United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Warrenton, VA, Employer	)	**Docket No. 09-1378** **Issued: October 20, 2009**

Appearances:
Appellant, pro se
No appearance, for the Director

Oral Argument September 10, 2009

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 5, 2009 appellant filed a timely appeal from Office of Workers' Compensation Programs' March 9, 2009 merit decision denying her claim for recurrence of disability and the April 22, 2009 nonmerit decision denying her 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 this case.

ISSUES

The issues are: (1) whether the Office properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124; and (2) whether appellant is entitled to wage-loss compensation for the period October 26 through November 2, 2008.

FACTUAL HISTORY

On December 21, 2006 appellant, a 52-year-old supervisory air traffic control specialist, filed a claim alleging that she sustained injuries to her lower back and shoulder on December 13,

2006 while reaching for folders.[1] The Office initially denied her claim on September 26, 2007 on the grounds that she had failed to establish fact of injury. Following an Office hearing representative's June 30, 2008 decision reversing the September 26, 2007 decision, it accepted appellant's claim for a lumbar sprain.

On August 20, 2008 appellant submitted a Form CA-2a alleging that she sustained a recurrence of disability as of July 9, 2008 while she was typing at work. On November 21, 2008 she submitted a claim for compensation for the period October 26 through November 2, 2008. In support of her claim, appellant provided an October 27, 2008 attending physician's report from Dr. Robert Goldman, a treating physician, who stated that she was disabled from October 23 through November 8, 2008. Dr. Goldman indicated by placing a checkmark in the "yes" box that appellant's condition was causally related to an employment activity." In response to a request for an explanation of his opinion, he stated, "aggravated strain."

On February 5, 2009 the Office informed appellant that the evidence submitted was insufficient to establish that she had sustained a recurrence of disability or that she was disabled during the alleged period. It advised her to submit a detailed statement regarding the recurrence of her disability and a medical report which contained a diagnosis and a rationalized opinion as to how her current disabling condition was causally related to the original work injury.

By letter dated March 3, 2009, the Office informed appellant that she had until March 9, 2009 to supply sufficient evidence in support of her request for compensation.

The record contains a March 3, 2009 statement from appellant received by the Office on March 9, 2009. She indicated that she had never completely recovered from her December 13, 2006 injury, noting that she had continued to experience stiffness and pain in her neck muscles. Appellant asserted that her flare-ups were a direct result of the original injury. She noted that she had sustained a traumatic injury in March 2008, when she fell in the employing establishment cafeteria and reinjured her neck in June 2008 while on official travel in Atlanta.

The record also contains a copy of a February 26, 2009 letter to appellant's employer from Dr. Olivia Gomez, a Board-certified internist. The letter was received by the Office on March 9, 2009. Dr. Gomez stated that, on October 23, 2008, Dr. Goldman had diagnosed recurrent strain and new strain to the neck and left shoulder and had placed appellant "off work" for two weeks. She asked the employer to assist appellant with any paper work necessary to cover the time in October and November of 2008, "when she had medical reasons to be off work." The record also contains an October 6, 2008 report of an x-ray of the cervical spine, which was received on March 9, 2009.

By decision dated March 9, 2009, the Office denied appellant's compensation claim, stating that it had received no response to its February 5, 2009 development letter. It found that the evidence of record failed to support disability during the alleged period.

[1] Appellant originally filed a CA-2a form alleging a recurrence of disability under OWCP File No. xxxxxx711. The Office determined that she was alleging a new injury and processed her claim as an occupational disease claim (OWCP File No. xxxxxx080).

Appellant submitted an undated request for an oral hearing. The record contains a copy of the envelope in which the request was delivered reflecting a postmark of April 9, 2009. By decision dated April 22, 2009, the Office hearing representative denied appellant's request for an oral hearing as untimely.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that a claimant not satisfied with a decision of the Office is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of the Office's decision.[2] Under the implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to a hearing by writing to the address specified in the decision 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.[3] If the request is not made within 30 days, or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[4]

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 made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of Board precedent.[5]

ANALYSIS -- ISSUE 1

The 30-day time period for determining the timeliness of appellant's request for an oral hearing commenced on the first day following the issuance of the Office's March 9, 2009 decision.[6] The 30th day following its issuance fell on April 8, 2009. The date of filing for appellant's hearing request was fixed by the date of the postmark, namely, April 9, 2009.[7] As her request for an oral hearing was made more than 30 days following the issuance of the

[2] 5 U.S.C. § 8124(b)(1).

[3] 20 C.F.R. § 10.616(a); 5 U.S.C. § 8124(b)(1).

[4] *Teresa Valle*, 57 ECAB 542 (2006).

[5] *D.E.*, 59 ECAB ___ (Docket No. 07-2334, issued April 11, 2008).

[6] *See John B. Montoya*, 43 ECAB 1148, 1151-52 (1992). *See also Donna A. Christley*, 41 ECAB 90, 91 (1989).

[7] *See* 20 C.F.R. § 10.616(a). *See also Gerard F. Workinger*, 56 ECAB 259 (2005).

Office's decision, it was untimely. Accordingly, appellant was not entitled to an oral hearing as a matter of right.[8]

The Office exercised its discretionary authority under section 8124 of the Act in considering whether to grant a hearing. 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.[9] In the instant case, the Office found that appellant's request could be equally well addressed through a request for reconsideration under section 8128 and the submission of new evidence. The Board has held that it is an appropriate exercise of discretion for the Office to apprise appellant of the right to further proceedings under the reconsideration provisions of section 8128.[10] The Board finds that the Office properly exercised its discretion in denying appellant's request for an oral hearing as untimely.

