U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN S. HEWIYOU and DEPARTMENT OF THE NAVY, NAVY PUBLIC WORKS CENTER, Great Lakes, IL

Docket No. 01-731; Oral Argument Held May 1, 2002; Issued June 10, 2002

Appearances: *John S. Hewiyou*, *pro se*; *Julia Mankata, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to a schedule award as a result of his employment-related cervical and lumbosacral conditions; and (2) whether the Branch of Hearings and Review properly denied his requests for an oral hearing.

On September 12, 1994 appellant, then a 55-year-old pipefitting worker, injured his back while attempting to prevent a coworker from falling down the stairs. The Office of Workers' Compensation Programs accepted his claim for cervical sprain. On March 28, 1995 appellant injured his back again while working on large pipes using a combination of heavy wrenches and hammers to loosen and affix valves. The Office accepted his claim for lumbosacral and cervical strain.

On February 7, 2000 appellant filed a claim for a schedule award. The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Julie M. Wehner, an orthopedic surgeon, to address the issue.

On May 15, 2000 Dr. Wehner related appellant's history of injury and described her findings on physical examination. She reviewed radiologic studies. Dr. Wehner reported that appellant suffered a cervical sprain with a preexisting diagnosis of degenerative arthritis of his neck at the time of the initial accident on September 12, 1994. The temporary aggravation of his neck condition should have resolved within six months. Appellant suffered a subsequent aggravation on March 28, 1995, which also should have resolved within six months, returning appellant to his baseline status of having degenerative arthritis in his neck unrelated to his occupation. He had mechanical low back pain consistent with a sprain of the area. There were no significant findings on his magnetic resonance imaging scan. Dr. Wehner reported that this, too, should have resolved within six months of the March 28, 1995 injury.

Dr. Wehner explained that appellant's degenerative arthritis might cause some limitations but was not itself work related. She reported that appellant had no sensory or motor deficit in his upper extremities and, therefore, had no impairment based on his cervical arthritis and the temporary exacerbation of the problem that occurred at work. Appellant also had no sensory or motor deficit in his lower extremities. There was no specific nerve root impairment and, therefore, no compromise of lower extremity function because of appellant's low back problem.

In a decision dated August 14, 2000, the Office denied appellant's claim for a schedule award. In an attached statement of appeal rights, the Office notified appellant that any request for a hearing must be made in writing within 30 days after the date of this decision, as determined by the postmark of the request. The Office advised that, to protect his right to a hearing, appellant must send his request to the Branch of Hearings and Review in Washington, DC, at the address provided.

In a letter dated October 2, 2000, but postmarked October 11, 2000, appellant requested that the Branch of Hearings and Review subpoena two witnesses.

On September 19, 2000 the Branch of Hearings and Review received a facsimile transmission from appellant's congressional representative, who forwarded a copy of a letter from appellant requesting an oral hearing. The letter was dated August 28, 2000 and was addressed to the district Office instead of to the Branch of Hearings and Review.

In a decision dated October 24, 2000, the Branch of Hearings and Review found that appellant's request was untimely because it was not postmarked within 30 days of the Office's August 14, 2000 decision. He, therefore, was not entitled to an oral hearing as a matter of right. The Branch of Hearings and Review considered appellant's request, nonetheless and denied a discretionary hearing on the grounds that he could address the issue in his case equally well by requesting reconsideration from the district Office and submitting evidence not previously considered establishing that he is entitled to a schedule award as a result of his work-related injuries.

In a letter dated November 9, 2000, postmarked November 10, 2000 and addressed on the envelope to the Branch of Hearings and Review,[1] appellant again requested an oral hearing.

In a decision dated January 2, 2001, the Branch of Hearings and Review denied appellant's request on the same grounds stated in its October 24, 2000 decision.

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award as a result of his employment-related cervical and lumbosacral conditions.

As used in the Federal Employees' Compensation Act,[2] the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving

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[1] The inside address on the letter itself is to the district Office in Chicago, Illinois.

[2] 5 U.S.C. §§ 8101-8193.

at the time of injury.[3] Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.[4] An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for wage loss.[5] When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any resulting loss of wage-earning capacity.[6]

The distinction between disability and physical impairment is relevant in this case. Here, appellant filed a claim for a schedule award, indicating that he had a permanent physical impairment caused by his accepted employment injuries. The Office denied this claim and appellant, after attempting to obtain an oral hearing before the Branch of Hearings and Review, appealed to the Board. The Board will, therefore, review whether appellant is entitled to a schedule award for permanent physical impairment.

The schedule award provisions of the Act[7] and its implementing federal regulation[8] provide for the payment of compensation (known as a "schedule award") for the permanent loss or loss of use of specified members, functions and organs of the body. No schedule award is payable, however, for a member, function or organ of the body not specified in the Act or in the regulations.[9] Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back,[10] no claimant is entitled to such an award.[11]

In this case, the Office accepts that appellant sustained a cervical sprain at work on September 12, 1994 and a lumbosacral and cervical strain on March 28, 1995. Because the law does not authorize a schedule award for physical impairment to the back, appellant may not

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[3] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f) (1999).

[4] *See Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that the Act provides for the payment of compensation in disability cases upon the basis of the impairment in the employee's capacity to earn wages and not upon physical impairment as such).

