

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIE D. ROBERSON and U.S. POSTAL SERVICE,
DALLAS BULK MAIL CENTER, Dallas, Tex.

*Docket No. 96-300; Submitted on the Record;
Issued May 11, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a schedule award; and (2) whether the Office properly denied appellant's request for a hearing before an Office representative.

On April 18, 1991 appellant, then a 39-year-old custodian, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that he was injured in the course of his federal employment when a co-worker struck him in the head. The Office accepted the claim for a contusion to the head. Subsequently, appellant filed a notice of recurrence of disability. The Office then accepted the claim for organic brain syndrome and appropriate compensation benefits were paid.

On November 2, 1993 appellant requested a schedule award.

By letters dated March 17 and April 19, 1994, the Office informed appellant that his claim had been accepted for organic brain syndrome and that pursuant to section 8107(a) of the Act¹ he could not receive a schedule award for injury to the head or brain.

Appellant submitted a February 9, 1994 report from Dr. Jay W. Seastrunk, a psychiatrist and neurologist. He diagnosed brain dysfunction due to a closed head injury suffered while on duty as a postal worker. He also diagnosed organic mood disorder with underlying organic personality disorder. Dr. Seastrunk indicated that appellant experienced severe headaches, memory loss, focus problems, black-outs, weakness in both legs, and an inability to taste.

On February 13, 1995 Dr. Jonathan E. Walker, a Board-certified psychiatrist and neurologist, reported that appellant had pain in both temples with tightness in his right neck and shoulder. He stated that appellant hardly slept due to the pain and that appellant's legs gave out.

¹ 5 U.S.C. § 8107(a).

On August 8, 1994 the Office issue a “[n]otice of [p]roposed [r]eduction of [e]ntitlement to [c]ompensation.” The Office indicated that it proposed to reduce appellant’s compensation benefits on the basis of appellant’s ability to earn \$125.00 per week as a cosmetologist. The Office found that the position of cosmetologist was suitable both medically and vocationally and that it represented appellant’s wage-earning capacity.

In a decision dated September 8, 1994, the Office reduced appellant’s compensation effective September 18, 1994 on the basis that the position of cosmetologist was suitable both medically and vocationally and that it represented appellant’s wage-earning capacity.

In a separate letter dated September 8, 1994, the Office advised appellant of his appellate rights, including his right to request a hearing within 30 days of the issuance of its decision.

In a letter postmarked April 19, 1995, appellant requested a hearing.

In a decision dated May 21, 1995, the Office found that since appellant’s hearing request was not postmarked within 30 days of its September 8, 1994 decision, he was not entitled to a hearing as a matter of right. Moreover, the Office exercised its discretion and denied appellant’s hearing request because the issues presented could be resolved upon reconsideration.

On May 22, 1995 Dr. Walker indicated that appellant continued to have pain with biofeedback. Dr. Walker stated that appellant had headaches, weakness in his legs and problems with his low back.

On June 15, 1995 the Office again advised appellant that he could not receive a schedule award for an injury to his head or brain.

In a decision dated June 22, 1995 the Office denied appellant’s request for a schedule award because section 8107 of the Act did not provide for a schedule award for the accepted condition.

Appellant subsequently requested reconsideration. In support, he submitted a June 6, 1995 report from Dr. Walker indicating that appellant continued to try to recover from his serious injury. Dr. Walker noted frequent headaches and muscles spasms in appellant’s right shoulder that precluded relaxation. He stated that appellants legs were weak and gave out. He indicated that appellant’s low back muscles and left gluteus muscle ached. He further stated that appellant’s left knee ached and popped.

In a decision dated July 21, 1995, the Office reviewed the merits of the case and found that the application was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office noted that Dr. Walker failed to describe any impairment pursuant to section 8107 of the Act and did not provide any opinion concerning the relationship of the impairment to the accepted injury.

