

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL V. HEPBURN and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Miami, FL

*Docket No. 99-2078; Submitted on the Record;
Issued September 5, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant established that he was temporarily totally disabled during the period September 22 through October 2, 1998 as a result of his accepted employment injury of October 21, 1986; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing, as untimely filed.

On October 21, 1986 appellant, then a 39-year-old custodian, sustained an injury to his lower back when he was struck by a moving hamper. The Office accepted the claim for lumbar strain and degenerative disc disease.¹ Appellant later claimed recurrences of disability on July 31, 1987, February 24, 1994 and March 6, 1995, which the Office also accepted. On October 3, 1998 appellant filed a claim for continuing compensation on account of disability (Form CA-8) for the period of September 22 through October 2, 1998. At the time, he was employed in a limited-duty capacity as a clerk. Appellant resumed those duties on October 3, 1998.

In support of his claim, he submitted treatment notes dated September 23 and October 2, 1998 from Dr. Luis R. Pagan, a Board-certified neurosurgeon. His September 23, 1998 treatment notes included diagnoses of lumbar radiculopathy and myofascial syndrome. Dr. Pagan explained that appellant presented him with complaints of an acute exacerbation of his back pain the prior day. He recommended that appellant rest for two days and that he return for a follow-up examination in a week. Dr. Pagan specifically noted appellant's work status as "TTD [temporary total disability] for 2 days." In his October 2, 1998 treatment notes, Dr. Pagan reported that appellant returned with complaints of low back pain and that appellant had been off from work since last week. He reiterated his prior diagnoses of lumbar radiculopathy and

¹ Appellant sustained a previous work-related injury (A06-0369621) on December 4, 1984, which the Office accepted for lumbar strain and herniated nucleus pulposus at L5. The Office also accepted that he sustained a recurrence of disability on March 29, 1985. Additionally, appellant underwent a lumbar laminectomy in June 1985, which the Office authorized.

myofascial syndrome and advised appellant that he could resume his modified employment duties.

By letter dated January 4, 1999, the Office advised appellant that in order to process his claim, it needed medical evidence establishing temporary total disability for work during the entire period claimed. The Office specifically requested that he submit his attending physician's treatment notes holding appellant off work for the period of September 22 through October 2, 1998. In response, appellant submitted a November 25, 1998 letter from Dr. Pagan which noted that he was being treated for his back injury and that he was excused from work for the period of September 22 through October 2, 1998.

In a decision dated February 3, 1999, the Office denied appellant's claim on the basis that the medical evidence failed to establish that appellant was temporarily totally disabled during the claimed period of September 22 through October 2, 1998. Appellant subsequently requested an oral hearing, which was postmarked March 30, 1999.

By decision dated May 17, 1999, the Office found that appellant did not submit his request for an oral hearing within 30 days of the Office's February 3, 1999 decision and; therefore, he was not entitled to a review as a matter of right. Additionally, the Office considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue of employment-related disability could equally well be addressed through the reconsideration process.

The Board finds that appellant established that he was temporarily totally disabled during the period September 22 through September 24, 1998. He, however, failed to establish disability during the period September 25 through October 2, 1998.

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 of establishing 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 this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.²

Appellant stopped working on September 22, 1998 and was examined by Dr. Pagan the following day. In his September 23, 1998 treatment notes, Dr. Pagan indicated that appellant was temporarily totally disabled for two days and he advised appellant to rest. In an accompanying duty status report (Form CA-17), he noted a diagnosis of lumbar radiculopathy and reported that appellant experienced a lot of pain from "just sitting verifying mail." This evidence is sufficient to establish appellant's disability from work for the period September 22 through September 24, 1998. Appellant, however, has failed to provide adequate medical documentation to establish his disability for work from September 25 through October 2, 1998. Dr. Pagan's October 2, 1998 treatment notes do not establish appellant's disability on that day or

² *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

for the seven days that preceded the October 2, 1998 examination. In fact, on October 2, 1998, he advised that appellant was capable of resuming his modified employment duties. Although in a subsequent letter dated November 25, 1998 Dr. Pagan indicated that appellant was excused from work during the entire claimed period, he did not provide any justification for appellant's claimed disability during the period September 25 through October 2, 1998. Dr. Pagan provided no explanation as to why the previously recommended two days of rest was not sufficient to resolve appellant's low back pain. Consequently, appellant has failed to establish that he was temporarily totally disabled during the period September 25 through October 2, 1998.

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

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of issuance of the decision. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of issuance of the decision.³ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.⁴ In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.⁵

As previously noted, the Office denied appellant's claim for compensation in a decision dated February 3, 1999. His request for an oral hearing was postmarked March 30, 1999, which is more than 30 days after the Office's February 3, 1999. As such, appellant is not entitled to an oral hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether his 1986 employment injury disabled him from work during the period September 22 through October 2, 1998 could equally well be addressed by requesting reconsideration.⁶ Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

³ 20 C.F.R. § 10.616(a).

⁴ *Herbert C. Holley*, 33 ECAB 140 (1981).

⁵ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁶ The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

The May 17, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed; and the Office's February 3, 1999 decision is modified to reflect appellant's entitlement to wage-loss compensation during the period September 22 to September 24, 1998. In all other respects, the February 3, 1999 decision is affirmed.

Dated, Washington, D.C.
September 5, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member