U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CURTIS MOORE and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, PUGET SOUND NAVAL SHIPYARD, Bremerton, Wash.

Docket No. 96-1032; Submitted on the Record;
Issued June 26, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) the Office of Workers' Compensation Programs properly denied appellant's claim for disability beginning April 16, 1993, due to his employment-related injury; and (2) whether the Office properly refused appellant's request for an oral hearing.

On February 8, 1990 appellant, then a 62-year-old pipefitter, filed a claim for a back strain on February 7, 1990 from being in an awkward and cramped position for seven hours while he was cutting a pipe. Appellant had a history of employment-related back strains superimposed on an underlying condition of degenerative disc disease.[1] He was treated at the employing establishment clinic following each of his back strains and was placed on limited light-duty assignments. After the February 7, 1990 injury, he was treated by Dr. Mark Sugiomoto, a Board-certified family practitioner, who diagnosed a lumbar strain with L5 right radicular symptoms and recommended no heavy lifting. Appellant performed light duty and was referred for diagnostic testing which confirmed degenerative disc disease at L3-5 with a central disc protrusion at L4-5 and nerve root compression.

On June 12, 1990 the Office accepted appellant's claim for a back strain and paid wage-loss compensation. The record indicates that appellant continued to be paid compensation

[1] Appellant claimed back and shoulder pain resulting from a fall at work on December 9, 1985, while working in an awkward position. He was off work for intermittent hours for a couple of months with three weeks of heat massage and ultrasound treatment. Dr. Richard F. Ambur, a Board-certified orthopedic surgeon, diagnosed a back strain which aggravated his underlying degenerative disc disease. Under claim number A14-210476 the Office accepted appellant's claim for thoracic strain due to the fall at work on December 9, 1985. Appellant worked for several months until stopping work for one week, due to back pain from lifting a piece of pipe weighing between 70 and 80 pounds. Under claim number A14-213480 the Office accepted his claim for a low back strain on April 8, 1986. The following year the Office accepted under claim number A14-224480 a back strain on August 29, 1987 from prying on a pipe, with no time lost from work. Four months later, the Office accepted under claim number A14-228483, a back strain at work on December 28, 1987 from prying and pushing a large wrench, with two days off from work.

for a two-month period in the summer of 1990, based on the lack of availability of light-duty work.

Appellant remained under the care of Dr. Sugiomoto, who referred appellant for neurologic evaluation, as well as physical therapy treatment and orthopedic evaluation.[2] Dr. Sugiomoto recommended permanent work restrictions in August 1991. Through a fitness for duty evaluation in September 1992, appellant was placed on permanent work restrictions. The following year, appellant was evaluated by Dr. Paul Williams, a Board-certified orthopedic and Office referral physician, who reported that the employment injuries had aggravated his underlying disc disease.

On April 13, 1993 appellant filed a notice of a recurrence of total disability based on his placement into a nonpay status effective April 16, 1993, due to the lack of work. He submitted a report from Dr. Sugiomoto, who supported continued work restrictions.

A telephone call to the emloying establishment confirmed that appellant was placed in a nonpay status effective April 16, 1993, because of a reduction in force. Appellant filed for disability retirement with the Office of Personnel Management, which was approved on November 5, 1993.[3]

Following an initial March 21, 1994 decision which denied appellant's request for benefits, the Office developed the case through obtaining further factual and medical information.[4] Based on a report by Dr. William G. Boettcher, a Board-certified orthopedic surgeon and Office referral physician, the Office accepted appellant's claim for aggravation of degenerative disc disease at L4-5.[5]

In a further statement, appellant noted his preferences in continuing to work if there had been work available, and in receiving wage-loss compensation as opposed to the retirement benefits which he received since November 1993. He submitted the notice of lack of work he received from the employing establishment which stated that "due to a declining workload in Shop 56" he was placed on a nonpay status. The notice indicated that he would be contacted once there was work, pursuant to the on-call agreement he had signed earlier in his employment.

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[2] While the diagnostic studies showed nerve root compression at the left, appellant's primary complaints of radiculopathy were on the right side. A neurologist who evaluated appellant in 1991 diagnosed right lateral femoral cutaneous nerve compression due to the twisted posture on February 7, 1990. Following an orthopedic consultation in August 1991, appellant was provided with a back corset.

[3] In November 1993, appellant underwent further evaluation by Dr. Paul F. Williams, a Board-certified orthopedic and Office referral physician, who indicated that appellant had sustained some amount of aggravation on his underlying degenerative disc condition from the employment injuries.

[4] An Office hearing representative directed a second opinion referral examination, in addition to obtaining further evidence surrounding the circumstances of appellant's work stoppage on April 16, 1993.

[5] Dr. Boettcher related appellant's stooping in a crouched position for a number of hours on February 7, 1990 to his disc protrusion and stenosis in an already compromised area. He reported the possibility of the need for surgical decompression at the L4-5 disc level.

