United States Department of Labor
Employees' Compensation Appeals Board

HUBERT JONES, JR., Appellant	)	
and	)	**Docket No. 05-603**
	)	**Issued: March 10, 2006**
DEPARTMENT OF THE ARMY, FORT SAM HOUSTON, Houston, TX, Employer	)	

Appearances:
Hubert Jones, Jr., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 13, 2005 appellant filed a timely appeal from a July 27, 2004 decision of the Office of Workers' Compensation Programs, which denied his claim of total disability beginning May 14, 2004 and an October 19, 2004 decision denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that he was totally disabled due to his accepted employment injury as of May 14, 2004; and (2) whether the Branch of Hearings and Review properly denied his request for an oral hearing as untimely.

FACTUAL HISTORY

This claim has previously been on appeal. In a February 26, 1993 decision, the Board affirmed a finding by the Office that appellant did not establish a recurrence of disability

commencing September 19, 1990 causally related to his August 15, 1990 employment injury.[1] The record reflects that appellant sustained injury on August 15, 1990, accepted for a lumbar strain while moving 55-gallon oil drums. The facts of the case, as set forth in the Board's prior decision, are incorporated herein and as noted.

On June 25, 1992 appellant sustained injury when he fell and struck his head while in the performance of duty. This claim was initially accepted for a lumbar strain and the Office subsequently accepted displacements of lumbar and cervical discs. On June 16, 1993 appellant underwent an anterior cervical fusion at C4-5 and C5-6. On February 16, 1994 he underwent surgery for a lumbosacral anterior spinal fusion at L3-4. Appellant received schedule awards for 42 percent loss of use of his penis, 1 percent loss of use of his left lower extremity and 6 percent loss of use of his right lower extremity. He underwent physical therapy and a work hardening program and returned to full-time light-duty work on July 25, 1994.[2] In subsequent reports, Dr. Rafael Parra, an attending Board-certified neurosurgeon, continued appellant's work restrictions.[3]

Appellant sustained injury on February 20, 1996, which the Office accepted for a left shoulder strain and torn rotator cuff. He received appropriate compensation for intermittent disability and a schedule award for 21 percent impairment of the left upper extremity. On August 5, 1997 Dr. Parra advised that appellant underwent another functional capacity evaluation following shoulder surgery and advised that he could continue working with restrictions.[4] Appellant also came under the treatment of Dr. David M. Hirsch, an osteopath Board-certified in physical medicine and rehabilitation. He followed appellant for pain management and advised that appellant could continue with modified duty on December 11, 2000 with no lifting, pushing or pulling greater than 20 pounds. Dr. Hirsh continued these restrictions on March 20, 2001. Diagnostic testing for Dr. Parra on September 30, 2002 revealed appellant's status as post posterior lumbar interbody fusion at L3-4, degenerative disc disease at L5-S1 and L5 retrolisthesis, Grade 1.

By letter dated February 26, 2004, appellant was advised by the employing establishment that he was being separated from employment under a reduction-in-force (RIF) effective May 14, 2004. The RIF was due to reorganization of the logistics division. On May 4, 2004 appellant filed a claim for compensation, effective May 14, 2004, based on his separation under the RIF.

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[1] Docket No. 92-1144 (issued February 26, 1993).

[2] On July 19, 1994 appellant's attending physician indicated that appellant could return to limited-duty work, up to 8 hours a day as an automotive mechanic foreman, subject to standing 2 hours; sitting 2 hours and walking 4 hours a day with lifting restricted from 20 to 40 pounds and carrying 10 to 20 pounds for 2-hour periods.

[3] The record contains a job description for appellant's position, which listed light lifting up to 15 pounds, carrying 15 pounds, walking for 2 hours, standing for 2 hours and operation of a truck or motor vehicle. It was noted that appellant's duties primarily involved planning and administration and that he could be accommodated with four to eight hours of work a day.

[4] Limitations were listed as standing 4 to 6 hours, sitting 2 to 3 hours, walking 1 to 2 hours, with lifting and carrying of up to 10 pounds on an occasional basis.

