an accompanying progress report of the same date, Dr. Chapman listed findings on examination and noted that he had requested a magnetic resonance imaging (MRI) scan of the lumbar and thoracic spine.

By letter dated May 5, 2003, the Office informed appellant of the definition of a recurrence of disability and requested additional factual information and a comprehensive medical report from her attending physician regarding her current condition and its relationship to her employment.

In a progress report dated May 5, 2003, Dr. Chapman discussed appellant's complaints of back and thigh pain, noted that the MRI scan of the lumbar and thoracic spine were negative and referred her for an electromyogram (EMG).

Dr. Chapman, in a letter to appellant dated May 19, 2003, noted that she awoke on March 21, 2003 with low back pain, pressure in her legs, burning in the buttocks and urinary urgency.[1] He indicated that she was diagnosed with a urinary tract infection, but did not have pain relief. Dr. Chapman stated:

> "The object[ive] findings w[ere] increasing muscle spasms in your back, your pain drawings showed increase in pain levels. Due to the fact that you have had no intervening accident or injury and due to the fact that you are having an increase in muscle spasm, it is my opinion that you have clearly convincing evidence that you had worsening in your work[ers'] compensation situation."

By decision dated June 4, 2003, the Office denied appellant's claim on the grounds that she did not establish that she sustained a recurrence of disability on April 1, 2003 causally related to her June 13, 2001 employment injury. The Office found that she had returned to light-duty work on July 11, 2001 and had not established a change in the nature and extent of her light-duty requirements or her injury-related condition.

On June 10, 2003 appellant requested reconsideration. She submitted a report dated June 3, 2003 from Dr. Chapman, who discussed her history of awakening on March 21, 2003

[1] Dr. Chapman signed a functional capacity evaluation dated May 14, 2003 which found that appellant could perform at the sedentary minus level and recommended work hardening.

with symptoms which included leg pressure and low back pain.[2] He found that appellant was unable to work due to her back pain and stated:

> "It is my considered opinion that, since you have not had any intervening accident or injury that you know of, you have had an exacerbation of your low back pain, which is work[ers'] comp[ensation] related."

In a form report dated June 27, 2003, Dr. Chapman noted the history of injury as appellant catching a patient who was falling and diagnosed cervical, thoracic and lumbar pain. He checked "yes" that the condition was caused or aggravated by employment and found that she was totally disabled beginning April 9, 2003. In a progress note of the same date, Dr. Chapman noted that appellant had a normal EMG.

By decision dated August 27, 2003, the Office denied modification of its June 4, 2003 decision.

On September 8, 2003 appellant requested reconsideration. In a statement dated September 9, 2003, she noted that following her injury she worked her regular employment duties and not limited duty as stated by the Office in its decisions.

In a progress note dated October 15, 2003, Dr. Chapman discussed appellant's complaints of back pain and listed findings on examination.

By decision dated November 7, 2003, the Office denied modification of its August 27, 2003 decision.

On November 28, 2003 appellant requested reconsideration, arguing that she worked at her usual employment duties following her injury. She submitted progress notes from Dr. Chapman dated November 17 and 28, 2003 listing his current findings on examination.

In a decision dated December 31, 2003, the Office denied modification of its prior decision.

In a report dated December 10, 2003 received by the Office on January 19, 2004, Dr. Chapman opined that appellant was "unfit for work due to intractable, chronic low back pain." He referred her to Dr. Fatma Gul, a Board-certified physiatrist, for treatment.

In a letter to appellant dated January 12, 2004, Dr. Chapman noted that she worked full duty until she became disabled on March 21, 2003. He discussed her complaints of back pain and listed findings on examination in a progress report of the same date.

On January 21, 2004 appellant requested reconsideration.

[2] In a progress report dated May 28, 2003, Dr. Chapman discussed appellant's complaints of neck and back pain and listed findings on examination.

In a report dated February 3, 2004, Dr. Gul discussed appellant's history of a June 2001 employment injury with a reoccurrence of pain in March 2003. She listed findings on examination and referred appellant for physical therapy.[3]

By decision dated March 2, 2004, the Office denied modification of the December 31, 2003 decision.

On March 31, 2004 appellant again requested reconsideration. She submitted reports from a physical therapist dated February and March 2004 and progress reports dated March 10, May 5 and June 2, 2004 from Dr. Chapman, which addressed her current complaints and listed findings on physical examination.

By decision dated June 30, 2004, the Office denied modification. Appellant requested reconsideration on July 28, 2004 and submitted a functional capacity evaluation signed by Dr. Chapman on May 28, 2003, which indicated that her condition was deteriorating. She also submitted a progress report from Dr. Chapman dated July 14, 2004 and a decision dated July 21, 2004 from the Social Security Administration (SSA), finding that appellant had a disability.

