United States Department of Labor
Employees' Compensation Appeals Board

JIMMEY CORNETT, Appellant	)	
and	)	**Docket No. 04-595**
	)	**Issued: July 2, 2004**
DEPARTMENT OF THE ARMY, DIRECTORATE OF PUBLIC WORKS, Fort Benning, GA, Employer	)	

Appearances:
Dennis McPherson, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 29, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated September 8, 2003, denying an oral hearing before the Branch of Hearings and Review, and January 22, 2003, denying his recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability causally related to his accepted work injury; and (2) whether the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On March 25, 1994 appellant, then a 39-year-old high voltage lineman, filed a traumatic injury claim alleging that he was injured when a malfunctioning circuit caused burns to his left

hand and arm. The claim was accepted for left hand and forearm burns. Appellant returned to work in a light-duty capacity. On August 19, 2002 appellant filed a recurrence claim alleging that he developed tremors in both arms related to the accepted injury. In a January 29, 1996 decision, the Office accepted the recurrence claim. Appellant continued to work in his light-duty capacity. The file contains a July 27, 1995 report from Dr. Jagdish Sidpura, a Board-certified neurologist, who stated that he attempted to treat appellant's tremors with beta blockers, especially Propranol, but he could not tolerate the medication as it caused headaches.

On August 19, 2002 appellant filed a recurrence claim alleging that his tremors worsened and he experienced migraine headaches. No medical evidence was submitted with the claim. In a December 18, 2002 letter, addressed to appellant's latest address of record, the Office informed him to submit more information, including a rationalized medical report with a diagnosis.[1] No further evidence was received.

In a January 22, 2003 decision, also addressed to appellant's latest address of record, the Office denied the recurrence claim due to insufficient medical evidence.

By letter dated April 2, 2003, appellant's representative indicated that appellant had not received any confirmation with respect to his claim. The record contains a May 9, 2003 note that indicates that appellant called the Office and stated that he did not receive the recurrence decision and that he had changed his address to Sandfort Road. In a May 22, 2003 letter, the Office sent appellant a copy of the January 22, 2003 decision and stated that he was welcome to exercise his appeal rights. In a May 29, 2003 letter, appellant, through his representative, stated that he had reviewed the May 9, 2003 letter and, for purposes of appeal assumed May 9, 2003 was the date of issuance. He further noted that he had taken disability retirement as of January 2003 and discussed the medical history. In a June 5, 2003 letter to appellant's representative, the Office informed appellant that his claim was denied on January 22, 2003 and the issues discussed in his May 29, 2003 letter must be addressed *via* an appeal, which the May 29, 2003 letter did not mention. The Office requested that appellant review his appeal rights and take appropriate action. In a letter postmarked June 25, 2003 and dated June 19, 2003, appellant requested an oral hearing before the Branch of Hearings and Review. In a September 8, 2003 decision, the Branch of Hearings and Review denied appellant's claim finding it was untimely filed and could equally well be handled through a reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[2] 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

[1] In a December 28, 1995 letter, appellant notified the Office his address changed to 901 25th Avenue, Apt. D-6, Phenix City, AL 36867.

[2] *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[3] Where no such rationale is present, medical evidence is of diminished probative value.[4]

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.[5]

ANALYSIS -- ISSUE 1

In the present case, appellant failed to submit rationalized medical evidence establishing that his August 19, 2002 recurrence of disability is causally related to the March 25, 1994 employment injury and, therefore, the Office properly denied his claim for compensation. The record indicates that appellant submitted no medical evidence regarding his 2002 recurrence claim before the January 22, 2003 decision was issued. The Board notes that with his request for a hearing appellant submitted additional evidence. However, this evidence has not been reviewed by the Office and the Board cannot consider such evidence for the first time on appeal.[6]

As appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to the accepted employment injury, the Office properly denied his claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a 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."[7] As section 8124(b)(1) is unequivocal in setting forth the time limitation 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.[8]

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

[3] *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[4] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[5] *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

[6] *See* 20 C.F.R. § 501.2(c). Appellant may resubmit such evidence to the Office through the reconsideration process. *See* 5 U.S.C. § 8128; 20 C.F.R. § 10.138.

[7] 5 U.S.C. § 8124(b)(1).

[8] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[9] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[10] when the request is made after the 30-day period for requesting a hearing[11] and when the request is for a second hearing on the same issue.[12]

Timeliness of hearings request is governed by 20 C.F.R. § 10.131(a) which provides that timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter itself should be used.[13]

ANALYSIS -- ISSUE 2

In his May 29, 2003 letter, appellant stated that he did not receive the January 22, 2003 decision that was sent to him at 901 25th Avenue Apt. D-6, Phenix City, AL 36867, his address in the record. There is evidence in the record that appellant moved from that location. The record does not establish, however, that appellant notified the Office prior to January 22, 2003 of a new address. The Office's regulation require that a copy of the decision be sent to the employee's last known address.[14] The Office followed its regulation in this case. As appellant's June 25, 2003 hearing request was made more than 30 days after the January 22, 2003 Office decision, appellant was not entitled to a hearing as a matter of right.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its September 8, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case could equally be handled through the reconsideration process. The Board notes that the issue of whether appellant sustained a recurrence of disability, is a medical question and he can submit additional medical evidence regarding his claim. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[15] In the present case, the evidence of record does not

[9] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[10] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[11] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[12] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[13] *See Gloria J. Catchings*, 43 ECAB 242 (1991); *Douglas McLean*, 42 ECAB 759, 761-62 (1991); *William J. Kapfhammer*, 42 ECAB 271, 272-74 (1990).

[14] 20 C.F.R. § 10.127. The Board notes that a copy of the decision must also be mailed to a designated representative. In this case, the record did not establish that as of January 22, 2003 appellant had a designated representative before the Office; the initial correspondence from the representative was dated April 2, 2003.

[15] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

CONCLUSION

Appellant has not met his burden of proof to establish that he sustained a recurrence and the Office properly denied appellant's request for a hearing under section 8124 of the Act.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 8 and January 22, 2003 are affirmed.

Issued: July 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member