U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD A. SAVAGE and U. S. POSTAL SERVICE,
POST OFFICE, New York, N. Y.

Docket No. 96-1246; Submitted on the Record;
Issued February 23, 1998

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act; and (2) whether appellant has met his burden of proof in establishing that he had a recurrence of disability beginning August 29, 1994 causally related to his September 29, 1993 employment injury of lumbosacral sprain.

On September 29, 1993 appellant, then a 37-year-old motor vehicle operator, filed a traumatic injury claim, alleging that he injured his lower back and head when he fell down stairs due to dizziness caused by an extremely high level of dust in the air. Appellant stopped work on September 30, 1993. The Office accepted appellant's claim for lumbosacral sprain. On April 12, 1994 the employing establishment offered appellant a limited-duty position as a modified clerk which required no lifting, pushing or pulling over 12 pounds, intermittent sitting and walking, use of a chair with a back, no driving for long periods of time and use of public transportation to and from work in compliance with medical restrictions set forth by Dr. Robert Brill, a Board-certified orthopedic surgeon and second opinion examiner. Appellant returned to work in this position on June 20, 1994.

On September 30,1994, appellant filed a claim for recurrence beginning August 29, 1994. By decision dated December 23, 1994, the Office denied appellant's claim on the grounds that the evidence failed to establish that the claimed disability was causally related to the accepted employment injury. On March 6, 1995 appellant returned to limited-duty work sitting while boxing mail. Appellant requested a hearing. By decision dated May 8, 1995, the Office denied appellant's requests as untimely. By decision dated October 17, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of the Office's December 23, 1994 decision.

The Board has duly reviewed the case record in the present appeal, and finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the 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."[1] As section 8124(b)(1) is unequivocal in setting forth the time limitations 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.[2] In this case, the Office issued it initial decision denying appellant's claim on December 23, 1994. A review of the record indicates that appellant submitted requests for a hearing which were dated April 5, 1995 and postmarked April 10 and 13, 1995. As appellant's request for a hearing was not within 30 days of the Office's decision, he is 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. In this case, the Office advised appellant that it considered his request in relation to the issue involved, and the hearing was denied on the basis that he could address this issue by submitting evidence which showed that he sustained greater than a 19 percent permanent impairment of his lower left extremity. Appellant was advised that he may request reconsideration with additional evidence. 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.[3] There is no evidence of an abuse of discretion in the denial of a hearing in this case.

The Board finds that appellant has not met his burden of proof in establishing that he had a recurrence of disability after August 29, 1994 causally related to his September 29, 1993 employment injury.

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 medical evidence of record establishes that he can perform the work of a light-duty position, the employee has the burden of establishing 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 the 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.[4]

In the present case, appellant has not submitted any rationalized medical evidence to establish that he is incapable of performing his limited-duty position. In a report dated December 5, 1994, Dr. Samuel L. Friedman, an osteopath, reported that he had examined appellant on October 2, 1993 and appellant has remained under his care since that time. After providing a history of appellant's 1993 injury, Dr. Friedman diagnosed cervical and lumbar

[1] 5 U.S.C. § 8124(b)(1).

[2] *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

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

[4] *Jackie B. Wilson*, 39 ECAB 915 (1988); *Terry R. Hedman*, 38 ECAB 22 (1986).

sprain, post-traumatic cephalgia and myofascitis as a result of that incident and indicated that he had instructed appellant to refrain from any light duty due to these conditions. This report is insufficient to establish a recurrence of disability as Dr. Friedman does not mention appellant's condition in the connection with his alleged August 29, 1994 recurrence and does not provide any rationale for his conclusion that appellant should refrain from engaging in light-duty work. As Dr. Friedman does not appear to have a complete factual picture and has not provided a rationalized opinion with respect to restricting appellant from limited duty, his opinion is of limited probative value.[5] In a report dated January 10, 1995, Dr. Friedman reiterated his diagnoses for appellant and provided objective findings concerning appellant's range of motion. However, the physician did not express an opinion regarding whether appellant was capable of performing his limited-duty work and did not relate his objective findings to the specifics of appellant's limited-duty work. Thus, this report cannot discharge appellant's burden of proof. Appellant submitted several medical reports and disability certificate forms in which Dr. Friedman repeated his diagnoses and indicated that appellant was disabled for specific periods of time after August 29, 1994. These form reports in which Dr. Friedman either checked a box to indicate that the claimed condition was related to the provided history of injury or filled in blanks to opine that appellant was totally disabled are insufficient to sustain appellant's burden of proof as these reports are not rationalized. Dr. Friedman did not provide any explanation or rationale for his opinion that the diagnosed medical condition was causally related to the September 29, 1993 incident or provide any explanation for his conclusion that appellant was totally disabled. Therefore, these reports are insufficient to meet appellant's burden of proof.[6] The report dated March 3, 1995 is essentially identical to the report dated December 5, 1994 by Dr. Friedman, except he added that appellant should refrain from heavy lifting. Since appellant's limited-duty restrictions provided that appellant would not be required to lift more than 12 pounds, this limitation by Dr. Friedman is not probative in relation to appellant's burden of proof. Although appellant was advised of the deficiencies in the medical evidence by the Office in letters dated October 31 and November 7, 1994, he has not submitted rationalized medical evidence which meets his burden of proof. Appellant has not established a recurrence of disability after September 30, 1994 causally related to his accepted employment injury.

[5] *James A. Wyrich,* 31 ECAB 1805 (1980).

[6] *Debra S. King,* 44 ECAB 203 (1992); *Salvatore Dante Roscello,* 31 ECAB 247 (1979).

The decisions of the Office of Workers' Compensation Programs dated October 17 and May 8, 1995 are hereby affirmed.

Dated, Washington, D.C.
February 23, 1998

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member