

**United States Department of Labor  
Employees' Compensation Appeals Board**

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G.S., Appellant )

and )

**DEPARTMENT OF VETERANS AFFAIRS,**  
**JAMES A. HALEY HOSPITAL, Tampa, FL,**  
**Employer** )

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**Docket No. 06-1905**  
**Issued: February 28, 2007**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 14, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated January 10, 2006 and a nonmerit decision dated June 12, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction both the merit and nonmerit issues in this case.

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof in establishing that she developed a herniated disc due to factors of her federal employment; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

**FACTUAL HISTORY**

On November 22, 2005 appellant, then a 36-year-old nurse, filed a notice of occupational disease alleging that she had developed a herniated disc due to the wear and tear of working

prolonged periods at the computer and reaching forward to handle calls. Appellant first became aware of her condition on October 22, 2005 and attributed her condition to her employment on that date.

In a letter dated December 1, 2005, the Office requested additional factual and medical evidence in support of appellant's claim and allowed her 30 days for a response.

Norma Figueroa, appellant's supervisor, submitted a statement dated November 23, 2005 noting that appellant did not report any difficulties until October 26, 2005. She stated that appellant initially denied that her neck condition was employment related. Ms. Figueroa noted that appellant had previously received treatment for episodic neck pain and suggested that she had a preexisting nonemployment-related neck condition.

Appellant responded to the Office's request for information on December 2, 2005. She attributed her neck condition to constant repetitive movements and tasks while working in a stationary position at a computer. Appellant also implicated her employment duties of reaching for the telephone, cradling the telephone between her neck and shoulders, typing on the computer and writing reports with few breaks. She noted that her pain and discomfort began on October 22, 2005 and that she had sought treatment for episodes of neck pain beginning in 2004.

Dr. Rodolfo D. Eichberg, a physician Board-certified in physical medical and rehabilitation, completed a note on October 24, 2005. He described appellant's onset of pain three days earlier as she was getting out of bed. Dr. Eichberg diagnosed acute cervical strain. He reviewed appellant's magnetic resonance imaging (MRI) scan on November 4, 2005 and found a central disc herniation at C5-6. Dr. Eichberg stated: "It is definitely worse that it was on a previous MRI [scan] of February of 2004." In reports dated November 30, 2005, he again diagnosed a central disc herniation at C5-6. Dr. Eichberg indicated that appellant's condition commenced on October 22, 2005 and that he expected the condition to continue through October 22, 2006. He did not offer an opinion regarding the cause of appellant's diagnosed condition. Dr. Eichberg recommended surgery.

In a statement dated December 20, 2005, appellant again attributed her cervical disc herniation to repetitive movements at work. She implicated reaching for the telephone across her desk, cradling the telephone between her neck and shoulders, typing on a computer for extended periods of time and writing reports with few breaks. Appellant noted in 2000 she was diagnosed with a herniated disc at L4, L5-S1. Appellant stated that she had not undergone any back surgery or treatment for other injuries.

Appellant submitted treatment notes from Dr. Eichberg beginning on March 2, 2000 addressing her low back pain. On January 30, 2004 Dr. Eichberg mentioned that appellant was experiencing occasional neck pain with periscapular radiation. He reviewed appellant's MRI scan on April 23, 2004 and found that she had reversal of the normal cervical lordosis with mild spondylosis at C5-6 and no evidence of focal disc herniation or spinal stenosis. In a note dated July 8, 2004, Dr. Eichberg reported appellant's complaints of severe neck pain and stiffness two weeks earlier. He stated that appellant was not sleeping well due to her neck pain.

By decision dated January 10, 2006, the Office denied appellant's claim finding that the medical evidence did not establish that her cervical condition was related to her employment duties.<sup>1</sup>

Appellant requested a review of the written record from the Branch of Hearings and Review on February 10, 2006. By decision dated June 12, 2006, the Branch of Hearings and Review denied appellant's request for a review of the written record as untimely. The hearing representative noted that appellant's request was postmarked more than 30 days after the Office's January 10, 2006 decision. The hearing representative further found that the case could equally well be addressed through the reconsideration process.

