U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of DEBRA L. LEVINGSTON and U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Detroit, Mich.

*Docket No. 97-632; Submitted on the Record;*
*Issued November 16, 1998*

---

DECISION and ORDER

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

The issues are whether appellant established that her recurrence of disability was causally related to the October 12, 1994 work injury and whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing.

On November 3, 1994 appellant, then a 38-year-old flat sorter operator, filed a notice of traumatic injury, claiming that on October 12, 1994 she pinched a nerve in her back, possibly herniating a disc, while moving tubs of mail. Appellant later filed a notice of occupational disease on the advice of the Office and the November 7, 1994 report of Dr. James A. Fortune, Board-certified in family practice, claiming that her lumbar radiculopathy was caused by her employment.

On February 9, 1995 the Office accepted appellant's claim for low back strain and lumbar radiculopathy and paid appropriate compensation, noting appellant's return to regular duty on February 6, 1995. However, appellant did not actually resume work at that time but instead underwent further testing and physical therapy for a herniated disc at L5-S1.

Subsequently, appellant returned to restricted, part-time duty on June 13, 1995, but then stopped work in late August 1995. On September 10, 1995 appellant filed a notice of recurrence of disability, claiming that on August 25, 1995 she awoke with the same kind of back pain she had experienced in October 1994.

On September 25, 1995 the Office issued a notice of proposed termination of disability compensation, based on the July 31, 1995 letter from Dr. Anthony F. Femminineo, Board-certified in physical medicine and rehabilitation, who concluded that there were no objective findings to support appellant's subjective complaints of pain and that he had limited her work to four hours a day based on her complaints.

On October 25, 1995 the Office terminated appellant's compensation on the grounds that her work-related disability had ceased. The Office noted that Dr. Femminineo's August 31 and September 28, 1995 reports were contradictory on the issue of whether appellant's lumbar discomfort occurred at home on August 25, 1995, the day before she began a week's vacation, or occurred at work when she returned from vacation.[1]

Appellant requested reconsideration and submitted reports from Dr. Charles F. Harvey, a neurosurgeon, who performed a lumbar laminectomy and discectomy on December 8, 1995. The Office denied appellant's request on January 16, 1996 on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of the prior decision. The Office noted that Dr. Harvey's opinion that appellant's October 1994 work injury aggravated her disc disease and led to the December 1995 operation was not based on a full and accurate medical history.

On February 22, 1996 appellant requested an oral hearing, which was denied on March 25, 1996 on the grounds that appellant had previously requested reconsideration.

On April 30, 1996 appellant filed a second notice of occupational disease, claiming that years of carrying mail as well as the repetitive lifting, bending and twisting required by her job caused a ruptured lumbar vertebral disc. Appellant, who had a second laminectomy on April 21, 1996, added that she was actually claiming a recurrence of her original injury. The Office informed appellant on August 26, 1996 that this claim had been deleted because it was the same as the recurrence of disability claim she had filed on September 10, 1995. The Office added that appellant could exercise her appeal rights.

On September 19, 1996 appellant requested reconsideration and submitted an August 12, 1996 report from Dr. Harvey. On October 31, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant modification of the prior decision. The Office noted deficiencies in Dr. Harvey's reports that detracted from the probative value of his conclusion linking appellant's current back condition to the 1994 injury.

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

[1] The Office terminated appellant's compensation in the October 25, 1996 decision but failed to indicate the effective date. Prior to the termination, appellant had stopped work and had filed a recurrence of disability claim, which the Board is now remanding for further evidentiary development. Therefore, the Board will not address the issue of whether the Office properly denied appellant's request for reconsideration of the termination decision, which was denied on January 16, 1996.

The Federal Employees' Compensation Act[2] is unequivocal that a claimant not satisfied with a decision of the Office has a right, upon timely request, to a hearing before a representative of the Office.[3] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[4] Because subsection (b)(1) is unequivocal on the time limitation for requesting a hearing, a claimant is not entitled to such hearing as a matter of right unless his or her request is made within the requisite 30 days.[5]

The Office's procedures implementing this section of the Act are found in Chapter 2.1601 of the Federal (FECA) Procedure Manual. The manual provides for a preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and, if not, whether a discretionary hearing should be granted; if the Office declines to grant a discretionary hearing, the claimant will be advised of the reasons.[6] The Board has held that the only limitation on the Office's authority is reasonableness,[7] and that abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[8]

In this case, appellant requested an oral hearing on February 22, 1996 following the January 16, 1996 denial of her request for reconsideration of the October 25, 1995 decision terminating her compensation. Attached to that decision was a statement outlining appellant's options regarding his appeal rights. The statement is clear that appellant may choose a hearing, reconsideration, or Board review. Equally clear is the following sentence: "A request for a hearing must be made *before* any request for reconsideration...." Inasmuch as appellant requested reconsideration of the October 25, 1995 decision, she is not now entitled to an oral hearing.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing, and must exercise that discretion.[9] Here, the Office informed appellant in its March 25, 1996 decision that it had considered the timeliness matter in relation to the issue involved and denied appellant's hearing request on the basis that additional evidence on the issue of causal relationship could be fully considered through a request for reconsideration.

---

[2] 5 U.S.C. §§ 8101-8193 (1974).