In a decision dated August 11, 2004, the Office denied modification of its prior merit decisions. On August 20, 2004 appellant requested an oral hearing before an Office hearing representative.

In a report dated August 30, 2004, Dr. Chapman discussed appellant's history of a June 13, 2001 employment injury when she caught a patient who was falling and "suffered immediate onset of low back pain." He noted that he released appellant to light-duty employment on July 18, 2001 but that she "decided to go ahead and work full duty" when she was told that light duty was not available. Dr. Chapman indicated that he evaluated her monthly until January 2, 2002. He stated:

> "You were not seen again in this office until April 9, 2003. By history, there was no new accident or injury noted. You explained to me that you had awakened on Friday, March 21, 2003 and had pressure on your legs, burning in your buttocks, urgency of urination, low back pain and you were unable to work that day."

He discussed in detail his treatment of appellant and stated:

> "In conclusion, there is no record or history of a new injury or accident having befallen you since your on-the-job injury at the [employing establishment] on June 13, 2001. It is well documented in the literature that having a traumatic event in which back pain is a result, exacerbations and remissions of back pain can occur indefinitely from that moment forward throughout the patient's lifetime.
>
> "It is my opinion, based upon my education, training and experience that, although you did not have any new injury, nor accident following your original

[3] In a progress report dated February 9, 2004, Dr. Chapman listed findings on examination.

> date of injury which was June 13, 2001, you did indeed have an exacerbation of pain due to the fact that you were working full duty when your functional capability, more likely than not, was less than your physical demand level required to perform the duties of your job.
>
> "That is to say that, although you were working full[-]time, full duty up until March 23, 2003, more likely than not, you were over your physical capability and thus, you exacerbated your back pain to the point of disability. Inasmuch as it is my considered opinion that you exacerbated your back pain, not aggravated your back pain (no new accident nor injury) your condition is directly related to your original injury of June 13, 2001."

Appellant also submitted additional physical therapy reports dated August and September 2004 and unsigned progress reports from Dr. Chapman dated August 13, September 17 and October 13, 2004.

In a decision dated November 5, 2004, the Office denied appellant's request for a hearing as she had previously requested reconsideration under section 8128 and as she could address the matter by submitting new evidence supporting that she had a recurrence of disability due to her accepted employment injury.[4]

On January 15, 2004 appellant requested reconsideration. She submitted an unsigned progress report from Dr. Chapman dated November 15, 2004.

By decision dated December 7, 2004, the Office denied modification of its August 11, 2004 decision. The Office noted that the only rationale provided by Dr. Chapman in his August 30, 2004 report was that exacerbations and remissions could occur with appellant's type of injury.

LEGAL PRECEDENT -- ISSUE 1

A "recurrence of disability" means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[5]

Office procedures state that a recurrence of disability includes a work stoppage caused by a spontaneous material change demonstrated by objective findings in the medical condition that resulted from a previous injury or occupational illness without an intervening injury or new exposure to factors causing the original illness. It does not include a condition that results from a new injury, even if it involves the same part of the body previously injured. Office procedures further state: "If a new work-related injury or exposure occurs, Form CA-1 [notice of traumatic

[4] The Office noted that the appeal rights accompanying its prior decision erroneously included the right to a hearing.

[5] 20 C.F.R. § 10.5(x).

injury] or Form CA-2 [notice of occupational disease or illness] should be completed accordingly."[6]

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her employment injury.[7] This burden 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 employment factors and supports that conclusion with sound medical reasoning.[8]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained cervical, thoracic and lumbar strain due to a June 13, 2001 employment injury. She had intermittent periods of total disability from June 14 to October 17, 2001, when she resumed her regular employment. On April 1, 2003 appellant filed a claim for compensation beginning that date.

In support of her claim for compensation, appellant submitted form reports from Dr. Chapman dated April 9 and June 27, 2003, in which he diagnosed cervical, thoracic and low back pain and checked "yes" that the condition was caused or aggravated by employment. The Board has held, however, that an opinion on causal relationship that consists only of checking "yes" to a form question has little probative value and is insufficient to establish causal relationship.[9]

Appellant further submitted numerous progress reports from Dr. Chapman dated May 5, 2003 to July 14, 2004. In his progress reports, Dr. Chapman discussed her complaints, listed findings on examination and recommended treatment. He did not, however, address the issue of causation and thus, his progress reports are insufficient to meet appellant's burden of proof. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of little probative value on the issue of causal relationship.[10]

In a letter to appellant dated May 19, 2003, Dr. Chapman discussed her history of awakening on March 21, 2003 with low back pain, leg pressure, burning in the buttocks and urinary urgency. He listed findings of increased muscle spasm and opined that she had a "worsening in [her] work[ers'] compensation situation" as she had not had any "intervening accident or injury…." Dr. Chapman did not, however, discuss the history of appellant's June 13, 2001 employment injury or provide a medical explanation of how her June 13, 2001 employment injury caused her to awaken with disabling back pain on March 21, 2003. A physician's opinion

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2)(e) (May 1997).

