U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARCHIE D. FRUITS and DEPARTMENT OF THE ARMY,
TRAINING SERVICE CENTER, Fort Sill, OK

Docket No. 99-758; Submitted on the Record;
Issued July 21, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden to establish that his claimed condition or disability as of December 30, 1997 was caused or aggravated by his accepted May 8, 1991 employment injury; and (2) whether appellant is entitled to a review of the record before an Office of Workers' Compensation Programs' hearing representative under 5 U.S.C. § 8124(b)(1).

Appellant, a 40-year-old warehouseman, injured his back, neck and right shoulder while lifting an overhead projector on May 8, 1991. He filed a claim for benefits on May 21, 1991, which the Office accepted for subluxations at C5-6 and T2.[1] The Office paid appellant compensation for appropriate periods and appellant was placed on the periodic rolls. He ultimately returned to work on limited duty on June 27, 1996.

On January 22, 1998 appellant filed a Form CA-2a claim for benefits, alleging that he sustained a recurrence of disability on December 30, 1997 which was causally related to his May 8, 1991 employment injury. He stated on the form that his condition became progressively worse and more painful during the last three years, as the duties he was required to perform aggravated his condition. Appellant further alleged that, during the past three to four years, with cutbacks in personnel and money, there was a greater work load with fewer people to help him to perform his work duties. In support of his claim, he submitted a December 30, 1997 report from Dr. Daniel R. Bartel, Board-certified in psychiatry and neurology, who stated that since his 1991 employment injury appellant experienced progressive weakness of the right arm with pain in his right shoulder and right hand. He advised that appellant had a cervical disc injury with evidence of persistent C6-7 radiculopathy on the right, in addition to evidence of myelopathy. Dr. Bartel believed these symptoms were progressive, and opined that appellant most likely had progressive spinal stenosis in the cervical region with spondylitic myelopathy, which appeared to

[1] On October 18, 1993 appellant received a schedule award from the Office based on a 33 percent impairment for loss of use of the right upper extremity.

be due to his work-related injury. He also completed a January 7, 1998 duty status report in which he placed additional restrictions on appellant's work activities.

By letter dated February 12, 1998, the Office advised appellant that it required additional medical evidence, including a medical report, to support his claim that his current condition or disability was causally related to his accepted employment injury. The Office also requested that appellant submit a factual statement explaining the circumstances of his alleged recurrence and specifically asked appellant to provide evidence supporting the fact that there had been a change in the requirements of his light-duty job or a change in his physical condition. The Office stated that appellant had 30 days in which to submit the requested information.

In response to the Office's letter, appellant submitted a letter dated March 12, 1998 in which he explained the reason he did not seek medical treatment from June 27, 1996, when he returned to work, through December 30, 1997, but did not submit any additional medical evidence.

By decision dated March 24, 1998, the Office denied appellant's claim for recurrence of disability, finding that he failed to submit medical evidence sufficient to establish that his current condition was causally related to the May 8, 1991 employment injury.

By letter dated April 24, 1998, appellant requested a review of the written record.

By decision dated June 1, 1998, the Office denied appellant's request for a review of the record because it was not made within 30 days and he was not entitled as a matter of right to such a review.[2] The Office stated that appellant's request was further denied on the grounds that the issue in the case could be equally well addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which could establish that he had a continuing disability causally related to the June 18, 1994 employment injury.

By letter dated June 11, 1998, appellant requested reconsideration of the Office's March 24, 1998 decision. In support of his claim, he submitted March 17 and April 8, 1998 medical reports from Dr. Bartel. In his March 17, 1998 report, Dr. Bartel stated:

> "[Appellant] has developed progressive spondylosis since [his 1991 employment injury]. He now has evidence of spondylitic myelopathy. This means he is developing pressure on his spinal cord that impairs function of the arms and legs especially with sustained exercise. He is at risk for developing loss of use of the arms and legs as this condition progresses. This is a direct complication of his injury in 1991 and represents the progression of the injury over time.
>
> "[Appellant] is unable to perform tasks requiring use of the arms, lifting or bending or carrying on a sustained basis. If he develops even minor trauma such as a slip or a fall and he jars his neck, he may develop sudden paralysis of arms and legs. To avoid this complication we need to keep him off work with no

[2] The hearing representative actually denied a request for an oral hearing.

lifting or bending, carrying, pushing or pulling and lifting restrictions at no more than 20 pounds on an occasional basis."