Appellant again requested reconsideration. In support, appellant submitted a July 11, 1995 report from Dr. Walker. Dr. Walker indicated that appellant was able to read and complete forms, but incorrectly recorded the date. He stated that appellant had difficulty with memory and

could not participate in recreational activity or work because of the memory problems. He stated appellant's sleep was disturbed and that he could not read or sleep due to moderate neck pain. Dr. Walker stated that appellant could not lift heavy objects from the floor. He indicated that appellant's pain was severe. He stated that appellant walked with a cane in the left hand and experienced left gluteus medium weakness. Right-handed cane walking resulted in an antalgic gait. Dr. Walker reported appellant could walk on a treadmill with a 2-hand hold assist for 3 minutes and 34 seconds at 1 mile per hour, that he could stand for 15 minutes, and sit for 30 minutes. He reported poor standing and sitting posture and indicated that hand coordination was within normal limits. He noted complaints of right upper extremity and shoulder pain. He stated appellant could not demonstrate lower extremity unilateral balance. Dr. Walker found cervical range of motion decreased. He also noted neck and back pain. He stated that the range of motion in the shoulder was decreased. Dr. Walker noted tightness in appellant's connective tissue about the knees. He indicated that there was popping in the knees. In conclusion, Dr. Walker stated that appellant was "70 percent impaired by his post-traumatic encephalopathy and his post-traumatic myofascial pain syndrome."

In a decision dated October 12, 1995, the Office reviewed the merits of the claim and again found the evidence submitted in support of the application insufficient to warrant modification. In an accompanying memorandum, the Office indicated that Dr. Walker failed to provide any reasoning why the reported conditions were caused or aggravated by the accepted employment injuries.

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

The Office accepted appellant's claim for a contusion to the head and organic brain syndrome. Schedule awards, however, are not payable for a member, function, or organ of the body not specified in the Act or in the implementing regulations.² As neither the Act nor the regulations provide for the payment of a schedule award for injuries to the head or brain, claimant is not entitled to such an award.³

In 1960, amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Consequently, claimant may be entitled to a schedule award for a member of the body covered by the schedule even though the cause of the impairment originated in the head or brain.⁴

In this case, Dr. Walker, a Board-certified psychiatrist and neurologist, opined that appellant suffered pain and weakness in his legs, knees, shoulder, and right upper extremity. In addition, Dr. Seastrunk, a psychiatrist and neurologist, noted weakness in appellant's legs. Neither physician, however, addressed whether these conditions or impairments were related to appellant's accepted employment injuries of a contusion to the head and organic brain syndrome.

² *George E. Williams*, 44 ECAB 530 (1993).

³ *Id.*

⁴ *Id.*

Accordingly, the medical evidence of record is insufficient to establish appellant's entitlement to a schedule award.

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

Section 8124(b)(1) of the Act provides that "a claimant not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of a decision, to a hearing on his claim before a representative of the Secretary." As section 8124(b)(1) is unequivocal in setting forth the time limitation 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. Moreover, 20 C.F.R. § 10.131(b) affords appellant, in lieu of a hearing, an opportunity for a review of the written record by an Office representative if such a request is made within 30 days after the date of the issuance of a decision.⁵

In the present case, the Office issued a decision dated September 8, 1994, but appellant request for a hearing was not postmarked until April 19, 1995, more than 30 days after the decision. Since appellant's request for a hearing was not postmarked within 30 days of the Office's September 8, 1994 decision, he is not entitled to a review of the hearing as a matter of right.⁶

Even when the request for a hearing is not timely, the Office has discretion to grant the 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 that it was denied because the issues presented could be resolved upon 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.⁷ There is no evidence of abuse of discretion in the Office's denial of appellant's request for a hearing.

⁵ See 20 C.F.R. § 10.131(b).

⁶ 20 C.F.R. § 10.131(a).

⁷ *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Program dated October 12, 1995, July 21, 1995, June 22, 1995 and May 21, 1995 are affirmed.

Dated, Washington, D.C.
May 11, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member