### **LEGAL PRECEDENT -- ISSUE 1**

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 a the disease or condition for which compensation is claimed; (2) a factual statement identifying the 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 diagnosed condition is causally related to the employment factors identified by the claimant. The medical opinion 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.<sup>2</sup>

### **ANALYSIS -- ISSUE 1**

In support of her occupational disease claim, appellant submitted evidence from Dr. Eichberg, a physician Board-certified in physical medical and rehabilitation. He diagnosed a herniated disc at C5-6. Appellant alleged that she developed this herniated disc due to her employment duties of working at a computer, answering the telephone and completing reports as well as due to the wear and tear of working prolonged periods. The evidence of record is sufficient to establish that she performed such duties in her federal employment. However, appellant has failed to provide sufficient medical evidence establishing a causal relationship between her diagnosed cervical condition to her employment duties. None of the reports from Dr. Eichberg address the cause of appellant's herniated disc. He noted that appellant had experienced neck pain as early as January 30, 2004. The MRI scan in the spring of that year demonstrated reversal of the normal cervical lordosis with mild spondylosis at C5-6 and no evidence of focal disc herniation or spinal stenosis. Appellant sought treatment for her neck again on July 8, 2004. In the first report following appellant's most recent onset of neck pain, October 22, 2005, Dr. Eichberg merely noted that this onset occurred at home. He did not mention the employment factors to which appellant attributed her condition or offer any opinion regarding the relationship between these factors and appellant's diagnosed herniated disc. There

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<sup>1</sup> Following the Office's January 10, 2006 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

<sup>2</sup> *Solomon Polen*, 51 ECAB 341, 343-44 (2000).

is no opinion from Dr. Eichberg which addresses how appellant's work caused or contributed to her diagnosed condition. Without the essential medical opinion evidence regarding the causal relationship between appellant's condition and her employment, appellant has failed to meet her burden of proof. The Office properly denied her claim.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of the Federal Employees Compensation Act provides in pertinent part as follows:

“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 issuance of the decision, to a hearing on his claim before a representative of the Secretary.”<sup>3</sup>

The claimant can choose between two formats: an oral hearing or a review of the written record.<sup>4</sup> The requirements are the same for either choice.<sup>5</sup> The Board has held that section 8124(b)(1) is “unequivocal” in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking<sup>6</sup> and before the claimant has requested reconsideration.<sup>7</sup> However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record and must exercise this discretion.<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

The Office issued its decision on appellant's claim on January 10, 2006. Appellant requested a review of the written record in a form postmarked February 10, 2006. This form was postmarked 31 days after the issuance of the Office's decision. As the request for a review of the written record was not timely postmarked within the 30 day period, appellant is not entitled to a review of the written record as a matter of right. Furthermore, in denying appellant's request for a review of the written record, the hearing representative properly exercised his discretion and found that appellant's claim could equally well be addressed through the submission of additional evidence in the reconsideration process. As appellant's request for a review of the written record was untimely and as the hearing representative exercised his discretion in denying the request, the Board finds that this denial was proper.

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<sup>3</sup> 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

<sup>4</sup> 20 C.F.R. § 10.615.

<sup>5</sup> *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

<sup>6</sup> 20 C.F.R. § 10.616(a). *Tammy J. Kenow*, 44 ECAB 619 (1993).

<sup>7</sup> *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

<sup>8</sup> *Id.*

**CONCLUSION**

The Board finds that appellant has not submitted medical evidence to establish a causal relationship between her diagnosed herniated cervical disc condition and her federal employment duties. Appellant has failed to meet her burden of proof in establishing an occupational disease claim. The Board further finds that appellant's request for a review of the written record was untimely and that the Branch of Hearings and Review properly exercised its discretion in denying her request.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 12 and January 10, 2006 are affirmed.

Issued: February 28, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board