[7] *Carmen Gould*, 50 ECAB 504 (1999).

[8] *Alfredo Rodriquez*, 47 ECAB 437 (1996).

[9] *Gary J. Watling*, 52 ECAB 278 (2001).

[10] *Willie M. Miller*, 53 ECAB 697 (2002).

on causal relationship between a claimant's disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.[11]

In a report dated June 3, 2003, Dr. Chapman again related appellant's history of waking up on March 21, 2003 with leg pressure and disabling low back pain. He found that she had an exacerbation of her workers' compensation related low back pain. Dr. Chapman, however, did not specifically discuss appellant's accepted employment injury or provide any rationale for his opinion and thus, it is of diminished probative value.[12]

Dr. Chapman, in a report dated August 30, 2004, discussed appellant's history of a June 13, 2001 employment injury when she caught a patient who was falling and experienced low back pain. He stated that he released her to light-duty employment on July 18, 2001 but she returned to full duty after being told light-duty work was not available. Dr. Chapman indicated that on April 9, 2003 appellant returned to his office with a history of awakening March 21, 2003 with low back pain with no "new accident or injury noted." He reported that with appellant's employment injury, "exacerbations and remissions" could "occur indefinitely." Dr. Chapman found that she experienced an exacerbation of pain "due to the fact that [she] was working full duty when [her] functional capability, more likely than not, was less than [the] physical demand level required to perform the duties of [her] job." A recurrence of disability, however, is a work stoppage caused by "a spontaneous material change demonstrated by objective findings in the medical condition that resulted from a previous injury or occupational illness without an intervening injury or exposure to new factors causing the original illness."[13] Dr. Chapman attributed appellant's low back condition beginning April 1, 2003 to performing work outside of her physical capabilities. As he attributed her disability to exposure to new work factors and not to a "spontaneous change" in her accepted injury, his opinion does not support that she had a recurrence of disability.[14]

In a report dated February 3, 2004, Dr. Gul discussed appellant's June 2001 employment injury and noted that she had a reoccurrence of the pain in March 2003. She did not, however, provide a definite diagnosis or specifically relate appellant's disability to her accepted employment injury. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to her federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[15]

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[11] *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

[12] *See Lois E. Culver (Clair L. Culver*), 53 ECAB 412 (2002).

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b (January 1995).

[14] This decision of the Board does not preclude appellant from pursuing a claim of occupational disease.

[15] *Patricia J. Glenn*, 53 ECAB 159 (2001).

Regarding appellant's submission of reports from a physical therapist, the Board notes that these have no probative value as a therapist is not a physician as defined by 5 U.S.C. § 8101(2) of the Federal Employees' Compensation Act and, therefore, is not competent to render a medical opinion.[16] Additionally, the finding from the SSA that appellant is disabled is not determinative of her eligibility for benefits under the Act. Under the Act a claimant's disability for work must be causally related to an accepted employment-related injury or accepted factors of her federal employment.[17]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office 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 [her] claim before a representative of the Secretary."[18] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[19]

ANALYSIS -- ISSUE 2

In this case, the Office denied appellant's August 20, 2004 request for a hearing as she had already requested reconsideration under section 8128. She requested reconsideration on June 10, September 8 and November 28, 2003 and January 21, March 31 and July 28, 2004. In decisions dated August 27, November 7 and December 31, 2003 and March 2, June 30 and August 11, 2004, the Office declined to modify its prior finding that she had not established a recurrence of disability. Appellant, therefore, was not entitled to a hearing as a matter of right since the Office had previously reconsidered her claim under section 8128.

The Office then proceeded to exercise its discretion in accordance with Board precedent to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process. The Office, thus, properly denied appellant's request for a hearing as it was made after she requested reconsideration and properly exercised its discretion in determining to deny her request for a hearing as she had other review options available.[20]

[16] 5 U.S.C. § 8101(2); *James Robinson, Jr.*, 53 ECAB 417 (2002).

[17] *Michael A. Deas*, 53 ECAB 208 (2001).

[18] 5 U.S.C. § 8124(b)(1).

[19] *See Claudio Vazquez*, 52 ECAB 496 (2001).

[20] *Id*.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability on April 1, 2003 causally related to her June 13, 2001 employment injury. The Board further finds that the Office properly denied her request for a hearing under section 8124 as she had previously requested reconsideration of her claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 7, November 5, August 11, June 30 and March 2, 2004 and December 31, 2003 are affirmed.

Issued: July 25, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member