[5] *See Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent physical impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

[6] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

[7] 5 U.S.C. § 8107(a).

[8] 20 C.F.R. § 10.404 (1999).

[9] *William Edwin Muir*, 27 ECAB 579 (1976).

[10] The Act itself specifically excludes the back from the definition of "organ." 5 U.S.C. § 8101(19).

[11] *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982).

receive such an award and this is so regardless of how impaired his back may be as a result of his employment injuries.

Appellant, nonetheless, could be entitled to a schedule award in special circumstances. Amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Because the schedule award provisions of the Act include the arms and legs, a claimant might be entitled to a schedule award for permanent impairment to an arm or leg even though the cause of the impairment originated in the spine.[12]

In this case, appellant submitted no medical opinion from his physician explaining how his employment-related cervical or lumbosacral conditions had caused any permanent physical impairment to an arm or leg. He complains of numbness in his fingers but has offered no reasoned medical opinion explaining whether this numbness is permanent or how this sensory deficit arose from the incidents that took place at work on September 12, 1994 or March 28, 1995. Without such an opinion, the record simply fails to support appellant's claim for a schedule award.

The Office referred appellant to Dr. Wehner, an orthopedic surgeon, to address the issue. She explained that the accepted employment injuries should have resolved in six months' time, leaving appellant with his preexisting degenerative arthritis, which was not employment related. Further, Dr. Wehner indicated that appellant had no sensory or motor deficits in his arms or legs, such as might be caused by a spinal condition. This evidence only weakens appellant's claim for a schedule award.

Appellant has not met his burden of proof to establish that his employment-related cervical and lumbosacral conditions have caused a permanent physical impairment to an arm or leg. For this reason, the Board will affirm the Office's August 14, 2000 decision denying his claim for a schedule award.

The Board also finds that the Branch of Hearings and Review acted within its discretion in denying appellant's requests for an oral hearing.

Section 8124(b)(1) of the Act provides:

> "Before review under section 8128(a) of this title [relating to requests for reconsideration], a claimant for compensation not satisfied with a decision of the Secretary [*i.e.*, the district Office] 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 [*i.e.*, the Branch of Hearings and Review]."[13]

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[12] *Rozella L. Skinner*, 37 ECAB 398 (1986).

[13] 5 U.S.C. § 8124(b)(1).

The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[14] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[15] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[16]

The Branch of Hearings and Review first received appellant's request for an oral hearing through a September 19, 2000 facsimile transmission from his congressional representative. The letter itself was addressed to the district Office in Chicago instead of to the Branch of Hearings and Review.

Office procedures provide that if the claimant sent the request to the district Office instead of to the Branch of Hearings and Review and the envelope was not retained, then the request was timely filed if it was date-stamped by the district Office within 30 days of issuance of the decision. The Branch of Hearings and Review may deny requests date-stamped by the district Office more than 30 days after the decision was issued on the basis that the date-stamp showed untimely receipt and the claimant's failure to send the request to the Branch of Hearings and Review, as specified in the appeal rights accompanying the decision, made it impossible to determine the timeliness from the postmark.[17]

In this case, there is no evidence in the record that the district Office ever received appellant's request for an oral hearing, much less date-stamped it within 30 days of the August 14, 2000 decision. Under these circumstances, the date of appellant's first request for an oral hearing is considered to be September 19, 2000, the date his congressional representative faxed the request to the Branch of Hearings and Review.[18] Appellant's second request was postmarked November 10, 2000.

Because the evidence of record fails to show that appellant made a request for an oral hearing within 30 days of the Office's August 14, 2000 decision, he is not entitled to a hearing as a matter of right. The Branch of Hearings and Review considered granting a discretionary hearing anyway and correctly advised appellant that he could address the issue in his case equally well by requesting reconsideration from the district Office and submitting evidence not

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[14] 20 C.F.R. § 10.616(a).

[15] *Herbert C. Holley*, 33 ECAB 140 (1981).

[16] *Rudolph Bermann*, 26 ECAB 354 (1975).

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4 (June 1997).

[18] There is no legal presumption that appellant mailed the request to the District Office on August 28, 2000, the date appearing on the letter. The record contains one letter from appellant with a postmark that does not agree with the date on the letter and contains another letter whose inside address is different from that appearing on the envelope. These letters raise a question about the reliability of the date and address appearing on the August 28, 2000 letter faxed to the Branch of Hearing and Review. *See Larry L. Hill*, 42 ECAB 596 (1991) (presumption of receipt established by the mailing custom or practice of a business or office); Annotation, *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476, 481 (1986).

previously considered establishing that he is entitled to a schedule award as a result of his work-related injuries. As appellant may indeed address the issue of permanent physical impairment to an arm or leg by submitting to the district Office new and relevant medical evidence with a request for reconsideration, the Board finds that the Branch of Hearings and Review acted within its discretion in denying a discretionary hearing.[19] The Board will, therefore, affirm the October 24, 2000 and January 2, 2001 decisions of the Branch of Hearings and Review denying appellant's untimely requests for an oral hearing.

The January 2, 2001 and October 24, 2000 decisions of the Branch of Hearings and Review are affirmed. The August 14, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 10, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[19] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Branch of Hearings and Review's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).