LEGAL PRECEDENT -- ISSUE 2

Section 10.5(x) of the Office's regulations defines "recurrence of disability" as 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 to the work environment that caused the illness.[11]

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 establishes that he can perform the light-duty position, the employee has the burden to establish 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 injury-related condition or a change in the nature and extent of the light-duty job requirements.[12]

[8] The Board notes that neither the date of the decision (March 9, 2009) nor the 30th day following the issuance of the decision (April 8, 2009), fell on a weekend or a federal holiday. *See John B. Montoya*, *supra* note 6 (If the last date of the relevant time period is a Saturday, Sunday or legal holiday, it is not included in determining timeliness); *see also Marguerite J. Dvorak*, 33 ECAB 1682 (1982) (In computing a time period, the date of the event from which the designated period of time begins to run shall not be included, while the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday).

[9] *Samuel R. Johnson*, 51 ECAB 612 (2000).

[10] *See André Thyratron*, 54 ECAB 257 (2002).

[11] 20 C.F.R. § 10.5(x) (2002). *See Carlos A. Marrero*, 50 ECAB 117 (1998).

[12] *Conard Hightower*, 54 ECAB 796 (2003).

An employee seeking benefits under the Act[13] has the burden of proof to establish the essential elements of his claim by the weight of the evidence.[14] For each period of disability claimed, the employee has the burden of establishing that he was disabled for work as a result of the accepted employment injury.[15] Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[16] The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[17]

The medical evidence required to establish a causal relationship, generally, is rationalized medical opinion evidence.[18] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant,[19] must be one of reasonable medical certainty,[20] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[21]

As the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision,[22] it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.[23] As the Board's decisions are final as to the subject matter appealed,[24] it is crucial that

[13] 5 U.S.C. §§ 8101-8193.

[14] *See Amelia S. Jefferson*, 57 ECAB 183(2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

[15] *See Amelia S. Jefferson, supra* note 14. *See also David H. Goss*, 32 ECAB 24 (1980).

[16] *See Edward H. Horton*, 41 ECAB 301 (1989).

[17] *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[18] *See Viola Stanko, claiming as widow of Charles Stanko*, 56 ECAB 436 (2005); *see also Naomi A. Lilly*, 10 ECAB 560, 572-573 (1959).

[19] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[20] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[21] *See William E. Enright*, 31 ECAB 426, 430 (1980).

[22] 20 C.F.R. § 501.2(c).

[23] *See William A. Couch*, 41 ECAB 548 (1990).

[24] *See* 20 C.F.R. § 601.6(c).

all evidence relevant to the subject matter of the claim which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.[25]

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for a decision as to whether appellant is entitled to compensation for the period October 26 through November 2, 2008, as the Office failed to review and consider all evidence of record prior to issuing its March 9, 2009 decision. Therefore, the case must be remanded for a merit review of all evidence received and an appropriate final decision.

In its February 5, 2009 development letter, the Office provided appellant 30 days to submit a detailed statement regarding the recurrence of her disability and a medical report, which contained a diagnosis and a rationalized opinion as to how her current disabling condition was causally related to the original work injury. In its March 3, 2009 letter, it informed appellant that she had until March 9, 2009 to supply sufficient evidence in support of her request for compensation. In its March 9, 2009 denial of appellant's claim, the Office stated that it had received no further evidence from her in response to its February 5, 2009 development letter. However, the record reflects that the Office received new factual and medical evidence from appellant on March 9, 2009, the day the decision was issued. It received a March 3, 2009 narrative statement from appellant, a February 26, 2009 medical report from Dr. Gomez, and an October 6, 2008 report of an x-ray of the cervical spine.

Board precedent requires the Office to review all evidence submitted by a claimant and received by the Office prior to the issuance of its final decision, including evidence received on the date of the decision.[26] It makes no difference that the claims examiner may not have been directly in possession of the evidence. Indeed, Board precedent envisions evidence received by the Office but not yet associated with the case record when the final decision is issued.[27] In the instant case, the Office was apparently unaware that appellant had submitted additional evidence in response to the February 5, 2009 development letter and, therefore, did not review or consider such evidence prior to issuing its final decision. The Board, therefore, must set aside the March 9, 2009 decision and remand the case to the Office to fully consider the evidence which was properly submitted by appellant prior to the March 9, 2009 decision. Following reconstruction of the record, the Office shall issue a *de novo* decision on the merits of the claim.

[25] *See Yvette N. Davis*, 55 ECAB 475 (2004) (Board precedent requires the Office to review all evidence submitted by a claimant and received by the Office prior to the issuance of its final decision, and it makes no difference that the evidence may not be directly in possession of the evidence). *See also Linda Johnson*, 45 ECAB 439 (1994) (where the Board found that the Office improperly failed to consider a medical report received on the date of its decision).

[26] *See Yvette N. Davis*, *supra* note 25; *see also William A. Couch*, *supra* note 23 (Office did not consider new evidence received four days prior to the date of its decision); *see Linda Johnson*, *supra* note 25 (applying *Couch* where the Office did not consider a medical report received on the date of its decision).

[27] *See Yvette N. Davis*, *supra* note 25; *Linda Johnson*, *supra* note 25.

CONCLUSION

The Board finds that the Office hearing representative properly denied appellant's request for an oral hearing as untimely. The Board further finds that this case is not in posture for a decision on whether appellant is entitled to wage-loss compensation from October 26 through November 2, 2008. The Office denied appellant's claim for compensation without reviewing evidence received on the date of its final decision. The Board will affirm the Office's April 22, 2009 decision, but will set aside the March 9, 2009 decision and remand the case for a merit review of all the evidence received and for an appropriate final decision on appellant's entitlement to compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed. It is further ordered that the Office's March 9, 2009 decision is set aside and the case is remanded for further action consistent with this decision.

Issued: October 20, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board