U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD D. PIRTLE and DEPARTMENT OF VETERANS AFFAIRS, ALVIN C. YORK MEDICAL CENTER, Murfreesboro, TN

Docket No. 99-2263; Submitted on the Record;
Issued October 2, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has established that he sustained a recurrence of disability beginning on January 5, 1998 causally related to an October 23, 1981 back injury; (2) whether appellant has established that he sustained a recurrence of disability beginning on or after May 1, 1998 causally related to an accepted January 5, 1998 lumbar strain; and (3) whether the Office of Workers' Compensation Programs' denial of appellant's request for an oral hearing pursuant to section 8124 of the Federal Employees' Compensation Act constituted an abuse of discretion.

On January 12, 1998 appellant, then a 52-year-old assistant chief of environmental management services, filed a claim alleging that on January 5, 1998 at 9:00 a.m., he "bent over and twisted to [the] left" and experienced low back pain.[1] He noted a 1981 back injury in which he lifted a "heavy display case in the [employing establishment] canteen. This has been the cause of pain ever since that time." The Office accepted his 1998 claim for a "low back strain."

On September 17, 1998 appellant alleged that he sustained a recurrence of disability beginning January 5, 1998 attributable to the October 23, 1981 low back injury in the canteen.[2] Appellant explained that, since his 1981 injury, his back periodically "went out" for a few days, then improved. However, after the January 5, 1998 incident in which he arose from a chair after

[1] In a January 9, 1998 employing establishment clinic note, a nurse noted appellant's history of low back pain beginning January 5, 1998 "when he bent over and twisted and he heard a pop."

[2] In a December 21, 1998 letter, appellant noted experiencing "constant" low back pain radiating to the knees since January 5, 1998. He explained that he sustained an October 23, 1981 low back injury and received instructions from a physical therapist regarding safe lifting and home exercise. "Every few years my back would go out and I would do these exercises to put it back into place. After January 5, 1998 I tried the exercises … and it did not help," nor did "a stretching treatment." Dr. Paisal Jirut, an attending physiatrist, then performed a magnetic resonance imaging (MRI) revealing a bulging L5-S1 disc and facet hypertrophy causing moderate spinal stenosis at L3-4 and L4-5.

bending to pick up a pencil, "the pain did n[o]t go away after a few days." Appellant did not stop work.

Appellant submitted medical evidence in support of his claim for recurrence of disability from Dr Jirut, an attending physiatrist. In a January 26, 1998 report, Dr. Jirut stated that, following a course of physical therapy, appellant "fe[lt] better 100 percent" from the January 5, 1998 low back injury and was doing back exercises. Dr. Jirut diagnosed a "resolved lumbar strain," and discontinued appellant's physical therapy and medication.

In a May 12, 1998 report, Dr. Jirut noted that a few weeks after discontinuing physical therapy, appellant started having radicular pain from buttock to knee, especially with walking, rising from a seated position, sneezing and coughing. Dr. Jirut diagnosed "recurrent low back pain -- possible radiculopathy" and prescribed physical therapy.[3] Electromyography and nerve conduction velocity studies of July 21, 1998 showed increased activity in the left L4-5 paraspinal musculature suggestive of left lumbar radiculopathy. An August 10, 1998 lumbar MRI scan showed a "[b]ulging L5-S1 intervertebral disc" and "[f]acet hypertrophy causing moderate spinal stenosis at L3-4 and L4-5." Dr. Jirut submitted periodic reports through November 17, 1998[4] noting appellant's continuing symptoms with a trend of improvement.[5]

By decision dated May 6, 1999, the Office denied appellant's claim for recurrence of disability on the grounds that causal relationship was not established. The Office found that there was no record of an October 23, 1981 low back injury and thus the recurrence claim would be associated with the January 5, 1998 injury file. The Office found that, regarding appellant's low back symptoms in May 1998, appellant's condition had resolved as of January 26, 1998 according to Dr. Jirut's report of that date. The Office further found that appellant did not submit sufficient medical evidence supporting a causal relationship between the low back condition on and after January 26, 1998 and factors of his federal employment.

On June 11, 1999 appellant requested an oral hearing. He contended that he did not receive the Office's May 6, 1999 decision until June, noting that it was "postmarked in June."

