

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BELAINESH BELATCHEW and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER WEST, Los Angeles, Calif.

*Docket No. 97-1555; Submitted on the Record;
Issued January 21, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on October 21, 1996 causally related to her February 13, 1995 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely.

The Board has duly reviewed the case on appeal and finds that appellant failed to meet her burden of proof in establishing that she sustained a recurrence of disability on October 21, 1996 causally related to her February 13, 1995 injury.

Appellant requested that the Board review two claims on appeal. On February 14, 1995 appellant filed a notice of traumatic injury alleging that she injured her back in the performance of duty on February 13, 1995 when a chair slipped out from under her.¹ The Office authorized payment of medical bills but did not issue a final decision addressing appellant's claim. Appellant filed a notice of recurrence of disability on October 29, 1996 alleging on October 21, 1996 she sustained a recurrence of disability while moving a patient and that this "recurrence" was causally related to her February 13, 1995 employment injury. By decision dated December 12, 1996, the Office denied appellant's claim for recurrence and stated that her October 21, 1996 employment injury was accepted as a traumatic injury on December 3, 1996 and that she had not established a causal relationship between her accepted employment injury and her current condition.

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability commencing October 21, 1996 and her February 13, 1995 employment injury.² This burden includes the

¹ This claim is number A13-1072441.

² *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-9 (1982).

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.³

Appellant submitted notes from Dr. William H. Dillin, a Board-certified orthopedic surgeon, on November 13, 1995. Dr. Dillin reported on February 28, 1995 that appellant fell off of a chair on February 13, 1995 at work. He diagnosed lumbar sprain. In a treatment note dated July 24, 1995, Dr. Dillin noted that appellant's magnetic resonance imaging scan revealed disc degeneration and a central disc protrusion. These notes are not sufficient to meet appellant's burden of proof in establishing a recurrence of disability causally related to her accepted employment injury as the notes predate appellant's alleged recurrence of disability on October 21, 1996.

Appellant submitted notes and reports from Dr. Leonard J. Faye, a chiropractor. Dr. Faye noted on October 28, 1996 that he reviewed x-rays and diagnosed L5 disc syndrome. In a form report dated October 29, 1996, he noted that appellant brought her previous x-rays and again diagnosed lumbar disc syndrome L5 and thoraco lumbar dysfunction.

Section 8101(2) of the Federal Employees Compensation Act⁴ provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated by x-ray to exist. As Dr. Faye did not diagnose a subluxation of the spine demonstrated on x-ray, he is not a physician for purposes of the Act and his reports do not constitute the medical evidence necessary to establish appellant's claim.

As appellant has failed to submit the necessary medical evidence to establish a recurrence of disability between her current condition and her employment injury, she has failed to meet her burden of proof and the Office properly denied her claim.⁵

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

In a separate claim,⁶ appellant filed a notice of traumatic injury on November 15, 1996 alleging that she sustained a back injury moving a patient on October 21, 1996. This record also includes a copy of appellant's claim for recurrence and the Office's denial of the recurrence claim dated December 12, 1996 relating to claim number A13-1072441. As noted previously, this decision indicates that appellant's October 21, 1996 injury was accepted on December 3, 1996.

³ See *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

⁴ 5 U.S.C. §§ 8101-8193, 8101(2).

⁵ Following the Office's December 12, 1996 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.2(c).

⁶ This claim is number A13-1121075.

In a letter dated January 17, 1997, the Office stated that appellant's claim was processed to allow medical benefits up to \$1,000.00. However, the Office also stated that the merits of appellant's claim had not been considered and that appellant had not submitted any medical evidence in support of her claim. The Office noted that the reports from a chiropractor did not constitute medical evidence and requested additional medical evidence within 30 days.

Appellant requested an oral hearing on January 29, 1997 of claim number A13-1121075. By decision dated March 11, 1997, the Branch of Hearings and Review denied appellant's request noting that a decision was issued on December 12, 1996 and that appellant's request was not timely filed within 30 days.

Section 8124(b) of the Act,⁷ concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁸

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.⁹ Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.¹⁰

In the instant case, the Office properly determined that appellant's January 29, 1997 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's December 12, 1996 decision. The December 12, 1996 decision addressed appellant's October 21, 1996 claim and asserted that this claim was accepted on December 3, 1996. The Office therefore, properly denied appellant's hearing as a matter of right in regard to her accepted claim for traumatic injury.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as she had other review options available.

The decisions of the Office of Workers' Compensation Programs dated March 11, 1997 and December 12, 1996 are hereby affirmed.

Dated, Washington, D.C.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Tammy J. Kenow*, 44 ECAB 619 (1993).

¹⁰ *Id.*

January 21, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member