In his April 8, 1998 report, Dr. Bartel stated:

"[Appellant] has developed a cervical myelopathy from cervical spondylosis. This has developed as a result of his injury in 1991. This means he has developed stiffness and weakness of the arms and legs that is slowly worsening and will require surgical decompression to provide any chance of recovery. Because of this, [appellant] is unable to work in any capacity at this time. Even minor falls and injuries predispose to sudden decompensation of spinal cord function and the resulting paralysis would be most likely permanent."

By decision dated June 19, 1998, the Office denied reconsideration, finding that appellant did not submit evidence sufficient to warrant modification of the previous decision.

The Board finds that appellant has not met his burden to establish that his claimed condition or disability as of December 30, 1997 was related to his accepted left May 8, 1991 employment injury.

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 she 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 she cannot perform such light duty. As part of this 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 requirements.[3]

In the instant case, the record does not contain any medical opinion showing a change in the nature and extent of appellant's injury-related condition. Indeed, appellant has failed to submit any medical opinion containing a rationalized, probative report which relates his condition or disability as of December 30, 1997 to his employment injury. For this reason, he has not discharged his burden of proof to establish his claim that he sustained a recurrence of disability as a result of his accepted employment injury.

The only medical evidence which appellant submitted consisted of the December 30, 1997 and March 17 and April 8, 1998 reports from Dr. Bartel. In his December 30, 1997 report, Dr. Bartel stated that appellant had experienced progressive weakness of the right arm with pain in his right shoulder and right hand since his 1991 employment injury, and diagnosed a cervical disc injury with evidence of persistent C6-7 radiculopathy on the right. He advised that these symptoms were also progressive, and also diagnosed progressive spinal stenosis in the cervical region with spondylitic myelopathy, which apparently was due to his work-related injury. Dr. Bartel stated in his March 17, 1998 report that appellant had developed progressive spondylosis since the 1991 employment injury with evidence of spondylitic myelopathy, which

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

resulted in pressure on his spinal cord impairing function of the arms and legs, particularly with sustained exercise. He commented that appellant was at risk for developing loss of use of the arms and legs as this condition progressed, which was a direct complication of his injury in 1991 and represented the progression of the injury over time. Dr. Bartel further stated that appellant was unable to perform tasks requiring use of the arms, lifting or bending or carrying on a sustained basis, and risked sudden paralysis of arms and legs in the event he encountered even minor trauma such as a slip or a fall or a jarring of his neck. He therefore restricted appellant from work, with no lifting or bending, carrying, pushing or pulling and lifting restrictions at no more than 20 pounds on an occasional basis. Finally, Dr. Bartel stated in his April 8, 1998 report that the stiffness and weakness in appellant's arms and legs was slowly worsening and required surgical decompression to provide any chance of recovery and that appellant was therefore unable to work in any capacity because of the 1991 employment injury. He reiterated that, even minor falls and injuries predisposed appellant to sudden decompensation of spinal cord function, and he concluded that the resulting paralysis would be most likely permanent. These reports provided a history of injury, diagnosed several new conditions, imposed new physical restrictions on appellant and indicated that he was totally disabled as of December 30, 1997, but did not constitute a probative, rationalized medical opinion sufficient to establish that appellant's condition and disability as of December 30, 1997 was causally related to his May 8, 1991 employment injury.

Dr. Bartel's reports do not constitute sufficient medical evidence demonstrating a causal connection between appellant's employment injury and his alleged condition and disability as of December 30, 1997. Causal relationship must be established by rationalized medical opinion evidence. His opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his conclusions.[4] Although Dr. Bartel generally stated that appellant had sustained a reinjury or recurrence of his accepted May 8, 1991 employment injury, he did not explain the process through which appellant's current condition as of December 30, 1997 was caused or aggravated by the work injury. Furthermore, his opinion is of limited probative value because it is generalized in nature and equivocal in that he stated that since 1991 appellant had developed cervical radiculopathy at C6-7, progressive spinal stenosis in the cervical region with spondylitic myelopathy, progressive spondylosis with evidence of spondylitic myelopathy and progressive weakening in his arms and legs, all of which were apparently due to the 1991 work injury, without relating how these conditions were caused or aggravated by his accepted 1991 employment conditions, the subluxations at C5-6 and T2. Thus, Dr. Bartel's reports did not establish a worsening of appellant's condition, and therefore did not constitute a probative, rationalized opinion demonstrating that a change occurred in the nature and extent of the injury-related condition.

