U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA T. AUGUSTUS and U.S. POSTAL SERVICE,
POST OFFICE, Baton Rouge, La.

Docket No. 96-1523; Submitted on the Record;
Issued July 24, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation effective May 31, 1995 based on her refusal to accept suitable employment in accordance with 5 U.S.C. § 8106(c); (2) whether appellant has established that she sustained a right shoulder injury as a consequential injury of her accepted left carpal tunnel syndrome; and (3) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124 as untimely.

On March 12, 1991 appellant, then a 37-year-old mailhandler, filed a claim for carpal tunnel syndrome of the left wrist. The Office accepted appellant's claim for left-sided carpal tunnel syndrome and authorized a left carpal tunnel release which was performed on December 24, 1991. Appellant returned to part-time limited-duty employment.

By letter dated October 28, 1993, the Office referred appellant to Dr. Raeburn Llewellyn, a Board-certified neurosurgeon, for a second opinion evaluation. In a report dated February 7, 1994, Dr. Llewellyn found that appellant had symptoms of a torn right rotator cuff, but that she did not have further "persistence of carpal tunnel entrapment at the wrist…."

By decision dated March 21, 1994, the Office determined that appellant's position as a part-time modified mailhandler effective February 26, 1993 fairly and reasonably represented her wage-earning capacity and reduced her compensation accordingly

In a letter dated June 22, 1994, the Office requested that Dr. Andrew T. Kucharchuk, a Board-certified orthopedic surgeon and appellant's attending physician, discuss whether appellant could return to work for eight hours per day. The Office noted that appellant was currently working for six hours per day.

In a report dated October 18, 1994, Dr. Kucharchuk found that appellant continued to have bilateral carpal tunnel syndrome and opined that she could work for eight hours per day in a sedentary to light-duty capacity. He stated:

> "[Appellant] can lift 10 pounds frequently, up to 10 [pounds] continually, 10 [to] 20 [pounds] frequently and she cannot lift more than 20 [pounds]. She can carry 0-10 pounds occasionally. She can carry up to 10 [pounds] frequently and occasionally she can carry 20 [pounds]. She can frequently squat [and] crawl. The only restriction I have is that she cannot work over her right shoulder. She can use her hands for firm grasp, but she cannot use them for fine manipulation. She still has the residual of a carpal tunnel syndrome. She has no restrictions around unprotected heights, moving machinery, changes in temperature and humidity."
>
> "I do think at this time, [appellant] can return to her former job. I think that she can stand, walk and sit up to eight hours with interruption. I think that her main problem is in the area of the carpal tunnel. I think that she has residual carpal tunnel syndrome and a rotator cuff tear with a rotator cuff tendinitis, which is probably partial thickness. The only restriction that I would have on her is not lifting her hand over her shoulder."

By letter dated February 3, 1995, appellant informed the Office that she had sustained a consequential injury to her right shoulder causally related to her bilateral carpal tunnel syndrome.[1]

By letter dated March 3, 1995, the employing establishment offered appellant a position as a modified mailhandler in accordance with Dr. Kurcharchuk's medical restrictions.

By letter dated March 3, 1995, the Office informed appellant that the position of modified mailhandler was found to be suitable and provided her 30 days, within which to accept the position or provide reasons for her refusal.

At a telephone conference, held on March 9, 1995 among appellant, the Office and the employing establishment, the details of the offered position were further discussed.

In a report of termination of disability and/or payment (Form CA-3), the employing establishment indicated that appellant returned to work on March 20, 1995. An attached note indicated that appellant did not show up for work but was off on leave.

In a report dated April 11, 1995, Dr. Kucharchuk diagnosed bilateral impingement syndrome and found that appellant could "probably return to work."

Appellant did not return to work.

[1] The Office accepted only left-sided carpal tunnel syndrome as employment related. The record indicates that appellant filed a traumatic injury claim alleging that she injured her right shoulder in the course of a second opinion evaluation. The Office denied the claim.

By decision dated May 31, 1995, the Office terminated appellant's compensation benefits effective that date based on her refusal to accept suitable employment.

In progress reports from June and July 1995, Dr. Kucharchuk treated appellant for bilateral residual carpal tunnel syndrome and found that she could "probably return to work now, provided she does not do repetitive type movements at work."

