U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL R. RAMIREZ and DEPARTMENT OF THE AIR FORCE, AIR FORCE SPACE COMMAND, Cheyenne, Wyo.

Docket No. 96-1543; Submitted on the Record;
Issued April 13, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are; (1) whether appellant met his burden of proof in establishing that he developed a back condition in the performance of duty on or before May 15, 1995; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing before an Office representative.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined in its January 22, 1996 decision that appellant failed to meet his burden of proof in establishing his claim due to insufficient medical evidence.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[1] These are the essential elements of each and every claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[2]

There is no dispute that appellant is a federal employee and that he timely filed his claim for compensation benefits. However, the medical evidence is insufficient to establish that appellant's back condition, which eventually required surgery, developed as a result of his

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[1] *Elaine Pendleton*, 40 ECAB 1143 (1989)

[2] The Office's regulations clarify that a traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas occupational disease refers to injury produced by employment factors which occur or are present over a period longer than a single workday or shift; *see* 20 CFR §§ 10.5(a)(15)(16).

employment duties on or before May 15, 1995,[3] because it does not contain a rationalized medical opinion explaining how appellant's back condition was caused or aggravated by his employment duties.

In support of his claim, appellant submitted treatment notes from his attending physicians, Drs. M. Mazhar, Roy A. Kanter, Richard E. Torkelson, and George J. Guidry, documenting a history of treatment for back pain from 1988 through 1995, including treatment for an employment-related lumbar strain. In a report dated May 16, 1995, Dr. Guidry noted that appellant was complaining of persistent and unrelenting back pain of several months duration. He noted that although appellant had a history of intermittent employment-related back injuries over the years, appellant's prior back problems had not been continuous or very significant. Magnetic resonance imaging performed by Dr. Guidry revealed degenerative disc disease at L2-3 through L5-S1, a small disc herniation on the right side at L4-5 and L5-S1, spinal stenosis at L2-3, L3-4 and L4-5, and spinal stenosis to a lesser degree at L5-S1. The physician discussed with appellant the possibility of surgical intervention, and in a follow-up letter dated May 23, 1995, recommended that appellant retrain for lighter work, as his current work was potentially risky for his back.

Appellant sought a surgical second opinion evaluation from Dr. James S. Warson, a Board-certified neurological surgeon. In a report dated August 1, 1995, Dr. Warson reviewed appellant's history of back problems and performed a physical examination and diagnostic testing. Dr. Warson stated:

> "Review of this patient's films is rather interesting. This patient has a congenital lumbar spondylosis, with a very tight canal at L3-4 and L4-5. He does have some dis[c] bulging, but I think this is essentially minimal. I think his problem there is tightening in the lateral recesses. This patient does have a S1 radiculopathy, and at L5-S1 on the right he does have a ruptured dis[c]."

Dr. Warson concluded that appellant appeared to need a decompression of L3, L4 and L5, with a right L5-S1 discectomy.

Appellant underwent surgery on October 20, 1995. Appellant's preoperative surgical diagnosis was lumbar spondylosis with lumbar stenosis of L3-4 and L4-5 with possible herniated nucleus pulposus of L5-S1. During the surgery, however, Dr. Warson discovered that a discectomy was not necessary after all, and listed appellant's postoperative diagnosis as "lumbar spondylosis at L3-4, L4-5 and L5-S1. Therefore, while the physician had initially indicated that appellant might have a ruptured disc in addition to congenital spondylosis, the surgical procedure revealed that this was not the case. In addition, Dr. Warson did not provide a reasoned opinion that appellant's congenital spondylosis was aggravated or accelerated by employment factors.

[3] Part of a claimant's burden of proof includes the submission of rationalized medical evidence based upon a complete factual and medical background showing causal relationship between claimed injury and employment factors; *see Mary J. Briggs*, 37 ECAB 578 (1986); *Joseph T. Gulla*, 36 ECAB 516 (1985).

The Office advised appellant of the type of medical evidence needed to establish his claim but he did not provide such evidence. Consequently, appellant has not submitted sufficient medical evidence to establish that he developed an employment-related back condition on or before May 17, 1995. In view of this, appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty.

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

Following the Office's January 22, 1996 decision denying compensation benefits, by letter postmarked February 26, 1996, appellant requested an oral hearing before an Office representative.[4]

In a decision dated March 25, 1996, the Office denied appellant's request for a hearing on the grounds that it was untimely. The Office further informed appellant that it had determined that the issue in his claim could be equally well resolved by submitting new evidence on reconsideration.

Section 8124(b) of the Federal Employees Compensation Act, concerning entitlement to a hearing before an Office representative states: "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."[5]

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 the Office must exercise this discretionary authority in deciding whether to grant or deny 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 the 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. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[6]

In this case, the Office issued its decision denying appellant's claim for compensation benefits on January 22, 1996. Appellant's letter requesting a hearing was postmarked February 26, 1996 which was beyond 30 days from the date that the January 22, 1996 decision

[4] By letter received February 5, 1996, appellant asked the Office to provide him with a copy of his claim file so that he could review it prior to deciding whether to pursue one of his rights of appeal. By letter dated February 21, 1996, the Office provided appellant with his file, as requested.

[5] 5 U.S.C. § 8124(b)(1).

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

was issued.[7] Because appellant did not request a hearing within 30 days of the Office's January 22, 1996 decision, he was not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request, and must exercise that discretion.[8] In this case, the Office advised appellant that it considered this request in relation to the issue involved and the hearing was denied on the basis that the issues in claim could be equally well resolved by a request for reconsideration. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[9] There is no evidence of an abuse of discretion in the denial of the hearing request in this case.

The decisions of the Office of Workers' Compensation Programs dated March 25 and January 22, 1996 are affirmed.

Dated, Washington, D.C.
April 13, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[7] Under the Office's regulations implementing 5 U.S.C. § 8124(b), the date the request is filed is determined by the postmark of the request; *see* 20 C.F.R. § 10.131(a).

[8] *William F. Osborne*, 46 ECAB 198 (1994); *Herbert C. Holley*, 33 ECAB 140 (1981).

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