The employing establishment submitted a copy of the notification of personnel action, which indicated, "reason for placement in nonpay status: lack of work." The employing establishment reported that even if appellant had not retired on disability, it was unlikely he would have been called to work because "[t]here simply was not enough work." In a subsequent statement, appellant's supervisor described the work appellant performed in Shop 56, where he was "typically assigned to inside shop duties doing bench work [and] some shipboard duties within his prescribed physical limitations." The supervisor noted that appellant, like all on-call employees in Shop 56 were "placed in a non-pay status in accordance with his on-call work schedule [which] was based on a declining workload in Shop 56." The supervisor stated, "[t]he placement in nonpay was a condition of [appellant's] employment and was unrelated to his physical conditions or limitations."

By decision dated October 12, 1995, the Office denied appellant's claim for wage-loss compensation benefits effective April 16, 1993. The Office found that appellant's position was suitable and represented his wage-earning capacity, and that his release from employment was administrative in nature, unrelated to his injury.

In a January 3, 1996 letter, received by the Office on January 12, 1996, appellant requested an oral hearing.

By decision dated June 20, 1996, the Office denied appellant's request for an oral hearing on the grounds that his request was not within the 30-day time limitation and that the issue could be resolved by further factual evidence establishing the job as not suitable.

The Board finds that the Office properly denied appellant's claim for disability beginning April 16, 1993, due to his employment-related injury.

In this case, the Office initially accepted appellant's claim for a back strain resulting from a February 7, 1990 work incident. Three years later when appellant was released from work due to lack of work, he filed for disability retirement which was approved. Subsequently however, upon further medical development, the Office accepted appellant's claim for an aggravation of his underlying disc disease due to the February 7, 1990 work incident. While appellant is entitled to payment of continued medical treatment for the accepted aggravation of his underlying disc disease, the evidence of record does not establish entitlement to wage-loss compensation.

Office procedures provide that in the circumstances of a withdrawal of light-duty work or temporary offer of employment, the employing establishment should provide information on the circumstances surrounding the lack of work.[6] The procedures distinguish a reduction-of-force from the withdrawal of light-duty work, by noting that a reduction-of-force affects both full-duty and light-duty employees alike. The personnel document on which the removal was based is evidence of whether the employee was released due to a reduction-of-force or whether the light-duty work was withdrawn from the employee.[7] Office procedures provide for a retroactive

[6] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.9 (December 1995).

[7] *Id.*

loss of wage earning capacity determination upon a finding that the claimant was employed for at least 60 days.[8]

The personnel document on which the removal was based lists "lack of work" as the cause of appellant's nonpay status beginning April 16, 1993. In addition, the statement from appellant's supervisor is evidence of the reduction of force effective in Shop 56, applicable to all on-call employees. The supervisor specifically addressed the lack of work beginning April 16, 1993 and indicated that it was not a function of appellant's injury, but a function of that shop, and that the reduction applied to all on-call employees equally. Under these circumstances, the Board finds that the evidence establishes no basis for wage-loss compensation beginning April 16, 1993. As there is no evidence to establish that appellant's position was seasonal or temporary, the Board finds that the actual earnings he received prior to April 16, 1993 reasonably and fairly represented his wage-earning capacity.[9]

The Board further finds that the Office properly refused appellant's request for an oral hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "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."[10] The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings…."[11] The Office's procedures implementing this section are found in the Code of Federal Regulations at 20 C.F.R. §10.131(a). The regulations state that a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made prior to requesting a hearing, or if a written review of the record by an Office hearing representative has already taken place.[12]

In the instant case, appellant requested an oral hearing by letter dated January 3, 1996, which was more than 30 days after the October 12, 1995 decision. Accordingly, the Board finds that the Office properly found appellant's January 3, 1996 letter to be untimely.

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 has held that the Office must exercise its discretion in such cases.[13] The Office shall determine whether a discretionary hearing should be granted and,

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[8] *Id.*

[9] *Id.*

[10] 5 U.S.C. § 501.2(c).

[11] *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

[12] 20 C.F.R. § 10.131(a); *See Robert Lombardo*, 40 ECAB 1038 (1989); *Shirley A. Jackson*, 39 ECAB 540 (1988).

[13] *See, e.g., Mary B. Moss*, 40 ECAB 640 (1989) (untimely request); *Johnny S. Henderson*, 34 ECAB 216 (1982)

if not, shall so advise the claimant with reasons.[14] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when no legal provision is made for such hearings, are a proper interpretation of the Act and of Board precedent.[15]

In its June 20, 1996 decision, the Office properly advised appellant that he may submit additional evidence through the reconsideration process, on the issue of suitability of the job which he performed prior to being placed on a nonpay status. The Board has held that the denial of a hearing on this ground represents a proper exercise of the Office's discretionary authority.[16]

The decisions of the Office of Workers' Compensation Programs dated October 12, 1995 and June 20, 1996 are hereby affirmed.

Dated, Washington, D.C.
June 26, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

(request for a second hearing); *Rudolph Bermann*, 26 ECAB 354 (1975) (injury occurring prior to effective date of the statutory amendments providing right to hearing).

[14] Federal (FECA) Procedure Manual, Part 2 -- *Claims, Hearings and Reviews of the Written Record*, Chapter 2.1601.4b3 (October 1992).

[15] *See Jeff Micono*, 39 ECAB 617 (1988); *Henry Moreno*, 39 ECAB 475 (1988).

[16] *See Robert Lombardo*, *supra* note 12.