

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRIET H. GODFREY and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, Corvallis, Oreg.

*Docket No. 96-382; Submitted on the Record;
Issued February 20, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation properly denied appellant's request for a hearing; and (2) whether the Office properly terminated appellant's compensation effective March 1, 1995, on the grounds that she refused an offer of suitable work.

On April 14, 1993 appellant then a 62-year-old warehouse clerk, filed a claim for a traumatic injury, Form CA-1, alleging that on that date she sustained an injury, to her back and left leg, when she leaned over to tie a bundle of laundry on the dock. Appellant underwent an L4-5 facetectomy and lateral diskectomy in 1991, a lumbar laminectomy in September 1992 and diskectomies at L3-4 and L4-5 in December 1993. The Office accepted appellant's claim for a low back strain, deep vein thrombosis and disc herniation and decompression at L4-5. Appellant received continuation of pay from May 3 through June 16, 1993 and temporary total disability benefits from June 17, 1993 and continuing until her benefits were terminated.

In a letter dated December 16, 1994, the employing establishment offered appellant a position as an information receptionist. The duties of the position included typing and answering the phone and the physical requirements were mostly sedentary, with the opportunity to change positions frequently, *i.e.*, every 15 minutes and move about as needed, *i.e.*, every 30 minutes. The work did not involve lifting and/or carrying items weighing more than 20 pounds and the work did not require crawling, kneeling, or squatting at any time. The position description stated that appellant would work in an office setting, would use a chair with lumbar support and could elevate her feet using a footrest.

By letter dated January 19, 1995, the Office requested that appellant's treating physician, Dr. Robert J. Hacker, a Board-certified neurological surgeon, review the position description and determine whether the position was appropriate for appellant. By letter dated January 20, 1995, Dr. Hacker stated that the position description that the Office enclosed with the changes, including the ability to rest, with the bed nearby her place of work and the ottoman to use for her feet, made the position acceptable for appellant.

By letter dated January 19, 1995, appellant declined the position, stating that the light-duty work provided in the job description was beyond her stamina and her pain level. She stated that she had difficulty walking, was unable to sit and stand for an extended length of time, and suffered back, leg and foot pain.

By letter dated January 26, 1995, the Office informed appellant that the position of information receptionist was suitable and that the position was currently available. The Office provided appellant 30 days within which to either accept the position or provide an explanation of the reasons for refusing it. The Office advised appellant that her compensation would be terminated if she refused the offer and her refusal was not justified.

By letter dated January 31, 1995, appellant declined the job offer, stating that as a result of two spinal surgeries and the complication of blood clots, she was lame and debilitated. She stated that she was unable to sit through a movie, shop in a large mall or perform any number of everyday activities due to her pain.

By letter dated February 6, 1995, the Office found that appellant's refusal to work as stated in her January 31, 1995 letter, was not justified and she had 15 days to accept the job.

In a report of a telephone call, Form CA-110, dated March 1, 1995, the Office indicated that appellant did not report for work and the offered position was still available.

By decision dated March 1, 1995, the Office terminated appellant's compensation benefits as of March 1, 1995. The Office considered appellant's January 31, 1995 letter, but found that she submitted no medical evidence to support her assertion that she was unable to work.

By letter dated May 30, 1995, which was date-stamped June 1, 1995, appellant requested an oral hearing before an Office hearing representative.

By decision dated June 13, 1995, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's letter requesting a hearing was postmarked May 29, 1995, more than 30 days after the Office issued the March 1, 1995 decision, and that therefore appellant's request was untimely. The Branch informed appellant that she could request reconsideration by the Office and submit additional evidence.

By letter dated June 28, 1995, appellant requested reconsideration of the Office's decision.

By decision dated August 4, 1995, the Office denied appellant's request.

The Board finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant ... 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."¹ Section 10.131 of

¹ 5 U.S.C. § 8124(b)(1).

the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.² Thus, a claimant has a choice of requesting an oral hearing, or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

Section 10.131(a) of the Office's regulations³ provides in pertinent part that "a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request."

