U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAMONA ROUNTREE and U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Austin, Tex.

Docket No. 98-130; Submitted on the Record;
Issued July 15, 1999

DECISION and ORDER

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

The issues are whether the Office of Workers' Compensation Programs properly denied appellant's requests for an oral hearing and written review of the record as untimely filed and whether appellant established that she sustained a recurrence of disability causally related to the accepted work injury.

Appellant's notice of traumatic injury, filed on July 15, 1994, was accepted by the Office for lumbosacral strain after she was accidentally hit in the back by a mail carrier. Appellant was returned to full duty, full time on February 3, 1995 by her treating physician, Board-certified in physical medicine and rehabilitation.

On September 8, 1995 the Office issued a notice of proposed termination on the grounds that the medical evidence established that she had no continuing disability resulting from the July 15, 1994 injury. On November 1, 1995 the Office terminated appellant's compensation, effective that date.

On October 8, 1996 appellant informed the Office that she had requested an oral hearing almost a year ago and had no response. She reiterated this statement in a letter dated October 17, 1996. On October 22, 1996 appellant filed a notice of recurrence of disability, noting that she had been working light duty and continued to have pain in her low back and weakness in her arms and legs.

On December 18, 1996 the Office denied appellant's request for an oral hearing as untimely filed. On March 5, 1997 the Office denied appellant's recurrence claim on the grounds that the medical evidence failed to establish that her current back problems were related to the July 15, 1994 injury.

On May 4, 1997 appellant requested "a hearing of written review." On June 25, 1997 the Office denied appellant's request as untimely filed.

The Board finds that the Office properly denied appellant's requests for an oral hearing and written review of the record as untimely filed.

The Federal Employees' Compensation Act[1] 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.[2] The statutory right to a hearing pursuant to section 8124(b)(1) follows an initial decision of the Office.[3] 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.[4]

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.[5] The Board has held that the only limitation on the Office's authority is reasonableness[6] 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.[7]

In this case, the Office included with its November 1, 1995 and March 5, 1997 decisions a copy of appellant's appeal rights, including the instruction that any request for an oral hearing or a review of the written record "must be postmarked within 30 days of the date of this decision." Appellant's request for an oral hearing was dated October 8, 1996, almost a year after the November 1, 1995 decision terminating her compensation. Appellant stated that her October 8, 1996 letter was a "second request," but the record contains no evidence of a previous request.

In her October 17, 1996 letter, appellant stated that she had written to the Dallas office requesting a hearing and it had replied stating that she needed to contact the Washington, D.C. office. Again, the record contains no evidence of such correspondence. Subsequently, appellant's request for an oral hearing/written review of the record was dated May 4, 1997, two

[1] 5 U.S.C. §§ 8101-8193.

[2] 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).

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

[4] *William F. Osborne*, 46 ECAB 198, 202 (1994).

[5] *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).

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

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

months after the March 5, 1997 denial of her recurrence claim. Therefore, both requests were untimely.

Nonetheless, even when the hearing request is not timely, the Office has the discretion to grant a hearing and must exercise that discretion.[8] Here, the Office informed appellant in its December 18, 1996 and June 25, 1997 decisions that it had considered the matter in relation to the issue involved and denied both requests on the basis that additional evidence on whether appellant was still disabled by the accepted work injury could be fully considered through a request for reconsideration.

In this case, nothing in the record indicates that the Office committed any act in denying appellant's requests 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 assertion that she was unable to work. Finally, appellant has offered no explanation for the untimely request or any argument to justify further discretionary review by the Office.[9] Thus, the Board finds that the Office properly denied appellant's request for a hearing.

The Board also finds that appellant failed to meet her burden of proof in establishing that she sustained a recurrence of disability causally related to the 1994 injury.

Under the Act,[10] 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] and supports that conclusion with sound medical reasoning.[13]

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 clinical 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

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

[9] *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).

[10] 5 U.S.C. §§ 8101-8193.

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

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

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

employee's condition and the original injury, any work limitations or restrictions and the prognosis.[14]

Thus, the medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated, or aggravated by the accepted injury.[15] In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.[16] Further, neither the fact that appellant's condition became apparent during a period of employment nor appellant's belief that his condition was caused by his employment is sufficient to establish a causal relationship.[17]

When an employee, who is disabled from the job he held when injured, returns to a light-duty position, or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence that he cannot perform such light duty.[18] As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[19]

In this case, appellant submitted two medical opinions in support of her recurrence of disability. Dr. Anthony M. Hicks, a practitioner in occupational medicine, who evaluated appellant for fitness for duty, stated in an April 17, 1996 report that she was capable of performing her modified duties, which she had been doing since returning to work in February 1994. Obviously, Dr. Hicks' opinion does not support a recurrence of disability.

Dr. David F. Henges, a Board-certified orthopedic surgeon, examined appellant on October 22, 1996, stating that beginning on July 15, 1994, "she evidently had the onset of low back pain and right-sided leg pain." He reviewed appellant's 1994 computerized tomographic scan, which showed mild bulging at L4-5 and L5-S1 but was otherwise within normal limits. Dr. Henges diagnosed a herniated disc at L4-5 and ordered a magnetic resonance imaging scan.

In a follow-up report dated December 9, 1996, Dr. Henges stated that appellant was still working but was in pain. He noted that her claim had not been approved but when it was he would recommend a strong program of physical therapy for appellant.

Dr. Henges offered no opinion on whether appellant's current back pain or the diagnosed herniated disc was causally related to the 1994 injury. Nor did he opine that appellant was unable to work because her back condition had worsened to the point of incapacitating her for

[14] 20 C.F.R. § 10.121(b).

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

[16] *Leslie S. Pope*, 37 ECAB 798, 802 (1986); *cf. Richard McBride*, 37 ECAB 748, 753 (1986).

[17] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

[18] *Richard E. Konnen*, 47 ECAB 388, 389 (1996).

[19] *Gus N. Rodes*, 46 ECAB 518, 526 (1995).

work. Further, appellant has submitted no evidence showing that the nature of the light-duty tasks she had been assigned in 1994 had changed.[20] Therefore, the Board finds that appellant has failed to establish that she sustained a recurrence of disability.[21]

The June 25 and March 5, 1997, and December 18, 1996 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
July 15, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[20] *See Glenn Robertson*, 48 ECAB ___ (Docket No. 95-639, issued February 20, 1997) (finding that appellant failed to submit rationalized medical evidence explaining how and why he was unable to perform his light-duty position).

[21] *See Jose Hernandez*, 47 ECAB 288, 294 (1996) (finding that despite a request from the Office, appellant failed to submit a rationalized medical opinion showing that the claimed recurrence was related to his employment injury).