U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JULIUS R. WALLACE and DEPARTMENT OF THE ARMY, FACILITY MAINTENANCE, Fort Campbell, Ky.

*Docket No. 96-880; Submitted on the Record;*
*Issued September 2, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether appellant established that he sustained a recurrence of disability causally related to his accepted work injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for an oral hearing.

On September 19, 1989 appellant, then a 44-year-old air conditioning and heating equipment mechanic, filed a notice of traumatic injury, claiming that he fell and pulled a back muscle while lifting a motor out of a truck bed. The Office accepted the claim for a low back strain and aggravation of appellant's lumbar disc disease and paid appropriate compensation.

Subsequently, appellant accepted a light-duty position as maintenance and repair clerk and returned to work on April 26, 1993. On June 3, 1993 appellant filed a notice of recurrence of disability, claiming an inability to tolerate prolonged sitting due to increase back pain. Appellant stated that he had pitting edema and swelling in both legs, that he could not concentrate at work and that he needed a cane for support when walking. Appellant stopped work on May 3, 1993.

On July 12, 1993 the Office informed appellant that he needed to submit a factual statement and a narrative medical report from his attending physician explaining, with medical rationale, the causal relationship between his present condition and the original injury. The Office added that the June 1993 reports from Dr. Carl R. Hampf, a Board-certified neurosurgeon, provided no objective findings of disability and no evidence of a worsening of appellant's condition, which would prevent appellant from performing the light-duty job.

Appellant responded that Dr. Hampf had released him to the care of his primary physician, Dr. Robert H. Lee, Board-certified in family practice, who had referred appellant to Dr. David McCord, a Board-certified orthopedic surgeon.

On September 23, 1993 the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence failed to establish "a true recurrence" or a causal relationship between the initial injury and appellant's current condition. The Office noted that the medical evidence consisted of forms from Dr. G. William Davis, a Board-certified orthopedic surgeon and Dr. Lee indicating referrals to Dr. McCord, but the record contained no report addressing the cause of the present claimed disability or the issue of appellant's ability to perform the duties of the clerk position.

On December 21, 1993 appellant requested reconsideration, which the Office denied on January 26, 1994 on the grounds that appellant's letter neither raised substantive legal questions nor included new and relevant evidence and was, therefore, insufficient to warrant review of the prior decision.

On February 11, 1994 appellant again requested reconsideration, noting that he was entitled to an oral hearing and requesting a schedule award. Appellant reiterated his request for a hearing in a letter dated April 8, 1994, stating that he did not realize he was waiving his right to a hearing by requesting reconsideration.[1]

On April 29, 1994 the Office denied appellant's request for a hearing on the grounds that it was untimely filed and that the issue could be equally well resolved by requesting reconsideration and submitting factual and medical evidence supporting a recurrence of disability.

Appellant again requested reconsideration and submitted a July 20, 1994 report, from Dr. Hampf, who stated that he could not be any more specific about appellant's work restrictions, that appellant "would certainly be well served by losing some weight," and that if prolonged sitting aggravated appellant's back, he should occasionally change positions, get up and walk around or lay down.

Dr. Lee stated on July 15, 1994, that appellant had lumbar disc disease and was "limited" in prolonged sitting, walking, or standing because of "constant pain in his low back." Dr. Lee added that appellant had had severe obesity most of his adult life, which had not appeared to have interfered with his job. Dr. Lee referred appellant to Dr. Tim P. Schoettle, a Board-certified neurosurgeon, who in turn sent appellant to Dr. Herschel A. Graves, Jr., a Board-certified surgeon.

In a report dated August 3, 1994, Dr. Graves stated that appellant needed a banded gastric by-pass to help him lose 150 pounds.[2] Dr. Graves added that appellant's obesity compounded a serious back problem caused by a work accident in September 1989. Since the injury and subsequent disc surgery in November 1993, appellant had gained 80 pounds and now weighed 405.

[1] On April 29, 1994 the Office waived collection of a $301.48 overpayment.

[2] On August 22-23, 1994 appellant had gastric surgery.

Dr. Graves opined that the inactivity, depression, and boredom accompanying appellant's life since the 1989 injury produced the severe weight problem and that appellant was unable to do his job which required sitting for six hours and commuting for two hours a day. Dr. Graves concluded that appellant's "entire problem" was related to the work injury, which had "precipitated" his severe weight gain.

In a report dated October 6, 1994, Dr. Timothy P. Schoettle, Nashville, stated that he had reviewed the duties of appellant's clerk position and concluded that appellant was unable to perform the job requirements due to a combination of his failed back syndrome, lumbar radiculopathy and morbid obesity.

On November 28, 1994 the Office denied reconsideration on the grounds that the medical evidence submitted in support of appellant's request was insufficient to warrant modification of the prior denial. The Office noted that the reports from Drs. Lee and Hampf offered no opinion on the causal relationship between appellant's current condition and the accepted injury in 1989 and that Dr. Graves' opinion was unsupported by any evidence.

On July 10, 1995 appellant again requested reconsideration on the grounds that the employing establishment terminated him for being unable to perform the duties of his job and the administrative law judge who heard appellant's appeal of his dismissal found that appellant could not do the job even if he had been accommodated with a cot or other reclining device.

On October 24, 1995 the Office denied reconsideration on the grounds that the medical evidence was insufficient to warrant modification of its prior decision. The Office found that no evidence supported appellant's contention that the employing establishment had withdrawn the offered light-duty position; rather, appellant had failed to supply medical documentation when he attempted to return to work twice in 1994, as required by the employing establishment.