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.⁴ 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,⁵ when the request is made after the 30-day period for requesting a hearing,⁶ and when the request is for a second hearing on the same issue.⁷

In the present case, despite the Office's asserting that the postmark date of appellant's hearing request was May 29, 1995, evidence of the postmark date is not in the record. The Board has held that if the envelope bearing the postmark date has not been retained, then the request is timely filed if it is date stamped by the Office within 30 days of the issuance of the decision.⁸ The letter containing appellant's hearing request was dated May 30, 1995 and the date stamp by the Office was June 1, 1995. Therefore, appellant's hearing request was made more than 30 days, after the date of issuance of the Office's March 1, 1995 decision and the Branch was correct in stating in that decision that appellant was not entitled to a hearing as a matter of right. The Branch informed appellant that she could submit additional evidence, through a request for reconsideration. The Branch exercised its discretionary powers in denying appellant's request for a hearing.

The Board finds that the Office properly terminated appellant's compensation effective March 1, 1995 on the grounds that she refused an offer of suitable work.

² 20 C.F.R. § 10.131.

³ 20 C.F.R. § 10.131(a).

⁴ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁵ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁶ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁷ *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

⁸ *See Donna A. Christley*, 41 ECAB 90, 91 (1989); *Delphine L. Scott*, 41 ECAB 799, 803 (1990).

The Office properly determined that the position was suitable. The Board finds that the medical evidence establishes that the position was within appellant's physical limitations. The position of the information receptionist was mostly sedentary with the opportunity to change position frequently and move about as needed. Lifting and carrying requirements were up to 20 pounds. The position provided a chair with a lumbar support, the opportunity for appellant to elevate her feet and to rest with a bed nearby her place of work. Appellant's treating physician, Dr. Hacker, approved the job description on January 20, 1995.

Appellant did not submit any medical evidence, that establishes she was unable to perform the work of the information receptionist. In a report dated July 19, 1994, Dr. Hacker stated he suspected residual low back impairment status post disc hernia and surgical treatment on November 30, 1993. He stated that appellant should function in a sedentary capacity limit and work activities should be balanced with appropriate rest and inactivity to allow her to perform efficiently. In a report dated November 3, 1994, Dr. John N. Mundall, a Board-certified psychiatrist and neurologist, diagnosed left leg pain and weakness secondary to previous lumbar radiculopathy but did not address appellant's ability to work. A November 28, 1994 progress note, from Dr. Mundall described the status of appellant's condition, but also did not address appellant's ability to work. In a report dated January 7, 1995, Dr. James P. Scott, opined that appellant's phlebitis was clearly related to her surgery, that appellant continued to suffer considerable pain in her leg and was unable to perform her previous job, and that she probably could perform some type of sedentary work on a limited basis. Other reports and progress notes in the record dated December 20, 1993 or December 1994, chronicling appellant's condition are not probative, because they were submitted by physical therapists or nurses who are not considered physicians within the meaning of the Act.⁹ In a report dated September 2, 1994, Dr. James MacD. Watson, a Board-certified psychiatrist and neurologist, diagnosed lumbar strain syndrome, status post laminectomy/discectomy, and deep vein thrombosis. He stated that appellant appeared to be qualified for only sedentary employment. Dr. Hacker's January 20, 1995 opinion, establishes that appellant can perform the work of information receptionist and his opinion is corroborated by the other medical evidence of record inasmuch as the other doctors, who addressed appellant's ability to work stated, that appellant could perform sedentary work. The Office therefore, properly terminated benefits based on appellant's refusal to perform suitable alternate work.

⁹ See *Sheila Arbour*, 43 ECAB 779, 787 n.6; *Barbara J. Williams*, 43 ECAB 649, 657 (1989).

The decisions of the Office of Workers' Compensation Programs dated August 4, June 13 and March 1, 1995 are hereby affirmed.

Dated, Washington, D.C.
February 20, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member