U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NATHAN GREEN and U.S. POSTAL SERVICE,
POST OFFICE, Berlin, N.J.

Docket No. 97-275; Submitted on the Record;
Issued October 2, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained a recurrence of disability on or after June 19, 1995 causally related to his March 7, 1995 employment injury; and (2) whether the Office of Worker's Compensation Programs abused its discretion in denying appellant's request for an oral hearing.

The Board has duly reviewed the case record in this appeal and finds that appellant has failed to meet his burden of proof to establish that he sustained a recurrence of disability on or after June 19, 1995 causally related to his March 7, 1995 employment injury

On March 9, 1995 appellant, a letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 7, 1995 he experienced sharp pains in his back while carrying the mail. Appellant stopped work on March 8, 1995. Appellant returned to light-duty work for eight hours per day on May 31, 1995.

On April 21, 1995 the Office accepted appellant's claim for cervical and lumbosacral sprain.

On June 29, 1995 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability on June 19, 1995 while picking up a parcel. Appellant stopped work on June 19, 1995. Appellant returned to limited-duty work for four hours per day on August 22, 1995.[1]

By decision dated October 10, 1995, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability on or after June 19, 1995 causally related to the March 7, 1995 employment injury.

[1] Appellant stopped work on September 12, 1995 and returned to work on March 16, 1996.

In letters dated November 9, 1995 and January 5, 1996, appellant, through his counsel, requested reconsideration of the Office's October 10, 1995 decision.

By letter dated February 5, 1996, the Office advised appellant to request for reconsideration as outlined in the October 10, 1995 decision.[2]

In a March 14, 1996 letter, appellant, through his counsel, requested reconsideration of the Office's October 5, 1995 decision. In a July 1, 1996 letter, appellant, through his counsel, requested an oral hearing before an Office representative.

By decision dated August 1, 1996, the Office denied appellant's request for a hearing as untimely pursuant to 5 U.S.C. § 8124. The Office further denied appellant's request for a hearing on the grounds that the issue in the case could equally well be addressed by requesting reconsideration from the district office and submitting evidence not previously considered, which established that the claimed condition was causally related to the employment injury.

Appellant filed this appeal to the Board on October 8, 1996.

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability by the weight of substantial, reliable and probative evidence and to show that he or she cannot perform the light duty.[3] As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.[4]

In the present case, appellant has neither shown a change in the nature and extent of his injury-related condition or a change in the nature and extent of the light-duty requirements. The record shows that following the March 7, 1995 employment-related cervical and lumbosacral sprain, appellant returned to work in a light-duty capacity with certain work restrictions. The record does not establish, nor does appellant allege, that the claimed recurrence of total disability was caused by a change in the nature or extent of the light-duty job requirements.

The medical evidence of record is insufficient to establish that appellant was disabled from his light-duty position due to a change in the nature or extent of his accepted March 7, 1995 employment injury, a cervical and lumbosacral sprain. In an August 14, 1995 letter to Dr. Harvey S. Benn, an osteopath and appellant's treating physician, Dr. Stephen E. Mittledorf, a Board-certified surgeon, noted a history of appellant's employment injury and previous

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[2] In its February 5, 1996 letter, the Office found that counsel's October 28, 1995 letter indicating that appellant intended to file an application for reconsideration and appellant's November 3, 1995 affidavit revealing a history of the March 7, 1995 employment injury, the alleged June 19, 1995 recurrence of disability and periods of disability did not constitute a request for reconsideration because appellant did not submit new or relevant evidence with respect to the Office's denial of his recurrence claim; *see Vincente P. Taimanglo*, 45 ECAB 504 (1994); *John B. Montoya*, 43 ECAB 1148 (1992); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (May 1991).

[3] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[4] *Id.*

automobile injury and his findings on physical and objective examination. Dr. Mittledorf opined that based on objective examination, there was no evidence of peripheral crush injury and no evidence of acute or chronic denervation. Dr. Mittledorf concluded that appellant should continue his current therapy. Dr. Mittledorf did not opine that there was a change in the nature and extent of appellant's medical condition. Neither did Dr. Mittledorf opine that appellant was totally disabled, only that he should continue his current therapy. Therefore, Dr. Mittledorf's August 14, 1995 letter, does not establish that appellant sustained a recurrence of total disability causally related to his March 7, 1995 employment injury or any other factors of his employment.