[3] 5 U.S.C. § 8124(b); *Joe Brewer*, 48 ECAB ___ (Docket No. 95-603, issued March 21, 1997); *Coral Falcon*, 43 ECAB 915, 917 (1992)

[4] *Eileen A. Nelson*, 46 ECAB 377, 379 (1994); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.10(b) (July 1993).

[5] W*illiam F. Osborne*, 46 ECAB 198, 202 (1994).

[6] *Belinda J. Lewis*, 43 ECAB 552, 558 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

[7] *Wanda L. Campbell*, 44 ECAB 633, 640 (1993).

[8] *Wilson L. Clow*, 44 ECAB 157, 175 (1992).

[9] *Frederick D. Richardson*, 45 ECAB 454, 465 (1994).

In this case, nothing in the record indicates that the Office committed any act in denying appellant's hearing request which could be found to be an abuse of discretion. Further, appellant was advised that she could request reconsideration and submit evidence in support of her recurrence of disability claim. Finally, appellant has offered no explanation for the untimely request or any argument to justify further discretionary review by the Office.[10] Thus, the Board finds that the Office properly denied appellant's request for a hearing.

The Board also finds that this case is not in posture for decision on the issue of whether appellant established that her recurrence of disability was causally related to the 1994 work injury.

Under the Act, an employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the recurrence of the disabling condition for which compensation is sought is causally related to the accepted employment injury.[11] As part of this burden the employee must submit rationalized medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the current disabling condition is causally related to the accepted employment-related condition[12] or to work factors,[13] and supports that conclusion with sound medical reasoning.[14]

Section 10.121(b) provides that when an employee has received medical care as a result of the recurrence, he or she should arrange for the attending physician to submit a medical report covering the dates of examination and treatment, the history given by the employee, the findings, the results of x-ray and laboratory tests, the diagnosis, the course of treatment, the physician's opinion with medical reasons regarding the causal relationship between the employee's condition and the original injury, any work limitations or restrictions, and the prognosis.[15]

In this case, appellant submitted the August 12, 1996 report of Dr. Harvey who concluded that appellant's continuing disability dating back to 1994 was work related because she sustained

[10] *Cf. Brian R. Leonard*, 43 ECAB 255, 258 (1992) (finding that the Office abused its discretion by failing to consider appellant's explanation regarding the untimely filing of his hearing request).

[11] *Dennis J. Lasanen*, 43 ECAB 549, 550 (1992).

[12] *Kevin J. McGrath*, 42 ECAB 109, 116 (1990).

[13] *Caroyln F. Allen*, 47 ECAB ___ (Docket No. 94-828, issued December 7, 1995).

[14] *Lourdes Davila*, 45 ECAB 139, 142 (1993).

[15] 20 C.F.R. § 10.121(b).

a herniated disc at that time, which subsequently required two surgeries. Dr. Harvey added that appellant was "a clear coherent historian" and explained:

> "Her work-related disc herniation of 1994 was extended to the right side in August of 1995 and caused contralateral symptoms.... There is only one disc at L5-S1. By history it was herniated on [October 12, 1994]. Her initial CT scan in November of 1994 was poor quality, and CT scans only reveal about 70 percent of disc herniation. The MRI scan of [February 23, 1995] and CT-myelogram of [March 28, 1995] confirm the clinically evident disc herniation. Since her injury of [October 12, 1994] she has been in virtually constant medical care for disabling symptoms of this same disc herniation at L5-S1.
>
> "Following lumbar disc surgery the recurrence risk is approximately 10 to 20 percent and [appellant] unfortunately suffered a recurrent herniation of the disc which was herniated at work on [October 12, 1994]. Without her initial work-related disc herniation she would not have required either surgery...."

Dr. Harvey noted that appellant had been referred to him by Dr. Femminineo after she had developed continuing severe back pain in August 1995.

The Board finds that the Office must further develop the record regarding appellant's recurrence of disability.[16] While Dr. Harvey's August 1996 report is not well rationalized, it does raise an uncontroverted inference that appellant's current back condition may be related to the initial 1994 injury.[17] Further, Dr. Femminineo stated on September 28, 1995 in response to the Office's questions that appellant's reported lumbar discomfort at work was an exacerbation of the 1994 injury. Finally, while Dr. Harvey was unclear about whether appellant's lumbar symptoms were caused by work factors or occurred simultaneously, he did explain that herniation can recur from one side of a disc to the other, and that is what happened to appellant.

Therefore, the Board will remand this case for the Office to ask Dr. Harvey to clarify his opinion on the causal relationship of appellant's current back condition to the 1994 injury and, specifically, whether appellant had a work-related propensity to the herniation extension, as noted by the claims examiner in the October 31, 1996 decision. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.[18]

---

[16] While appellant has the burden of establishing entitlement to compensation when the Office has undertaken the development of either factual or medical evidence, proceedings under the Act are not adversarial, and the Office has an obligation to see that justice is done. 20 C.F.R. §10.110(b); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[17] *See John J. Carlone*, 41 ECAB 354, 358 (1989) (finding that medical evidence submitted by appellant is sufficient, absent any opposing medical evidence, to require further development of the record).

[18] *See Raymond H. VanNett*, 44 ECAB 480, 483 (1993) (finding that the Office failed to complete evidentiary development in accord with its own procedures and Board precedent).

The March 25, 1996 decision of the Office of Workers' Compensation Programs is affirmed, the October 31 and January 16, 1996 decisions are set aside, and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
November 16, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member