U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES SIMPSON and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Mechanicsburg, PA

Docket No. 99-2025; Submitted on the Record;
Issued December 4, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant established that he sustained a recurrence of disability on or after November 14, 1998 causally related to his April 27, 1998 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied his request for a hearing.

On April 27, 1998 appellant, then a 51-year-old equipment operator, filed a notice of traumatic injury alleging that he injured his back in the performance of duty. Appellant was loading heavy metal scrap using a 1500-pound forklift when the rear of the forklift dropped down approximately three feet, causing him to hit his back against the rear of the seat. The Office accepted the claim for a lumbar sprain. Appellant was off work from the date of injury until November 9, 1998 when he returned to full-time light duty. On November 14, 1998 appellant stopped work and has not returned since that date.

Appellant initially sought treatment for the April 27, 1998 injury at Health-South Rehabilitation Clinic, where he was prescribed medication for lower back pain. He also went to the emergency room on April 29, 1998 complaining of back pain. The hospital records for that date indicated appellant was seen for his second back injury that year. A series of x-rays were taken of the cervical, thoracic and lumbar spine on April 30, 1998, which revealed spondylosis at C5-6, generalized thoracic spondylosis and lumbar spondylosis with probable degenerative changes at the L5-S1 disc.

Appellant subsequently came under the care of Dr. S.T. Clayton, Jr., a Board-certified family practitioner. In a Form CA-16, Part B attending physician's report, dated May 13, 1998, Dr. Clayton diagnosed "back pain two percent to [c]ompression [i]njury" which he attributed to the April 27, 1998 work injury. He noted that appellant would require pain medication, muscle relaxants and physical therapy to include aquatics.

In a Form CA-20 attending physician's report dated June 24, 1998, Dr. Clayton noted that appellant suffered from herniated discs at C-7 and C7-T1 due to the April 27, 1998 work

injury. He noted that appellant had no evidence of a concurrent or preexisting injury or condition. Dr. Clayton considered appellant to be disabled from work.

Appellant underwent magnetic resonance (MRI) testing on June 15 and 16, 1998 and it was determined that he had a herniated disc at C6-7 and C7-T1. The MRI also showed mild degenerative changes in the thoracic and lumbar spine.

In a July 1, 1998 report, Dr. Malik N. Momin, Board-certified in pain management, advised that appellant was seen for chronic lower back pain, left lower radiculopathy and chronic neck pain that had been present since he had jarred his back in a forklift on April 27, 1998. Dr. Momin prescribed a series of steroid injections on the left side of the lumbar spine where the pain was most prominent.

In a treatment note dated July 15, 1998, Dr. Momin stated that appellant returned for follow-up after an epidural steroid injection to help treat his chronic lower back pain and left lower radiculopathy, "which is thought to be due to some degenerative changes in his lumbar spine." He recommended that appellant have a surgical evaluation and lumbar discograms to determine whether there was a discongenic etiology for his continuing back pain.

In a report dated September 23, 1998, Dr. Walter C. Peppelman, Jr., an osteopath, noted that he had seen appellant on referral from Dr. Clayton for a discometric evaluation.[1] According to Dr. Peppelman, the testing was unable to delineate a specific discogenic cause of appellant's ongoing low back pain and subjective complaints. He noted that appellant's previous MRI results showed some evidence of degenerative changes but no evidence of any significant stenosis or herniated discs. Dr. Peppelman recommended that appellant be seen by a physiatrist for evaluation of his physical capabilities.

In a report dated October 28, 1998, Dr. William A. Rolle, Jr., Board-certified in physical medicine and rehabilitation, recorded appellant's history of injury and physical findings. He diagnosed low back pain for which he prescribed a course of facet nerve blocks from L4-S1 bilaterally.[2] Dr. Rolle opined that appellant could perform full-time modified duty with a ten-pound lifting restriction.

Appellant submitted a November 13, 1998 certificate signed by M.G. Spaeder, a physician's assistant, stating that appellant was disabled from work indefinitely.

In a report dated November 18, 1998, Dr. Rolle noted that the etiology of appellant's back pain remained unclear. He stated that "the discs, lumbar nerve roots and lumbar facet joints have all been ruled out as possible causes of his persistent low back pain, which is now going on seven months duration." He recommended that appellant undergo a course of chiropractic manipulation, but that he also continue working light duty with the restrictions previously outlined.