In a report dated August 1, 1995, Dr. Kucharchuk noted that appellant was currently disabled.

In a report dated August 11, 1995, Dr. Kucharchuk found that appellant could return to light-duty employment. He diagnosed cumulative trauma disorder and stated that appellant "developed a rotator cuff tendinitis, for which she is predisposed, because she has a Type 3 acromion." Dr. Kucharchuk further indicated that much of the medical community was of the opinion that cumulative trauma disorder did not exist, in which case "more likely that not none of the conditions that [appellant] or any of the other [employing establishment] employees have are work-related."

By letter dated August 29, 1995, appellant informed the Office that she did not refuse the offered position but was out on sick leave and had so notified the employing establishment. Appellant requested reconsideration of the Office's termination of her benefits.

By letter dated October 4, 1995, the Office requested that appellant submit a rationalized medical opinion from Dr. Kucharchuk discussing the relationship between her right shoulder condition and her accepted employment-related left carpal tunnel syndrome.

By decision dated October 23, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. In the accompanying memorandum to the Director, incorporated by reference, the Office found that appellant had not provided the employing establishment with sufficient documentation regarding the reason she did not return to work.

In a report dated December 1, 1995, Dr. Kucharchuk attributed appellant's right shoulder impingement syndrome, bilateral carpal tunnel and cervical strain to her employment and stated:

> "[Appellant] has impingement syndromes in both shoulders, but her right is worse than her left. It should also be noted that the shoulder symptomatology is related to her work activity. Therefore, I do feel that [appellant] qualifies for only sedentary work. This means that she cannot do repetitive motion at work with either her right or left hands, nor can she lift overhand with her right and left shoulders. Compounded with this is a chronic cervical strain, which is also related to the over-use syndromes of the upper extremity."

By decision dated January 10, 1996, the Office denied appellant's claim for a consequential injury on the grounds that the evidence failed to establish that she sustained a right shoulder condition causally related to her left-sided carpal tunnel syndrome.

By letter dated February 18, 1996, postmarked February 19, 1996, appellant requested a hearing before an Office hearing representative regarding the Office's January 10, 1996 decision. The Office denied appellant's request by decision dated March 25, 1996, after finding that her request for a hearing was untimely as it was not made within 30 days of the prior decision.

The Board finds that the Office properly terminated appellant's compensation under 5 U.S.C. § 8106(c) based on her refusal to accept suitable employment.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him or her is not entitled to compensation.[2] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific requirements of the position.[3] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty position, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.[4]

The determination of whether appellant is capable of performing the offered position is a medical question that must be resolved by medical evidence.[5] The Board finds that the probative medical evidence establishes that the position offered was within appellant's medical restrictions.

In a report dated October 18, 1994, Dr. Kucharchik, appellant's attending physician, found that she could work for 8 hours per day with restrictions on lifting no more than 20 pounds, carrying up to 10 pounds frequently and 20 pounds occasionally and not working above her right shoulder. He further found that she could continuously stand, walk and sit up to eight hours. The employing establishment offered appellant a position as a modified mailhandler for eight hours per day in accordance with Dr. Kucharchuk's restrictions.

The record, therefore, contains probative medical evidence, which establishes that appellant was physically capable of performing the modified mailhandler position. Following the termination of her benefits, appellant submitted progress reports dated June and July 1995, from Dr. Kucharchuk, who stated that he had treated appellant for bilateral residual carpal tunnel syndrome and found that she could "probably return to work now, provided she does not do repetitive type movements at work." In a report dated August 1, 1995, Dr. Kucharchuk noted that appellant was currently disabled. Dr. Kucharchuk, however, did not opine that appellant

[2] 5 U.S.C. § 8106(c)(2).

[3] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[4] *Glen L. Sinclair*, 36 ECAB 664 (1985).

[5] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

was unable to perform the position of modified mailhandler and thus his reports do not establish that the position offered appellant was not medically suitable.

Accordingly, the Board finds that the medical evidence establishes that appellant was capable of performing the position of modified mailhandler. It is, as noted above, the Office's burden to establish that the job offered was suitable and the Office has met its burden in this case. Having been offered a suitable job, appellant must show that her refusal of the position was reasonable or justified.[6] In the present case, appellant indicated that she did not decline the modified mailhandler position, but rather did not return to work because she was sick. Appellant, however, did not submit any probative medical evidence in support of her claim that she was physically unable to return to work and thus the Office properly determined that the she was not justified in failing to perform suitable work.

