U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARL W. FOSTER and U.S. POSTAL SERVICE,
GREENPOINT STATION, Brooklyn, N.Y.

Docket No. 97-1312; Submitted on the Record;
Issued March 24, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained a recurrence of disability on and after December 5, 1995 causally related to an accepted February 11, 1994 lumbosacral strain; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record on the grounds that it was untimely filed.

The Office accepted that appellant, then a 39-year-old letter carrier, sustained a lumbosacral strain on February 11, 1994 when he slipped and fell on a snowy walkway, landing on his mailbag.[1] Appellant was initially treated by Dr. Richard Basson, an employing establishment physician, who on February 11, 1994 diagnosed a lumbar disc herniation due to the fall that day. Appellant then sought treatment from Dr. Herbert Jalens, an attending Board-certified orthopedic surgeon, who submitted periodic progress reports from February through September 1994 diagnosing chronic discogenic back derangement with possible L5 radiculopathy and a functional overlay.[2]

[1] The Office noted concurrent, nonoccupational conditions of "severe neck and low back injuries" due to a June 1992 motor vehicle accident.

[2] A May 27, 1994 magnetic resonance imaging scan authorized by the Office showed a central posterior bulging disc at L4-5 deforming the thecal sac and an L5-S1 disc bulge without thecal compression. Appellant also submitted reports from Dr. Mitchell Weisman, an attending Board-certified orthopedic surgeon associated with Dr. Jalens. In May 11 and June 10, 1994 reports, Dr. Weisman noted that appellant's participation in a physical therapy program improved his cervical and lumbar ranges of motion, although he was still symptomatic, with objective paraspinal muscle spasms. Appellant participated in a return to work physical therapy program from July 19 to August 12, 1994. Dr. Brisson submitted July 12 and August 17, 1994 reports diagnosing degenerative disc disease at L4-5 and L5-S1, noting that appellant's condition caused by the 1992 motor vehicle accident was quiescent until the February 11, 1994 fall.

Appellant was off work through September 2, 1994, when he returned to limited-duty, approved by Dr. Jalens, as a modified mail carrier, sorting mail while either sitting or standing, for six hours per day,[3] increasing to eight hours per day by approximately August 1995.[4] In monthly reports from February to November 1995, Dr. Jalens stated that appellant's condition was unchanged.

In an August 18, 1995 report, Dr. Jalens stated that appellant's working for six hours per day was "a minor miracle. He has made no significant improvement in complaints or findings in the past year and is unlikely to in the future. [Appellant] is permanently partially disabled on the basis of a herniated disc and a significant chronic functional overlay."

In a November 13, 1995 report, Dr. Jalens noted appellant's account that three weeks before, he was "assaulted while taking a break on the job and, defending himself, he tried to kick the one who was attacking him," thus exacerbating his back symptoms.[5]

In a December 4, 1995 report, Dr. Jalens opined that appellant had functioned "reasonably, working a six-hour day, but eight hours is apparently more than he can handle." He "suggest[ed] strongly that in order to keep [appellant] working that he stay at the six-hour day" with restrictions.

On December 5, 1995 appellant filed a claim for recurrence of disability causally related to the February 11, 1994 injury. Appellant stated that at the time of the alleged recurrence of disability, he was working eight hours per day limited duty. Appellant asserted that as the employing establishment shifted his "hours from 6:00 a.m. to 2:30 p.m. to 8:30 a.m. to 5:00 p.m., [he found himself] unable to work productively" as his back pain increased as the day went on.

In a December 14, 1995 report, Dr. Jalens noted lumbar muscle spasms on examination. He related that appellant had his work schedule "changed from early morning to later in the day," and that "as the day goes on he gets more tired and he cannot handle the work as well as he could on an earlier schedule. Dr. Jalens suggested that appellant be returned to his former work schedule which began at 6:00 a.m.

In a December 19, 1995 report, Dr. Jalens prescribed work restrictions limiting work to 6 hours per day, lifting to 15 pounds or less, no driving a motor vehicle or operating machinery, no climbing, kneeling, bending, stooping or twisting. He renewed these restrictions in periodic reports through August 29, 1996 stating on March 28 and August 29, 1996 that appellant's

[3] Appellant received compensation for temporary total disability from April 2 to August 20, 1994. Dr. Jalens prescribed a flexion back brace, approved by the Office in approximately February 1995. Dr. Jalens submitted December 14, 1994 and January 12, 1995 reports noting that appellant had fallen out of bed in December 1994, temporarily exacerbating his low back symptoms and requiring increased pain medication.

[4] The record indicates that appellant's bidded assignment as a letter carrier was revoked as of June 17, 1995 as the medical evidence showed that appellant could not return to full duty in that position.

[5] The Board notes that there is no claim of record pursuant to the alleged assault or any injuries that may have resulted therefrom.

condition had not changed in two years. The record indicates that appellant's work schedule was reduced to six hours per day on or before February 1 through August 1996.

Dr. Henry M. Tischler, a Board-certified orthopedic surgeon of professorial rank and a second opinion physician, provided January 1996 reports. He reviewed the medical record and statement of accepted facts, provided a history of injury and treatment, noted findings on examination of lumbosacral and sacroiliac tenderness, positive straight leg raising tests bilaterally at 30 degrees and diagnosed chronic discogenic low back derangement with L5 radiculopathy. Dr. Tischler opined that appellant's current condition was unrelated to a prior June 1992 motor vehicle accident. He stated that appellant could work 8 hours per day limited duty, casing mail weighing less than 20 pounds, without prolonged standing, twisting or kneeling and no "strenuous exertions involving [the] low back." Regarding the change in appellant's duty hours, Dr. Tischler related appellant's contention that he "felt he was better in his working conditions if he could come to work at 6:00 a.m., his day was a lot smoother than him arriving at 8:30 in the morning."