In addition, the Board finds that the evidence fails to establish that there was a change in the nature and extent of appellant's limited-duty assignment such that he no longer was physically able to perform the requirements of his light-duty job. The record demonstrates that appellant returned to work on limited duty on June 27, 1997 with restrictions on lifting more than 20 pounds, and appellant indicated in his January 22, 1998 Form CA-2a that he stopped working on December 30, 1997. Appellant indicated generally that his work-related cervical and

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

thoracic conditions were aggravated because his work duties had increased, but submitted no evidence which specifically indicated that the nature and extent of his limited-duty assignment had changed. He has submitted no additional factual evidence to support a claim that a change occurred in the nature and extent of his limited-duty assignment during the period claimed.[5] Accordingly, as appellant has not submitted any factual or medical evidence supporting his claim that he was totally disabled from performing his light-duty assignment as of December 30, 1997 as a result of his employment, appellant failed to meet his burden of proof.

As there is no medical evidence addressing and explaining why the claimed condition and disability as of December 30, 1997 was caused or aggravated by his employment injury, appellant has not met his burden of proof in establishing that he sustained a recurrence of disability. The Board therefore affirms the Office's decision denying benefits based on a recurrence of his work-related disability.

The Board finds that the Office did not abuse its discretion in denying appellant's April 24, 1998 request for a review of the written record before an Office hearing representative, pursuant to 5 U.S.C. § 8124.

Section 8124(b)(1) of the Federal Employees' Compensation Act,[6] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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." The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[7] The Board has held that section 8124 provides the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing", and that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.[8]

[5] The March 24, 1997 Office decision contains statements of fact regarding the date appellant returned to light duty and the restrictions under which he was returned to work which are not supported by the evidence of record. The Office stated that appellant returned to work on limited duty on August 25, 1997, with restrictions on lifting more than 20 pounds and on overhead lifting. In a return to work form dated June 26, 1996, however, appellant's treating chiropractor returned him to work on light duty on June 27, 1997, with restrictions against lifting more than 20 pounds and carrying more than 10 pounds. The only indication in the record that appellant had a restriction against overhead lifting was contained in appellant's January 22, 1998 Form CA-2a, in which appellant stated he had this restriction but provided no medical evidence supporting this assertion. Any error is harmless, however, as the Office's finding that appellant did not establish he sustained a recurrence of disability as of December 30, 1997 is supported by substantial evidence in the record.

[6] 5 U.S.C. § 8124(b)(1).

[7] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[8] *See Michael J. Welsh,* 40 ECAB 994; 20 C.F.R. § 10.131(b).

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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[9]

The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing.[10] The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[11]

In the present case, the Office on March 24, 1998 issued its decision finding that appellant had not sustained a recurrence of disability resulting from by his May 1, 1991 employment injury. On April 24, 1998 appellant's attorney requested a review of the record by an Office hearing representative. By decision dated June 1, 1998, the Office denied appellant's request for a review of the record beause it was not made within 30 days.[12] The Office exercised its discretion in considering appellant's request, noting that it had considered the matter and determined that the issue in the case could be resolved through the reconsideration process by submitting evidence not previously considered which he showed sustained a recurrence of disability caused or aggravated by his December 30, 1997 employment injury.

An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, prejudice, partiality, intentional wrong or action against logic.[13] The Office properly exercised its discretionary powers in denying appellant's request for a review of the record.[14]

The Board affirms the Office's June 1, 1998 decision denying appellant a review of the written record by an Office hearing representative.

The decisions of the Office of Workers' Compensation Programs dated March 24, 1998 June 19 and 1, 1998 are hereby affirmed.

Dated, Washington, D.C.

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

[10] *Johnny S. Henderson, supra* note 9*; Herbert C. Holley*, 33 ECAB 140 (1981); *Rudolph Berrnann*, 26 ECAB 354 (1975).

[11] *Herbert C. Holley*, *supra* note 10.

[12] Although the hearing representative erred in finding that appellant had requested an oral hearing, this error is harmless, as appellant is required to request a review of the record or oral hearing within 30 days; *i.e.*, the standards for both are identical. As appellant failed to request a review of the record within 30 days, any error on the part of the Office is harmless.

[13] *See Sherwood Brown*, 32 ECAB 1847 (1981).

[14] *Stephen C. Belcher*, 42 ECAB 696 (1991); *Ella M. Garner*, 36 ECAB 238 (1984).

July 21, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member