The Board further finds that appellant has not established that she sustained a right shoulder injury as a consequential injury of her accepted left carpal tunnel syndrome.

The general rule respecting consequential injuries as expressed by Larson is that "when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributed to claimant's own intentional conduct."[7] The subsequent injury "is compensable if it is the direct and natural result of a compensable primary injury."[8] With regard to consequential injuries, the Board has stated that where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation, to arise out of and be in the course and is compensable.[9] However, an employee who asserts that a nonemployment-related injury was a consequence of a previous employment-related injury, one has the burden of proof to establish that such was the fact.[10]

In this case, appellant alleged that she sustained a consequential injury to her right shoulder causally related to her carpal tunnel syndrome. The Office accepted that appellant sustained carpal tunnel syndrome on the left side due to factors of her federal employment. The Office requested that appellant submit a rationalized medical opinion from her attending physician discussing the relationship between her right shoulder condition and her accepted employment injury.

In a report dated October 18, 1994, Dr. Kucharchuk diagnosed residual carpal tunnel syndrome and a rotator cuff tear. He noted that appellant complained of pain in her hands and right shoulder following a physical examination on July 19, 1994. He stated, "I do think that

---

[6] *See* 20 C.F.R. § 10.124(c).

[7] Larson, *The Law of Workmen's Compensation* § 13.00.

[8] *Id*. at § 13.11.

[9] *Margarette B. Rogler*, 43 ECAB 1034 (1992).

[10] *Id*.

[appellant] was predisposed to having problems with her rotator cuff before the accident. I think that the purported incident probably made symptomatic an asymptomatic condition…." As Dr. Kucharchuk does not relate appellant's shoulder problems to her left carpal tunnel syndrome but rather to an incident occurring on July 19, 1994, his report is insufficient to meet her burden of proof.

In a report dated August 11, 1995, Dr. Kucharchuk found that appellant could return to light-duty employment. He diagnosed cumulative trauma disorder and indicated that much of the medical community did not believe that cumulative trauma disorder existed, in which case "more likely that not none of the conditions that [appellant] or any of the other [employing establishment] employees have are work-related." As Dr. Kucharchuk does not relate appellant's shoulder problem to her left carpal tunnel syndrome and further opines that appellant's problem may not be employment related, his report does not support appellant's claim for a consequential injury.

In a report dated December 1, 1995, Dr. Kucharchuk related appellant's right shoulder condition, bilateral carpal tunnel syndrome and cervical strain to her employment and found that she could only perform sedentary employment. Dr. Kucharchuk, however, did not relate appellant's shoulder condition to her left-sided carpal tunnel syndrome, the only condition accepted by the Office as employment related, did not discuss the specific factors of her employment, to which he attributed the diagnosed conditions and provided no rationale for his opinion.[11] Appellant, thus, has not submitted sufficient evidence to establish that her right shoulder impingement syndrome was the "direct and natural" result of her accepted employment injury.

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

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that: "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."[12] 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.[13]

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. 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

[11] *William C. Thomas*, 45 ECAB 591 (1994).

[12] 5 U.S.C. § 8124(b)(1).

[13] *Frederick D. Richardson*, 45 ECAB 454 (1994).

amendments to the Act, which provided the right to a hearing,[14] when the request is made after the 30-day period established for requesting a hearing,[15] or when the request is for a second hearing on the same issue.[16] 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.[17]

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 January 10, 1996 and thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated February 18, 1996 and postmarked February 19, 1996. Hence, the Office was correct in stating in its March 25, 1996 decision, that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's January 10, 1996 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 January 10, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by requesting reconsideration and submitting additional evidence to establish that she sustained a consequential 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.[18] 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 hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

[14] *Rudolph Bermann*, 26 ECAB 354 (1975).

[15] *Herbert C. Holley*, 33 ECAB 140 (1981).

[16] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[17] *Sandra F. Powell*, 45 ECAB 877 (1994).

[18] *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs dated March 25 and January 10, 1996, October 23 and May 21, 1995 are hereby affirmed.

Dated, Washington, D.C.
July 24, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member