

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CALVIN G. LORENZ and U.S. POSTAL SERVICE,
POST OFFICE, Hicksville, N.Y.

*Docket No. 96-2368; Submitted on the Record;
Issued July 29, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a recurrence of disability causally related to his August 23, 1994 employment injury, commencing February 16, 1996; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

The Board has duly reviewed the case record in the present appeal and finds that appellant has failed to establish that he sustained a recurrence of disability causally related to his August 23, 1994 employment injury, commencing February 16, 1996.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which he seeks compensation was causally related to his employment injury.¹ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.²

The Office accepted appellant's claim for a low back strain, herniated lumbar disc and lumbar laminectomy with excision of the herniated disc at L4-5. Appellant returned to light-duty work after his August 18, 1987 employment injury. On February 28, 1996 appellant filed a

¹ *Dominic M. DeScala*, 37 ECAB 369 (1986).

² *Louise G. Malloy*, 45 ECAB 613, 617 (1994).

notice of recurrence of disability, alleging that his disability beginning on February 16, 1996 was related to the August 23, 1994 employment injury.³

Appellant submitted an undated medical report from his treating physician, Dr. Allan G. Zippin, a Board-certified neurologist, which was received by the Office on March 6, 1996. In his report describing his February 21, 1996 physical examination of appellant, Dr. Zippin stated that approximately one week earlier, appellant began developing increased pain in his back which came on suddenly and was severe. He stated that appellant attempted to work with it but had been walking bent over. Dr. Zippin diagnosed herniated lumbar disc and lumbar degenerative disc disease. He stated that appellant was suffering an acute exacerbation of his chronic problem and was totally temporarily disabled. The other recent medical report in the record from Dr. Zippin, dated January 24, 1996, describes appellant's work restrictions.

By letter dated March 15, 1996, the Office informed appellant that more information was required to establish his claim, particularly a report from his treating physician explaining how his current condition is causally related to the August 23, 1994 employment injury.

By decision dated April 25, 1996, the Office denied the claim, stating that the evidence of record failed to establish that the claimed medical condition or disability was causally related to the August 23, 1994 employment injury.

By letter which was date stamped by the Office June 5, 1996, appellant requested an oral hearing before an Office hearing representative.⁴ An envelope in the record addressed to the Branch of Hearings and Review is postmarked June 3, 1996 and appears to be the envelope in which the letter was mailed.⁵

By decision dated July 15, 1996, 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 June 3, 1996, more than 30 days after the Office issued the April 25, 1996 decision and therefore appellant's request was untimely. The Branch informed appellant that she could request reconsideration by the Office and submit additional evidence.

In the present case, the recent, relevant opinion of record is Dr. Zippin's February 21, 1996 report in which he stated that a week earlier appellant began developing increased pain in his back which came on suddenly and was severe. Dr. Zippin diagnosed herniated lumbar disc and lumbar degenerative disc disease and stated that appellant was suffering an acute exacerbation of his chronic problem and was temporarily totally disabled. Dr. Zippin's opinion, however, is insufficient to establish that appellant's current back condition is causally related to

³ Appellant filed several claims for recurrences of disability since his initial claim was accepted, one of which he filed on February 8, 1995 (Form CA-2a) alleging that a recurrence of disability occurred in August 1994. A "stickem" note attached to the page states "this is a new claim under #A2685336." In its April 25, 1996 decision, the Office stated that appellant sustained a lumbosacral strain during his employment on August 23, 1994 and addressed whether appellant's recurrence of disability of February 16, 1996 was related to the August 23, 1994 employment injury.

⁴ The letter appears to be undated but it is possible the date is covered as a part of another piece of paper was copied onto the top part of the page.

⁵ The enveloped was not attached to anything in the record.

the August 23, 1994 employment injury. While Dr. Zippin stated that appellant was suffering an acute exacerbation of his chronic problem, he did not state whether appellant's herniated disc had been exacerbated or his degenerative disc disease. Appellant's degenerative disc disease was not an accepted condition and therefore any exacerbation due it would not be compensable. Further, Dr. Zippin did not provide a rationalized opinion explaining how appellant's herniated disc or the August 24, 1994 employment injury of a lumbosacral strain was exacerbated. Dr. Zippin's January 24, 1996 report in which he described appellant's work restrictions predates appellant's alleged recurrence of disability occurring on February 16, 1996 and therefore is not probative. Although the Office advised appellant of the type of medical evidence needed to establish his claim for a recurrence of disability, appellant did not submit medical evidence responsive to the request. Consequently, appellant has not established that he sustained a recurrence of disability beginning February 16, 1996.

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."⁶ Section 10.131 of 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.⁷ 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 regulations⁸ 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.⁹ 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,¹⁰ when the request is made after the 30-day period for requesting a hearing,¹¹ and when the request is for a second hearing on the same issue.¹²

⁶ 5 U.S.C. § 8124(b)(1).

⁷ 20 C.F.R. § 10.131.

⁸ 20 C.F.R. § 10.131(a).

⁹ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹⁰ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹¹ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹² *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

In the present case, the envelope which appeared to be the one in which appellant's request for a hearing was mailed was postmarked June 3, 1996. The letter containing the request was date stamped by the Office June 5, 1996. 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.¹³ By either the postmark date on the envelope June 3, 1996 or the date appellant's hearing request was date stamped June 6, 1996, appellant's hearing request was made more than 30 days after the date of the issuance of the Office's April 26, 1996 decision, and the Branch was correct in stating in its July 15, 1996 decision that appellant was not entitled to a hearing as a matter of right. The Branch informed appellant that he could submit additional evidence through a request for reconsideration. The Branch exercised its discretion in denying appellant's request for a hearing.¹⁴

Accordingly, the decisions of the Office of Workers' Compensation Programs dated July 15 and April 25, 1996 are hereby affirmed.

Dated, Washington, D.C.
July 29, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ See *Donna A. Christley*, 41 ECAB 90, 91 (1989); *Delphine L. Scott*, 41 ECAB 799, 803 (1990).

¹⁴ The record also contains a decision or notification dated August 7, 1996 which covers substantially the same matters as the July 15, 1996 decision. However, since appellant had appealed the July 15, 1996 decision on July 25, 1996, the Office lacked any jurisdiction to take any action after that date.