Appellant was treated on April 23, 2004 by Dr. Parra, who addressed appellant's complaints of low back pain with numbness and weakness of the right lower extremity and neck pain with muscle spasms. He noted that appellant was presently working on light duty and was to remain on such restrictions, with no lifting, pushing or pulling more than 20 pounds, no prolonged standing or sitting for over 2 hours and no bending or stooping.

On June 23, 2004 the Office requested additional information in support of appellant's claim. The employing establishment submitted documentation pertaining to its reorganization of the workforce. A September 8, 2003 letter noted that the position of automotive mechanic foreman was to be abolished and that, on September 22, 2002, appellant was placed in the position of automotive mechanic with retained pay. However, as appellant was not physically able to perform the duties of this position, he was placed back into the foreman position on July 13, 2003.[5] On May 7, 2004 the automotive mechanic foreman position was eliminated under a RIF effective May 14, 2004.

In a July 2, 2004 report, Dr. Parra addressed his treatment of appellant since 1992, noting the injuries to the cervical and lumbar spine. He noted that appellant had been able to return to light-duty work, which was accommodated and of a supervisory nature. He noted that the position was eliminated and that appellant had sustained injury on November 12, 2002. Dr. Parra described appellant as experiencing chronic low back and neck pain and found that he was able to return to light-duty work within the restrictions previously noted.

By letter dated July 20, 2004, appellant noted that he had worked as an automotive mechanic foreman since 1989. He described the injuries to his cervical and lumbar spine and that he had been able to return to work in the foreman position with restrictions. With the RIF process, appellant's position was changed to that of an automotive mechanic and he sustained injury on November 12, 2002 while inspecting a tractor-trailer rig. Appellant contended that the personnel action constituted a "one-man RIF."

In a July 27, 2004 decision, the Office denied appellant's recurrence of disability claim, finding that the medical evidence established that he had the capacity to perform light duty and that he was separated from the foreman position due to a RIF.

By letter dated August 26, 2004, postmarked August 27, 2004, appellant requested a hearing before the Office's Branch of Hearings and Review. By decision dated October 19, 2004, the Office found that appellant's request was untimely as it was not made within 30 days of the July 27, 2004 decision and that he could submit additional evidence pertaining to his claim with a request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence establishes that he can perform the limited-duty position, the employee has the burden of proof to

[5] Appellant filed a claim for a traumatic injury on November 12, 2002. There is no final decision regarding this claim and it is not before the Board on this appeal. *See* 20 C.F.R. § 501.2(c).

establish a recurrence of total disability and that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature or extent of the injury-related condition or a change in nature and extent of the light-duty job requirements.[6]

The Office's definition of a "recurrence of disability" means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure. The term also means the inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, except for when such withdrawal occurs for reasons of misconduct, nonperformance of the job duties or a RIF.[7] The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is not disability within the meaning of the Federal Employees' Compensation Act.[8]

Under the Office's procedure manual, it is noted that a reemployed claimant may face removal from employment due to closure of an installation, cessation of special ("pipeline") funding or termination of temporary employment or RIF. If it is not clear whether the claimant's situation involves a RIF or the withdrawal of light duty, the claims examiner should request the personnel document on which the removal was based. Such occurrences as a RIF are not considered recurrences of disability and further action may be warranted according to whether a formal loss of wage-earning capacity determination has been made.[9]

ANALYSIS -- ISSUE 1

Appellant sustained several injuries accepted by the Office for lumbar strain, displacement of cervical and lumbar discs, for which he underwent surgery, a neurogenic bladder condition and impotence. The record reflects that he returned to light-duty work on July 25, 1994 as an automotive mechanic foreman under the work restrictions recommended by Dr. Parra. Following injury to his shoulder in 1996, appellant came under the treatment of Dr. Hirsch and was returned to modified duty in his foreman position on December 11, 2000. The work restrictions were continued by both physicians through 2004.

