

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWIN E. SONG and U.S. POSTAL SERVICE,
POST OFFICE, Santa Ana, CA

*Docket No. 98-492; Submitted on the Record;
Issued September 23, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant had met his burden of proof in establishing a recurrence of disability for the period April 17 to November 8, 1996 that was causally related to his accepted March 15, 1985 employment injury of left knee crepitus; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124 of the Federal Employees' Compensation Act.

On September 20, 1995 appellant, then a 60-year-old letter carrier, filed an occupational disease claim, alleging that he had no cartilage left in his left knee due to factors of his federal employment. Appellant indicated that he was first aware of this condition on March 15, 1985 and that he realized that the condition was causally related to factors of his federal employment on December 20, 1987. By decision dated January 31, 1996, the Office accepted appellant's claim for left knee crepitus. On July 25, 1996 appellant retired on disability from the employing establishment. On August 6, 1996 appellant filed a claim for continuing compensation for the period April 17, 1996 through that date. On September 22, 1997 appellant filed a second claim for continuing compensation for the period April 17 through November 8, 1996. In a decision dated September 22, 1997, the Office denied appellant's claim for temporary total disability and wage loss beginning April 16, 1996. The Office noted that appellant had worked in a modified position based on his left knee crepitus effective April 1996. The Office further noted that appellant underwent a liver transplant on April 17, 1996 and did not return to work after that date. The Office found that based on the second opinion examination report of Dr. J. Pierce Conaty, a Board-certified orthopedic surgeon, appellant was capable of doing his light-duty work at the time that he left work for the liver transplant. The Office therefore determined that appellant had not established that he was entitled to wage-loss compensation for the period April 17 to November 8, 1996. By decision dated November 20, 1997, the Office denied appellant's request for a hearing as untimely filed.

The Board has duly reviewed the entire case record on appeal and finds that appellant has not established temporary total disability after April 17, 1996 that was causally related to his accepted employment injury.

The term “disability” as used under the Act means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of injury.¹ The general test for determining loss of wage-earning capacity is whether an injury-related impairment prevents the employee from performing the kind of work he was doing when injured.²

In the present case, appellant was working in a light-duty position at the time he stopped work and filed a claim for continuing compensation. Therefore, appellant was effectively claiming a recurrence of disability beginning April 17, 1996 as he indicated that his disability was due to his accepted employment injury. Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which he seeks compensation was causally related to his employment injury. As part of such burden of proof, rationalized medical evidence showing causal relationship must be submitted.³ When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of the burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirement.⁴

The Office accepted appellant’s claim for left knee crepitus and then advised the employing establishment that appellant was entitled to compensation through July 25, 1996 for disability related to his accepted employment injury. By letter dated December 10, 1996, the employing establishment advised the Office that while it acknowledged notification of its letter concerning appellant’s entitlement to monthly compensation, appellant had retired on disability in relation to his liver transplant condition. The employing establishment inquired why appellant was entitled to compensation benefits for wage loss due to this disabling liver condition that was not work related. The employing establishment also advised that appellant had been provided sedentary duties commensurate with his medical restrictions prior to his cessation of work in April 1996. The Office determined that further development of the medical evidence was necessary and requested that the employing establishment provide information concerning appellant’s exact duties prior to his surgery on April 17, 1996. The employing establishment responded that appellant had worked three hours of gang box delivery of his route, one hour of mounted delivery, and one-half hour of dismounted delivery each day. The employing

¹ See *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

² See *Gary L. Loser*, 38 ECAB 673 (1987).

³ *Dominic M. DeScala*, 37 ECAB 369 (1986).

⁴ *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

establishment indicated that appellant drove a postal jeep, had one hour of walking a day and six hours of standing.

The Office provided a statement of accepted facts including this information to Dr. Conaty and requested that he examine appellant and review his medical records to provide an opinion concerning whether appellant could have continued working after April 17, 1996. In a report dated April 4, 1997, he indicated that appellant did have left knee crepitus and advanced arthritis of both knees with the condition being greater on the left knee than on the right side. Dr. Conaty stated that the severe degeneration of both knees was related to factors of appellant's federal employment and that he would recommend total knee replacement surgery. He concluded, however, that appellant could have continued to work as a modified letter carrier as described in the statement of accepted facts at the time that he left work on April 16, 1996. Dr. Conaty concluded that but for appellant's liver condition, he could be gainfully employed from an orthopedic standpoint. The record does not contain any evidence which contradicts the opinion of Dr. Conaty. Consequently, as the weight of the medical evidence clearly indicates that appellant was capable of performing his light-duty work at the time that he ceased work on April 17, 1996, appellant did not meet his burden of proof.

The Board also finds that the Office properly denied appellant's request for hearing.

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the 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."⁵ As section 8124(b)(1) is unequivocal in setting forth the time limitations 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.⁶

In the present case, the last merit decision denying appellant's claim for wage-loss compensation was issued on September 22, 1997. Appellant's request for an oral hearing was postmarked October 24, 1997. As appellant's request for a hearing was not within 30 days of the issuance of the September 22, 1997 decision, *viz.*, October 22, 1997, he is not entitled to a hearing as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered his request in relation to the issue involved, and the hearing was denied on the basis that he could address this issue by submitting evidence which showed that he had temporary total disability due to his accepted employment injury after April 17, 1996. Appellant was advised that he might request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions

⁵ 5 U.S.C. § 8124(b)(1).

⁶ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

from established facts.⁷ There is no evidence of an abuse of discretion in the denial of a hearing in this case.

The decision of the Office of Workers' Compensation Programs dated November 20 and September 22, 1997 are hereby affirmed.

Dated, Washington, D.C.
September 23, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ *Daniel J. Perea*, 42 ECAB 214 (1990).