Dr. Mittledorf's August 29, 1995 letter to Dr. Benn, indicated his findings on objective examination and his opinion that appellant had a double crush injury involving the C6 cervical root, as well as, the median nerve. Dr. Mittledorf failed to address whether appellant's worsening condition was causally related to his March 7, 1995 employment injury.

The medical treatment notes of Dr. Ronald Wood, a family practitioner, covering the period June 20, 1995 through April 23, 1996 failed to address whether appellant's back condition was caused by the March 7, 1995 employment injury.

Dr. Wood's August 17, 1995 and April 23, 1996 supplemental attending physician's reports (Form CA-20a) indicated that appellant had a cervicodorso lumbosacral sprain/strain. Dr. Wood further indicated that appellant's condition was caused by the March 7, 1995 employment injury by placing a checkmark in the box marked "yes." The Board has held that an opinion on causal relationship, which consists only of a physician checking "yes' to a medical form report question on whether the claimant's disability was related to the history is of diminished probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[5] Dr. Wood failed to provide any medical rationale to support his opinion. Because Dr. Wood failed to provide any rationale for his conclusion that appellant's condition was caused or aggravated by factors of his employment, the Board finds that his opinion is insufficient to establish appellant's burden.

In medical treatment notes dated June 19, 1995, Dr. Wood indicated that appellant experienced an exacerbation of low back pain. In a January 2, 1996 medical report, Dr. Wood indicated that appellant experienced a severe exacerbation of his March 7, 1995 injury on June 19, 1995. Dr. Wood's April 15, 1996 response to the employing establishment's March 22, 1996 letter provided that appellant's back condition was precipitated by a work injury as documented. Dr. Wood's February 6, 1996 disability certificate revealed that appellant was totally disabled due to the March 7, 1995 employment injury. Dr. Wood provided no medical rationale to support his opinion that appellant's worsening condition was causally related to his March 7, 1995 employment injury. Without any explanation or rationale, a medical report has diminished probative value and is insufficient to establish causal relationship.[6] Therefore, Dr. Woods' treatment notes, medical report, response to the employing establishment's letter and disability certificate are insufficient to establish appellant's burden.

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[5] *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

[6] *Deborah S. King*, 44 ECAB 203 (1992); *Donald W. Long*, 41 ECAB 142 (1989).

Dr. Wood's February 29, 1996 Form CA-17 revealed a diagnosis of cervicodorso lumbosacral sprain/strain and appellant's physical restrictions. Dr. Wood further stated that he could not comment on appellant's September 12, 1995 determination concerning his recurrence since he did not see appellant from August 22, 1995 through February 22, 1996. Inasmuch as Dr. Wood failed to state that appellant's back condition was caused by the March 7, 1995 employment injury, his report is insufficient to establish appellant's burden.

Dr. Wood's February 22, 1996 disability certificate indicated that appellant could return to work on February 26th with physical restrictions. This disability certificate is insufficient to establish appellant's burden inasmuch as it failed to provide a diagnosis and to address a causal relationship between appellant's current condition and the March 7, 1995 employment injury.

In a March 4, 1996 supplemental medical report, Dr. Wood noted appellant's medical treatment and opined that appellant's exacerbation of low back pain was directly caused by his work activity on June 19, 1995. Dr. Wood's report is insufficient to establish appellant's burden because he did not attribute appellant's current back condition to the March 7, 1995 employment injury.

In a May 13, 1996 medical report, Dr. Wood stated that appellant's condition was unchanged since his last statement, dated April 15, 1996. Dr. Wood did not opine that there was a change in the nature and extent of appellant's medical condition.

An August 8, 1995 disability certificate of Dr. I. David Weisband, an osteopathy, revealed that appellant could return to light-duty work and that he could begin full-duty in two weeks. Dr. Weisband's March 27, 1996 medical report revealed that appellant could return to full-duty work. Dr. Weisband's disability certificate and medical report failed to address whether appellant's current back condition was caused by the March 7, 1995 employment injury and thus, they are insufficient to establish appellant's burden.

