U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE E. PAUL and DEPARTMENT OF DEFENSE, DEFENSE CONTRACT MANAGEMENT COMMAND, Boston, MA

Docket No. 98-1031; Submitted on the Record;
Issued October 7, 1999

DECISION and ORDER

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

The issues are: (1) whether appellant met her burden of proof establishing that she sustained a recurrence of disability, due to the November 22, 1993 employment injury, commencing August 28, 1996 and June 4, 1997; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly determined that appellant did not meet her burden of proof in establishing that she sustained a recurrence of disability, due to the November 22, 1993 employment injury, commencing August 28, 1996 and June 4, 1997.

The Office accepted appellant's claim for cervical strain and temporary aggravation of preexisting spondylosis. On August 7, 1997 appellant, then a 53-year-old contract administrator, filed a claim for a recurrence of disability, Form CA-2a, alleging that since the November 22, 1993 employment injury, she continued to have neck and back pain and spasms. Appellant's supervisor indicated that the dates of the recurrence of disability were August 28, 1996 and June 4, 1997. Appellant submitted medical evidence consisting of medical reports dated August 28, 1996 and June 4, 1997 from her treating physician, Dr. Jonas V. Lieponis, a Board-certified orthopedic surgeon, and progress notes of her physical therapy treatment dated from July 20, 1994 through March 15, 1995. In his August 28, 1996 report, Dr. Lieponis opined that appellant's condition of cervical stiffness had plateaued. He performed a physical examination which showed mild spasm and a Cybex test to determine range of motion. Dr. Lieponis diagnosed cervical strain and the related condition of cervical spondylosis. He stated that appellant would continue with her activities as tolerated and return within six months.

In his June 4, 1997 report, Dr. Lieponis noted that appellant stated that her symptoms were unchanged since the last visit and she continued to have neck pain and stiffness radiating down into the thoracic area and shoulder problems. He stated that she was continuing to perform her job description with discomfort but without limitation and found persistent spasm and

restriction of range of motion on physical examination. Dr. Lieponis performed the Cybex test which demonstrated significant increased functional motion. He reiterated his diagnosis of cervical strain and related cervical thoracic strain and regarding appellant's shoulder difficulties, stated that he noted these first as the result of her November 22, 1993 employment injury but had not specifically diagnosed or managed them. Dr. Lieponis recommended further evaluation of the shoulder problem by another doctor.

By letter dated September 12, 1997, the Office informed appellant that additional evidence was required including a narrative medical report from her treating physician explaining the causal relationship between her current condition and the November 22, 1993 employment injury. Appellant did not respond.

By decision dated October 31, 1997, the Office denied the claim, stating that the evidence of record failed to establish that the claimed recurrences of disability were causally related to the November 22, 1993 employment injury.

By letter dated December 2, 1997, which was date stamped by the Office December 8, 1997 and by an undated letter which was postmarked December 11, 1997, appellant requested an oral hearing before an Office hearing representative and submitted additional medical evidence.

By decision dated January 5, 1998, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's requests for an oral hearing, the first letter dated December 2, 1997 and the second letter postmarked December 11, 1997, were made more than 30 days after the Office issued the October 31, 1997 decision and that, therefore, appellant's requests were untimely. The Branch informed appellant that she could request reconsideration by the Office and submit additional evidence.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which she seeks compensation was causally related to her employment injury.[1] This burden includes the 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.[2]

In the present case, the medical evidence appellant submitted is insufficient to establish that she sustained recurrences of disability, due to the November 22, 1993 employment injury, commencing August 28, 1996 and June 4, 1997. Dr. Lieponis' reports dated August 28, 1996 and June 4, 1997 reiterated his diagnosis of cervical strain, found spasm on physical examination and concluded, in the June 4, 1997 report, that appellant's cervical strain had improved. However, Dr. Lieponis did not address how appellant's current disability was causally related to the November 22, 1993 employment injury and, therefore, are not probative. Further, the progress notes dated from July 20, 1994 through March 15, 1995 by the physical therapist are not probative because a physical therapist is not a doctor within the meaning of the Federal

[1] *Dominic M. DeScala*, 37 ECAB 369 (1986).

[2] *Louise G. Malloy*, 45 ECAB 613, 617 (1994).

Employees' Compensation Act.[3] Although the Office advised appellant of the medical evidence she must submit to establish her claim, appellant was not responsive to this request. She, therefore, has failed to establish her claim for recurrences of disability, due to the November 11, 1993 employment injury, commencing August 28, 1996 and June 4, 1997.

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

Section 8124(b)(1) of the Act provides that "a claimant... 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] Section 10.131 of the Office's federal regulations implementing this section of the Act, provides that a claimant shall be afforded the choice of an oral hearing or a review of the written record by a representative of the Secretary.[5] Thus, a claimant has a choice of requesting an oral hearing or a review of the written record pursuant to section 8124(b)(1) of the Act and its implementing regulation.

Section 10.131(a) of the Office's regulations[6] provides in pertinent part that "a claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request…" The Board has held that if the envelope bearing the postmark date has not been retained, then the request is timely filed if it is date stamped by the Office within 30 days of the issuance of the decision.[7]

The Board has held that 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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[8] 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,[9] when the request is made after the 30-day period for requesting a hearing,[10] and when the request is for a second hearing on the same issue.[11]

In the present case, appellant's first letter requesting a hearing dated December 2, 1997 was date stamped December 18, 1997 and her undated letter requesting a hearing was

[3] *See Jerre R. Rinehart*, 45 ECAB 518, 519-20 (1994).

[4] 5 U.S.C. § 8124(b)(1).

[5] 20 C.F.R. §10.131.

[6] 20 C.F.R. § 10.131(a).

[7] *See Donna A. Christley*, 41 ECAB 90, 91 (1989); *Delphine L. Scott*, 41 ECAB 799, 803 (1990).

[8] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[9] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[10] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[11] *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

postmarked December 11, 1997. Both requests were made more than 30 days after the issuance of the Office's October 31, 1997 decision. Appellant's requests for a hearing were therefore untimely and the Office was correct in stating in that decision that appellant was not entitled to a hearing. The Office exercised its discretionary powers in denying appellant's request for a hearing and in so doing, did not act improperly.

The decisions of the Office of Workers' Compensation Programs dated January 5, 1998 and October 31, 1997 are hereby affirmed.

Dated, Washington, D.C.
October 7, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member