By decision dated March 12, 1996, the Office denied appellant's claim for recurrence of disability on the grounds that causal relationship was not established. The Office found that the change of work schedule did not constitute a change in the nature and extent of appellant's light-duty job activities, as his actual job duties and shift duration remained the same. The Office further found that Dr. Jalens' reports were insufficiently rationalized to establish that appellant was totally disabled for work due to the accepted condition on and after December 5, 1995, or that appellant was medically incapable of working on the new schedule.

In an undated letter received by the Office on June 11, 1996, appellant requested a review of the written record by a representative of the Office's Branch of Hearings and Review. The record indicates that the Office did not respond to this request. In a letter postmarked October 2, 1996, appellant requested an update on the status of his prior request for a review of the written record. He enclosed a photocopy of the letter received on June 11, 1996.

By decision dated November 27, 1996, the Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. The Office found that appellant's request for a review was not postmarked until October 2, 1996, more than 30 days after issuance of the March 12, 1996 decision. The Office then conducted a limited review of the record and further denied appellant's request for a review of the written record on the grounds that the issue involved could be addressed equally well by submitting new, rationalized medical evidence addressing causal relationship accompanying a request for reconsideration.

Regarding the first issue, the Board finds that appellant has not established that he sustained a recurrence of disability on and after December 5, 1995 causally related to the accepted February 11, 1994 lumbosacral strain.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, 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 to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. 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, such that the employee cannot perform those job duties due to the medical limitations of the accepted condition.[6]

The Office's procedures in effect at the time of the alleged recurrence of disability[7] set forth that a recurrence of disability may occur upon "[w]ithdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury." Thus, Board precedent requires and the Office's procedures indicate, that the change in the nature and extent of light-duty job requirements be so substantial that the employee cannot perform those duties due to actual or constructive loss of accommodation of the work-related condition.

As applied to this case, appellant has the burden to demonstrate, by the submission of sufficient, rationalized medical evidence, that he was medically unable to begin work at 8:30 a.m. instead of 6:00 a.m. due to the accepted lumbosacral strain. However, appellant has submitted insufficient medical evidence to substantiate that he was medically incapable of working this earlier shift due to the accepted condition.

Dr. Jalens opined in a December 14, 1995 report that appellant reported increased fatigue working the 8:30 a.m. shift and suggested that appellant be returned to his previous schedule. However, he did not opine that sequelae of the accepted lumbosacral strain, such as a highly regimented medication schedule, having to report for physical therapy or other treatment at fixed times, or prescribed frequent rest breaks, would render appellant totally disabled to work the 8:30 a.m. shift. Thus, Dr. Jalens' report contains insufficient medical rationale to establish that appellant was totally disabled for work on and after December 5, 1995.[8]

Similarly, Dr. Tischler, a Board-certified orthopedic surgeon and second opinion physician, noted appellant's contention that he felt the day went more smoothly when he arrived at work at 6:00 a.m., but did not opine that appellant was medically disabled from working the later shift.

Also, the record demonstrates that appellant's accepted condition did not change at the time of the alleged recurrence of disability. Dr. Jalens filed monthly reports through November 1995 stating that appellant's condition was unchanged. In a March 28, 1996 report, he stated that appellant's "minimal objective findings have not changed in the two years we are following him," a period which encompasses December 5, 1995. The Board notes that although Dr. Jalens noted in a November 13, 1995 report that appellant alleged he was injured in an assault at work approximately three weeks before, Dr. Jalens did not find objective signs of a worsened back

[6] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Stuart K. Stanton*, 40 ECAB 864 (1989); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[7] Federal (FECA) Procedure Manual, Part 2 -- *Claims*, 2-1500.3.b.(1)(a-c), *Appeals and Special Handling: Recurrences* (January 1995).

[8] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

condition. As appellant did not file a compensation claim of record for this assault, the incident cannot be considered a factor of employment.

Thus, appellant has submitted insufficient rationalized medical evidence establishing that the change in work shift from starting at 6:00 a.m. to starting at 8:30 a.m. rendered him disabled for work, or that his occupationally-related condition objectively worsened such that he was totally disabled for work for any period on and after December 5, 1995.

Regarding the second issue, the Board finds that the Office properly denied appellant's request for a review of the written record on the grounds that it was untimely filed.

Section 8124(b) of the Federal Employees' Compensation Act, 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."[9]

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[10]

The Board notes that the Office was incorrect in finding that appellant's request for a review of the written record was not made until October 2, 1996. The record contains an undated letter requesting review of the written record, date punched received by the Office on June 11, 1996. However, the June 11, 1996 request is also untimely as it was made more than 30 days after issuance of the March 12, 1996 decision. Therefore, the Office's use of the October 2, 1996 date is harmless, nondispositive error.

The Board finds that the Office properly exercised its discretion in conducting a limited review of the record and determining that the dispositive issue of causal relationship was medical in nature and thus could be addressed equally well on reconsideration with the submission of the necessary medical evidence. Thus, the November 27, 1996 decision denying appellant's request for a review of the written record was proper.

[9] 5 U.S.C. § 8124(b)(1).

[10] *Henry Moreno*, 39 ECAB 475 (1988).

The decisions of the Office of Workers' Compensation Programs dated November 27 and March 12, 1996 are hereby affirmed.[11]

Dated, Washington, D.C.
March 24, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[11] Accompanying his request for appeal, appellant submitted new medical and factual evidence. The Board cannot consider evidence for the first time on appeal that was not before the Office at the time of the final decision in the case. 20 C.F.R. § 501.2(c).