By decision dated July 19, 1999, the Office denied appellant's request for an oral hearing on the grounds that it was untimely. The Office further denied appellant's request on the grounds that the issue involved could be addressed equally well on reconsideration by submitting new

[3] Appellant submitted physical therapy notes dated January 9 to 26, May 20 to June 22, 1998 and February 22, 1999.

[4] In a November 17, 1998 report, Dr. Jirut diagnosed lumbar spinal stenosis and obesity. He prescribed exercise and a weight reduction diet.

[5] Appellant submitted kinesiotherapy notes dated August 25 to February 17, 1999.

evidence establishing a causal relationship between the claimed recurrence of disability and the accepted injury.[6]

The Board finds that appellant has not established that he sustained a recurrence of disability beginning either January 5 or May 1, 1998, as he submitted insufficient medical evidence establishing causal relationship.

When an employee claims a recurrence of disability causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed recurrence of disability is causally related to the accepted injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[7] An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's unsupported belief of causal relation.[8]

In this case, appellant submitted medical reports from Dr Jirut. Although these reports provide a detailed description of appellant's symptoms and progress, other than briefly mentioning the January 5, 1998 injury, they do not refer to appellant's federal employment or explain how appellant claimed recurrence of disability related to his accepted injury of January 5, 1998. Thus, appellant has not provided sufficient rationalized medical evidence explaining how and why any factor of his federal employment caused the disability on and after January 5, 1998.

The third issue, the Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides, in pertinent part, 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."[9] 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.[10]

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[6] In a letter dated August 5 and postmarked August 6, 1999, appellant again requested an oral hearing. He stated that "the letter is dated July 7, 1999 and "postmarked "July 29, 1999 and [he] received it on August 4, 1999." In a September 3, 1999 letter the Office referred to appellant's August 5, 1999 request for an oral hearing. Referencing the July 19, 1999 decision, the Office reiterated that appellant was not entitled to an oral hearing. The Office enclosed a copy of the July 19, 1999 decision.

[7] *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[8] *Ausberto Guzman*, 25 ECAB 362 (1974).

[9] 5 U.S.C. § 8124(b)(1).

[10] *Delmont L. Thompson*, 51 ECAB ___ (Docket No. 97-988, issued November 1, 1999); *Charles J, Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

In this case, the Office issued its decision denying appellant's claim for recurrence of disability on May 6, 1999. Appellant requested a hearing in this matter by letter dated and postmarked June 11, 1999. The Board notes that appellant was provided with appropriate appeal rights accompanying the May 6, 1999 decision, which noted that a request for an oral hearing "must be postmarked within 30 days of the date of this decision." As appellant's request for a hearing was not made within 30 days of the Office's May 6, 1999 decision, he is not entitled to a hearing under section 8124 as a matter of right.

Nonetheless, 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, in its decision dated July 19, 1999, the Office advised appellant that it considered his request in relation to the issue involved and the hearing was also denied on the grounds that he could address the issue equally well on reconsideration, by submitting new medical evidence establishing causal relationship. 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 from established facts.[11] The Board finds that in this case, there is no evidence that the Office abused its discretion in denying appellant's request for a hearing.

On appeal, appellant contends that his request for an oral hearing was timely as he did not receive the May 6, 1999 decision until June 6, 1999. Although appellant stated that the May 6, 1999 decision was not postmarked until June 6, 1999, he did not submit the envelope in which the Office decision was mailed to him. It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises after it appears from the record that the notice was duly mailed and properly addressed.[12] In this case, all the Office's correspondence to appellant, including the May 6, 1999 decision, was addressed to him at "133 Brentmeade Dr., Murfreesboro, TN 37130," appellant's address of record. There is no indication in the record that any correspondence was returned to the Office as undeliverable, or that the May 6, 1999 decision was not mailed in accordance with customary Office procedures. Therefore, the Board finds that appellant has not established that the Office's May 6, 1999 decision was not delivered to him in a timely manner.

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

[12] *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

The decisions of the Office of Worker's Compensation Programs dated July 19 and May 6, 1999 are affirmed.

Dated, Washington, DC
October 2, 2000

Michael J. Walsh
Chairman

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member