In his July 24, 1995 medical treatment notes, Dr. Weisband admittedly stated that he did not have any explanation for appellant's continued back pain. Dr. Weisband recommended that appellant see another orthopedic physician and undergo another magnetic resonance imaging test. Because Dr. Weisband did not opine that appellant's current back condition was caused by the March 7, 1995 employment injury, his treatment notes are insufficient to establish appellant's burden.

Dr. Benn's undated duty status report (Form CA-17) provided that appellant had lumbosacral spine strain/sprain, radiculitis and carpal tunnel syndrome and appellant's physical restrictions. Dr. Benn's September 19, 1995 Form CA-20a reiterated his diagnoses. Dr. Benn's reports are insufficient to establish appellant's burden because they did not address causal relation.

In an October 27, 1995 disability certificate, Dr. Benn indicated that appellant was totally disabled due to the March 7, 1995 employment injury through January 2, 1996 or longer and reiterated his previous diagnoses. In a November 8, 1995 medical report, Dr. Benn stated that he believed that appellant sustained a work-related injury on March 7, 1995 and that appellant suffered an exacerbation of his low back symptom complex on June 19, 1995 when he attempted to lift a parcel weighing 15 pounds while working for the employing establishment. Dr. Benn

failed to provide any medical rationale for his opinion, therefore, it has diminished probative value.[7]

The September 12, 1995 electroneurophysiologic test results of Dr. Irvin M. Gerson, a neurologist, revealed that appellant had an abnormal upper set of somatosensory evoked potentials studies. The results also revealed that the positive features included delayed responses in bilateral cervical responses indicating a multisegmental bilateral set of cervical radiculopathies. These test results are insufficient to establish appellant's burden because they failed to address a causal relationship between appellant's current back condition and the March 7, 1995 employment injury.

An April 22, 1996 medical report of Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, revealed appellant's medical history, his findings on physical examination and a review of medical records. Dr. Mattei opined that with a reasonable degree of medical certainty that appellant had "possible" degenerative changes of the cervical spine and resolved sprain/strain of the thoracal lumbosacral spine "which may have" affected the muscles of the upper thoracic area and the mid-back. Dr. Mattei further opined that he could not substantiate clinical evidence of a radiculopathy of the upper or lower extremities. Dr. Mattei also opined that appellant "may have" a double crush injury affecting the C6 nerve root and involving the median nerve, but that all the clinical evidence revealed that this was subacute and not clinically evaluated on examination. Dr. Mattei concluded that appellant had a pre-existing condition that predated the March 7, 1995 employment injury, thus the March 7, 1995 injury was not the true cause of appellant's pathology, but "may have been" a temporary exacerbation of his preexisting condition. Dr. recommended that appellant return to full-duty work, be placed on an exercise program. Dr. Mattei's report is insufficient to establish appellant's burden inasmuch it is speculative as to the diagnosis of appellant's conditions and whether the May 7, 1995 employment injury exacerbated appellant's preexisting condition.[8]

Inasmuch as appellant has failed to establish that he had a change in the nature or extent of his modified duties or a change in the nature or extent of his employment injury, which caused his claimed recurrence of total disability, the Board finds that he has failed to discharge his burden of proof.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative states: "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."[9]

[7] *Id.*

[8] *Barbara J. Williams*, 40 ECAB 649 (1989); *Philip J. Deroo*, 39 ECAB 1294 (1988).

[9] 5 U.S.C. § 8124(b)(1).

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 or deny 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 amendments to the Act, which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. 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.[10]

In this case, the Office issued its decision denying appellant's claim on October 10, 1995. Appellant requested an oral hearing in a July 1, 1996 letter. Inasmuch as appellant did not request a hearing within 30 days of the Office's October 10, 1995 decision, he is not entitled to a hearing under section 8124 as a matter of right. The Office also exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that he could have his case further considered on reconsideration by submitting relevant medical evidence. Consequently, the Office properly denied appellant's hearing request.

The August 1 and February 5, 1996 and October 10, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
October 2, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[10] *Henry Moreno*, 39 ECAB 475 (1988).