

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REBEL L. CANTRELL and U.S. POSTAL SERVICE,
POST OFFICE, Flint, Mich.

*Docket No. 97-2230; Submitted on the Record;
Issued May 4, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing pursuant to section 8124 of the Federal Employees' Compensation Act as untimely; and (2) whether appellant met her burden of proof in establishing wage loss after January 2, 1991.

This case has previously been on appeal before the Board. By decision and order dated May 7, 1993, the Board affirmed the Office's March 19, 1992 decision, denying appellant's request for a hearing and set aside the Office's decision dated August 23, 1991, finding that appellant did not establish a medical condition or disability that was causally related to her federal employment. The case was remanded for further development of the medical evidence. The facts and circumstances of the case are completely set out in that decision and are hereby incorporated by reference.¹ On remand the Office accepted that appellant sustained bilateral tendinitis of her wrists and indicated that she could file a claim for wage loss related to the accepted condition. Appellant filed claims for wage loss beginning January 2, 1991 through August 31, 1993. In a decision dated March 10, 1997, the Office denied appellant's claim for wage-loss compensation on the grounds that the medical evidence did not establish a definite diagnosis of a condition causally related to appellant's federal employment and did establish that appellant could work with restrictions. By decision dated April 30, 1997, the Office denied appellant's request for a hearing as untimely.

¹ 44 ECAB 660 (1993); Docket No. 92-1458.

The Board has duly reviewed the entire case record on appeal and finds that the Office properly denied appellant's request for a hearing.²

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the decision of the Secretary ... 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."³ As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.⁴

In the present case, the Office issued its decision denying appellant's claims for wage-loss benefits on March 10, 1997. The first request for a hearing in the record was dated April 10, 1997. Since appellant's request for a hearing was not within 30 days of the Office's decision, her request was untimely pursuant to section 8124(b)(1) of the Act and she was not entitled to hearing as a matter of right.

Nonetheless, even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered her request in relation to the issue involved and the hearing was denied on the basis that she could address this issue by submitting evidence, which showed that the claimed disability was causally related to her approved claim of November 1, 1990. Appellant was advised that she may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.⁵ There is no evidence of an abuse of discretion in the denial of a hearing in this case.

However, the Board also finds that the issue of whether appellant established a loss of wages is not in posture for decision.

The term "disability" as used under the Act means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of injury.⁶ The general test for determining loss of wage-earning capacity is whether an injury-related

² The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on June 19, 1997, the only decisions before the Board is the Office's March 10 and April 30, 1997 decisions; *see* 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ 5 U.S.C. § 8124(b)(1).

⁴ *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

⁵ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁶ *See Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

impairment prevents the employee from performing the kind of work he was doing when injured.⁷

In the present case, the Office denied appellant's claim for wage-loss benefits on the grounds that the medical evidence did not establish that the claimed disability was causally related to factors of her federal employment. However, in the prior decision on appeal in this case, the Board remanded the case for the Office to further develop the evidence by requesting that Dr. Andrew J. Sulich, a rheumatologist and appellant's treating physician, submit a rationalized medical opinion addressing whether appellant's bilateral upper extremity overuse syndrome was causally related to the identified factors of her federal employment.⁸ This remand instruction was not carried out by the Office and appellant's claims for wage loss have been denied on the exact same basis as her prior claim for disability. While appellant has submitted additional medical evidence from Dr. Hal Martens, an osteopath, it is not sufficient to establish that the claimed disability and resulting wage loss is causally related to the identified factors of her federal employment. However, once again as there is no contrary medical evidence of record, these medical reports are sufficient to require further development of the evidence related to this issue, especially in light of the Office's failure to further develop the evidence in our prior remand of this case. The Board notes that when an employee initially submits supportive factual and/or medical evidence which is not sufficient to carry the burden of proof, the Office must inform the claimant of the defects in proof and grant at least 30 calendar days for the claimant to submit the evidence required to meet the burden of proof. The Office may undertake to develop either factual or medical evidence for determination of the claim.⁹ It is well established that proceedings under the Act are not adversarial in nature,¹⁰ and while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.¹¹ The Office has the obligation to see that justice is done.¹²

In the present case, as there was an uncontroverted inference of causal relationship, the Office was obligated to request further information from appellant's treating physician. On remand, the Office should further develop the evidence by providing Drs. Sulich and Martens with a statement of accepted facts and requesting that they submit a rationalized medical opinion on whether appellant's claimed condition is causally related to the identified factors of her federal employment. If the above physicians are unavailable to render a rationalized opinion, then the Office should refer appellant with an updated statement of accepted facts to a second opinion physician for a rationalized opinion on the question to be resolved. After such development as the Office deems necessary, a *de novo* decision shall be issued.

⁷ See *Gary L. Loser*, 38 ECAB 673 (1987).

⁸ 44 ECAB 666.

⁹ 20 C.F. R. § 10.11(b); see also *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ See, e.g., *Walter A. Fundinger, Jr.*, 37 ECAB 200 (1985); *Michael Gallo*, 29 ECAB 159 (1978).

¹¹ *Dorothy L. Sidwell*, 36 ECAB 699 (1985).

¹² *William J. Cantrell*, 34 ECAB 1233 (1983).

The decision of the Office of Workers' Compensation Programs dated April 30, 1997 is hereby affirmed, the decision of the Office dated March 10, 1997 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
May 4, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member