U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH BURNLEY and U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, Pa.

Docket No. 97-1362; Submitted on the Record;
Issued January 28, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

The issues are: (1) whether appellant has established a recurrence of disability commencing December 1, 1995 causally related to her April 16, 1993 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

In the present case appellant, a mailhandler, filed a claim alleging that she sustained injuries in the performance of duty on April 16, 1993 when she was hit by a coworker with a stack of magazines. The Office accepted the claim for an acute cervical strain and traumatic headaches. Appellant returned to work on April 16, 1994 in a light-duty position. She filed a notice of recurrence of disability (Form CA-2a) commencing December 1, 1995.

In a decision dated September 19, 1996, the Office determined that appellant had not established a recurrence of disability commencing December 1, 1995. Appellant requested a hearing before a representative the Office's Branch of Hearings and Review in a letter postmarked October 25, 1996. By decision dated November 26, 1996, the Branch of Hearings and Review denied appellant's request for a hearing.

The Board finds that appellant has not established a recurrence of disability commencing December 1, 1995.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[1]

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[1] *Terry R. Hedman*, 38 ECAB 222 (1986).

In this case, the record indicates that appellant had returned to work in a light-duty position on August 16, 1994. By letter dated August 30, 1995, the employing establishment notified appellant that she was to be reassigned to a position on Tour 3 with different working hours.[2] The effective date of the reassignment was September 16, 1995, although the employing establishment granted several extensions until December 1, 1995. Appellant did not report to work on December 1, 1995.[3]

As noted above, appellant may establish a recurrence of disability by showing a change in the nature or extent of her light-duty job. On her Form CA-2a appellant stated that "workload capacity has increased" without further detail. With regard to the reassigned position, the employing establishment indicated that it would also have accommodated appellant's restrictions. According to the employing establishment, even though the mail volume was higher on Tour 3, it would not have affected appellant since her position would be modified to meet her current restrictions. Since appellant did not actually begin work in the reassigned position on December 1, 1995, there is no probative evidence of record establishing an increased workload or other change in the nature and extent of the light-duty job.

With respect to the medical evidence, the Board finds that it is not sufficient to establish a recurrence of disability commencing December 1, 1995. In a note dated November 30, 1995, a Dr. Badkerhanian stated that appellant should continue working the day shift because of "mental stress." No further details are provided and the Board notes that a stress condition has not been accepted in this case. In a report dated November 15, 1995, the attending internist, Dr. Samuel C. Vrooman, stated that appellant's restrictions remained the same, but appellant would not be able to work the night shift because the "volume of work is too great." As indicated above, however, the factual evidence does not establish that appellant's specific duties on the night shift would involve additional work. In reports dated February 27 and March 7, 1996, Dr. Vrooman stated that appellant's symptoms "are worse at the end of the day" and therefore she was unable to work on Tour 3. The Board finds that this is not sufficient medical reasoning to establish disability commencing December 1, 1995. He indicated in is February 27, 1996 report that appellant's restrictions had not changed and he does not provide additional detail or fully explain how appellant's employment injuries prevented appellant from performing the reassigned light-duty job.

The remainder of the medical evidence also fails to establish a recurrence of disability from December 1, 1995 through January 20, 1996. A second opinion referral physician, Dr. Kevin A. Mansmann, an orthopedic surgeon, stated in an August 12, 1996 report that appellant's complaints did appear consistent with her work injury and she continued to be capable of performing her light-duty job. Dr. Mansmann did not specifically comment on the period commencing December 1, 1995. Another referral physician, Dr. Kathleen Maloney, a neurologist, opined that residuals of the employment injuries had ceased by December 1, 1995.

[2] The work shift would begin at 5:15 p.m., rather than the day shift appellant had been working.

[3] The record indicates that appellant did return to work on January 20, 1996.

In the absence of a reasoned opinion, based on a complete background, that appellant was disabled for the reassigned job commencing December 1, 1995, the Board finds that appellant has not met her burden of proof in this case.

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

Section 8124(b)(1) of the Federal Employees' Compensation Act provides in pertinent part:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this title 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."[4]

A claimant requesting a hearing after the 30-day period is not entitled to a hearing as a matter of right.[5] In this case, appellant requested a hearing by letter postmarked October 25, 1996. Since this is more than 30 days after the September 19, 1996 decision, appellant is not entitled to a hearing as a matter of right.

Although appellant's request for a hearing was untimely, the Office has discretionary authority with respect to granting a hearing and the Office must exercise such discretion.[6] In the January 31, 1994 decision, the Office advised appellant that it had considered the matter in relation to the issue involved and the hearing was denied on the grounds that appellant could resolve the issue by requesting reconsideration and submitting relevant evidence. This is considered a proper exercise of the Office's discretionary authority.[7] There is no evidence of an abuse of discretion in this case.

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[4] 5 U.S.C. § 8124(b)(1).

[5] *See Robert Lombardo*, 40 ECAB 1038 (1989).

[6] *See Herbert C. Holley,* 33 ECAB 140 (1981).

[7] *Mary B. Moss,* 40 ECAB 640, 647 (1989).

The decisions of the Office of Workers' Compensation Programs dated November 26 and September 19, 1996 are affirmed.

Dated, Washington, D.C.
January 28, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member