The Board finds that appellant has failed to establish that his recurrence of disability was causally related to the October 4, 1989 work injury.

Under the Federal Employees Compensation Act,[3] 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.[4] 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,[5] and supports that conclusion with sound medical reasoning.[6]

[3] 5 U.S.C. §§ 8101-8193 (1974).

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

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

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

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.[7] Thus, the medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated, or aggravated by the accepted injury.[8]

In this case, the Board finds that the medical evidence is insufficient to establish that appellant sustained a recurrence of disability causally related to the 1989 work injury.

None of the medical reports contains a rationalized opinion explaining how appellant's current back condition is related to the accepted injuries of strain and aggravation of his degenerative disc disease.[9] The June 3, 1993 report, from Dr. Hampf, stated that appellant's low back pain was related to his degenerative disc disease aggravated by his obesity, not an accepted work condition and the June 11, 1993 report indicated a causal relationship but provided no rationale for the conclusion that appellant's disc disease was work related. The forms from Drs. Davis and Lee indicated referred appellant to Dr. McCord but provided no opinion on the relevant issue.

The July 20, 1994 letter, from Dr. Hampf, similarly omitted any opinion on the causal relationship of appellant's current condition to the accepted injuries. Dr. Hampf emphasized that appellant should change positions as needed and could "either get up and walk around or lay down." Contrary to appellant's assertions on appeal, Dr. Hampf did not opine that appellant needed the added accommodation of a cot or couch to enable him to work at the light-duty job.

The July 15, 1994 letters from Dr. Lee stated, that appellant had lumbar disc disease and constant pain in his low back, along with severe obesity, which had not limited him in working, Dr. Lee added that he had nothing from a therapeutic view to offer appellant, but failed to provide any conclusion on the causal connection between appellant's current back condition and the 1989 injuries.

Dr. Graves stated in an August 3, 1994 report, that appellant's entire problem was related to the initial work injuries, but did not explain this conclusion with any medical rationale except to point out that the work injury had precipitated appellant's weight gain. Dr. Graves performed a splenectomy and tubal gastrostomy on August 26, 1994, but offered no further opinion on the

[7] 20 C.F.R. § 10.121(b).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship,* Chapter 2.805.2 (June 1995).

[9] *See Jose Hernandez*, 47 ECAB ___ (Docket No. 94-1089, issued January 23, 1996) (finding that medical reports that failed to address directly the causal relationship between appellant's recurrence of disability and his employment injuries were insufficient to meet appellant's burden of proof).

relevant issue. Inasmuch as the medical evidence is insufficiently rationalized to meet appellant's burden of proof, the Board finds that his claim for a recurrence of disability was properly denied.[10]

Appellant argues that the real issue in his case is not a recurrence of disability but rather a withdrawal of the light-duty position offered by the employing establishment. Appellant claims that when he tried to return to work, the employing establishment refused to accommodate his physical limitations and questioned his medical fitness. Appellant refers to the decision by the Merit Systems Protection Board that appellant was found unable to perform the duties of the repair clerk position.

The record shows that the employing establishment did not withdraw its light-duty position and that it terminated appellant because he refused to provide the medical documentation needed before he could resume his duties after being on absent-without-leave status in 1993-94. On appeal, the employing establishment's termination of appellant was upheld. As noted, Dr. Hampf did not require that appellant have the added accommodation of a cot or couch at the work site. Therefore, the Board rejects appellant's arguments as well as his contentions regarding the suitability of the light-duty position.[11]

The Board also finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing.

The Act 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.[12] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[13] 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.[14]

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.[15] The Board has held that the

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[10] *See Connie Johns*, 44 ECAB 560, 570 (1993) (finding the medical evidence insufficient to establish that appellant had any disability causally related to the residuals of her accepted back condition).

[11] This issue was never before the Office.

[12] 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).

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

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

[15] *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).

only limitation on the Office's authority is reasonableness,[16] 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.[17]

In this case, appellant requested a hearing on February 11, 1994 and reiterated his request on April 8, 1994. However, the record shows that, with its September 23, 1993 decision, the Office included a copy of appellant's appeal rights, which clearly states that if appellant has "not requested reconsideration as described below," he may request a hearing within 30 days. The Office's instruction is unequivocal: the request for a hearing must be made in writing within 30 days of the date of the decision. Appellant's 1994 requests were, therefore, untimely filed and appellant was not entitled to a hearing as a matter of right.

Appellant argues that the Office's denial of an oral hearing violates his due process rights on the grounds that his wife, acting as his representative, was "deceived" by an Office claims examiner who advised her to seek reconsideration and failed to inform her that such reconsideration would waive his right to a hearing. There is no evidence of such "deceit" in this record. Further, the Act provides that appellant is entitled to present evidence in support of his claim either through the means of reconsideration or oral hearing.[18] Therefore, appellant's due process rights have not been violated.[19]

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing and must exercise that discretion.[20] Here, the Office informed appellant in its April 29, 1994 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 whether he had sustained a recurrence of disability could be fully considered by requesting another reconsideration and submitting factual and medical evidence in support of his alleged disability.

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 he could request reconsideration and submit evidence in support of his claim for wage-loss compensation. Finally, appellant has offered no explanation for the untimely request or any argument to justify further discretionary review by the Office.[21] Thus, the Board finds that the Office properly denied appellant's request for a hearing.

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

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

[18] *Lester G. Wold*, 32 ECAB 1105, 1108 (1981).

[19] *See Donald E. Buckles*, 41 ECAB 338, 342 (1989) (noting that violations of due process are found only in what the Office did or omitted to do).

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

[21] *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).

The October 24, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
September 2, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member