Documents from the employing establishment indicate that in 2001 a reorganization commenced, which included the proposed abolishment of the automotive mechanic foreman position. Personnel records reflect that on September 22, 2002 appellant was placed in an automotive mechanic position with retained pay through September 22, 2004. As noted, appellant alleged injury in this position on November 12, 2002 which is not a subject of the

[6] *See John I. Echols*, 53 ECAB 481 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[7] *See* 20 C.F.R. § 10.5(x).

[8] *See John I. Echols*, *supra* note 6; *John W. Normand*, 39 ECAB 1378 (1988). Disability is defined to mean the incapacity because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total. *See* 20 C.F.R. § 10.5(f).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.12 (July 1997).

present appeal. On July 13, 2003 he was returned to the foreman position after it was determined that he was unable to perform the duties of a mechanic. He continued working in this position under the noted work restrictions until receipt of the May 7, 2004 separation notice, which reflects that he was removed from the foreman position effective May 14, 2004 based on the RIF.

Appellant contends that he sustained a recurrence of disability commencing May 14, 2004, due to his separation under the RIF. However, appellant's work stoppage was not due to a spontaneous change in his accepted medical conditions. The medical evidence of record clearly reflects that he is not totally disabled due to his accepted employment injuries. The reports of his physicians addressed his capacity for work at limited duty subject to specified physical restrictions. As noted, a recurrence of disability is not contemplated when the work stoppage occurs as part of a RIF. The Office obtained records from the employing establishment which ascertain that appellant's separation from service was part of a RIF and the abolishment of the foreman position.[10] There is no evidence that the May 14, 2004 separation was related to anything other than the RIF and not due to residuals of the accepted injuries. Therefore, appellant did not sustain a recurrence of total disability, as defined, commencing that date.[11]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act, 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 not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[12]

The Office, in its discretion, has the authority to hold hearings in certain circumstances where no legal provision was made for such hearings and it must exercise this discretionary authority in deciding whether to grant a hearing. 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 enactment of the 1966 amendments to the Act, which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing or when the request is for a second hearing on the same issue.[13] The Office's procedures, which require it to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made

[10] *See Steven A. Andersen*, 53 ECAB 367 (2002) (the employee, a purchase and hire employee, was not eligible to receive wage-loss compensation following his termination due to lack of funding for his crew).

[11] Appellant's contention that he was removed from service as an automotive mechanic because the employing establish was unable to accommodate his work restrictions is not supported by the May 7, 2004 personnel action, removing him from the foreman position.

[12] 5 U.S.C. § 8124(b)(1).

[13] *See Andre Thyratron*, 54 ECAB 257 (2002).

after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[14]

ANALYSIS -- ISSUE 2

The Office issued the decision denying appellant's recurrence of disability claim on July 27, 2004. The 30-day period in which appellant could request a hearing as a matter of right commenced July 28, 2004.[15] The 30th day fell on Thursday, August 26, 2004. Although appellant's request for a hearing was dated August 26, 2004, the record reflects that the letter was not postmarked until August 27, 2004, the 31st day.[16] Therefore, appellant was not entitled to a hearing before an Office hearing representative as a matter of right. The Office exercised its discretion in this case and found that appellant's claim could equally well be addressed by requesting reconsideration and submitting additional evidence. The only limitation on the Office's authority is reasonableness. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and deductions from known facts.[17] There is no evidence of record that the Office abused its discretion in denying appellant's request for a hearing under these circumstances.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability commencing May 14, 2004. The Office did not abuse its discretion in denying appellant's request for a hearing.

[14] *See Henry Moreno*, 39 ECAB 475 (1988).

[15] *See Angel M. Lebron, Jr.*, 51 ECAB 488 (2000) (the date of the event from which the designated period of time begins to run shall not be included when computing the time period).

[16] *See* 20 C.F.R. § 10.616(a) (the hearing request must be sent within 30 days as determined by postmark or other carrier's date marking).

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

ORDER

IT IS HEREBY ORDERED THAT the October 19 and July 27, 2004 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: March 10, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board