[1] The Office authorized appellant to undergo a discogram on September 14, 1998.

[2] Appellant subsequently underwent a facet joint nerve block on November 9, 1998.

In a December 1, 1998 report, Dr. Edwin A. Aquino, noted that appellant was seen on referral from Dr. Clayton for assessment of his low back pain. Dr. Aquino discussed appellant's history of injury and medical record. He diagnosed a lumbosacral strain and recommended that appellant undergo a functional capacity evaluation.

In a letter dated December 2, 1998, appellant notified the Office that he chose not to be treated by Dr. Rolle because he felt that the physician had rushed him to return to work. He stated that he was disabled from work.

In a December 11, 1998 letter, the Office indicated that appellant's December 2, 1999 letter was being considered as a claim for a recurrence of disability. The Office advised appellant of the factual and medical evidence required to establish his claim.

In a decision dated January 26, 1999, the Office denied appellant's claim for a recurrence of disability.

On March 2, 1999 appellant filed a second claim for a recurrence of disability beginning November 13, 1998.

On March 11 and March 30, 1999 appellant filed a request for a hearing.

In a letter dated March 17, 1999, the Office informed appellant that his claim for a recurrence of disability had already been denied on January 26, 1999 and that he should refer to his appeal rights in that decision if he wished to further pursue the claim.

In an April 7, 1999 decision, the Office denied appellant's request for a hearing as untimely filed. The Office noted that appellant's request for further review of the record could be equally well addressed through the reconsideration process.

The Board finds that appellant has failed to establish that he sustained a recurrence of disability on or after November 14, 1998 causally related to his April 27, 1998 employment injury.[3]

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden or proof requires that a claimant furnish 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 the employment injury and supports that conclusion with sound medical reasoning.[4]

[3] Appellant submitted new evidence subsequent to the Office's January 26, 1999 decision, but the Board is not permitted to review that evidence as it was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

[4] *Dennis J. Lasanen*, 43 ECAB 549 (1992); *Robert H. St. Onge*, 43 ECAB 1169 (1992). *See* 20 C.F.R. § 10.104 (1999).

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she 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 disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[5]

Appellant has not submitted rationalized medical opinion evidence showing that he sustained a recurrence of disability beginning November 13, 1998. The only medical evidence of record indicating that appellant was disabled after November 13, 1998 is certificates of disability signed by a physician's assistant. Under the Act, however, a physician's assistant is not considered to be a "physician" for purposes of establishing a claimant's entitlement to benefits.[6] The remaining medical evidence consists of reports from Dr. Rolle, who specifically opined that appellant could perform light duty. In the absence of a reasoned medical opinion stating that appellant is totally disabled from work as a result of a recurrence of disability causally related to the April 27, 1998 work injury, appellant has not met his burden of proof. Appellant has also not shown that he is incapable of performing his light-duty job. The Board, therefore, concludes that the Office properly denied appellant's claim for compensation based on a recurrence of disability.

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

Section 8124(b)(1) of the Act provides:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."[7]

A claimant is not entitled to a 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.[8] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[9] In such a

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

[6] 5 U.S.C. § 8102(2) states in part that a "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

[7] 5 U.S.C. § 8124(b)(1).

[8] 20 C.F.R. § 10.616(a) (1999).

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

case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[10]

Appellant filed two requests for an oral hearing that were postmarked March 11 and 30, 1999 respectively. Because each hearing request was filed more than 30 days after the Office's January 26, 1999 decision, appellant is not entitled to a hearing as a matter of right. Although the Office properly found appellant's hearing requests to be untimely, the Office nonetheless considered the matter in relation to the issue involved and correctly advised appellant that he could pursue his claim through the reconsideration process. As appellant may still pursue his claim by submitting new and relevant medical evidence, along with a request for reconsideration to the appropriate regional Office, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing.[11]

The decisions of the Office of Workers' Compensation Programs dated May 5 and January 26, 1999 are hereby affirmed.

Dated, Washington, DC
December 4, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

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

[11] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).