

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEBORAH K. APPLGATE and U.S. POSTAL SERVICE,
POST OFFICE, Fresno, CA

*Docket No. 01-1365; Submitted on the Record;
Issued April 22, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant was disabled from June 14 to September 7, 1999 and from September 18 to October 15, 1999 and whether appellant was disabled on October 18, November 5, 11, 15 and 25, 1999; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

This case is on appeal to the Board for the second time.¹ In the first appeal, the Board affirmed the Office's April 3 and June 18, 1997 decisions, that appellant had a 4 and 14 percent loss of use of her left and right legs, respectively and had no loss in wage-earning capacity.

Appellant submitted "[c]laims for [c]ompensation," Forms CA-7 or CA-7a, dated July 15, August 12, September 20 and October 15, 1999, respectively, covering the periods from June 14 to September 7, 1999 and from September 18 to October 15, 1999. The reasons appellant gave for her disability for each period included increased back pain in her back and pelvic area, lack of feeling in her legs, loss of movement in her legs and muscle spasm.

In a duty status report, Form CA-17, dated July 15, 1999, appellant's treating physician, Dr. Ahsan K. Bajwa, a Board-certified psychiatrist and neurologist, stated that she could sit four to six hours a day, stand and walk only five minutes each an hour and could lift two pounds an hour. He noted that appellant had been in a car accident which affected her entire body, her back, kidneys, neck, legs and head. In a Form CA-17 dated June 14, 1999, Dr. Bajwa stated that appellant could sit four to eight hours but could perform no lifting.

In a report dated August 20, 1999, Dr. Bajwa stated that he saw appellant on August 12, 1999 and that appellant continued to have pain, tingling and numbness in both lower extremities. He stated that a magnetic resonance imaging (MRI) scan of the lumbar spine was normal.

¹ Docket No. 97-2316 (issued May 3, 1999). The facts and history surrounding the prior appeal is set forth in the initial decision and is hereby incorporated by reference.

Dr. Bajwa also found that appellant had a positive straight leg raising test and was severely disabled with muscle spasm in the low back, "the etiology of which was unclear." In a disability note dated August 20, 1999, Dr. Bajwa stated that appellant was being released to return to work on August 23, 1999. In a report dated September 30, 1999, he stated that appellant's symptoms had significantly improved with Celebrex, that appellant was working eight hours a day but she continued to have muscle spasm, tenderness, limited range of motion and a positive straight leg raising test. In a report dated October 19, 1999, Dr. Bajwa noted that he treated appellant on October 14, 1999 and that she had missed work that day due to severe back pain. In duty status reports dated August 24 and September 17, 1999 and one undated that was received by the Office on November 2, 1999, he restricted appellant to four to eight hours of sitting, five minutes of walking and standing an hour and lifting only two pounds an hour. In an undated Form CA-17 received by the Office on December 2, 1999, Dr. Bajwa indicated that appellant could sit eight hours but had the same standing, walking and lifting restrictions.

On November 30, 1999 appellant submitted a "[c]laim for [c]ompensation," Form CA-7 dated November 30, 1999, for the period from October 15 to November 30, 1999, requesting compensation for the dates October 18, November 5, 11, 15 and 25, 1999 due to increased back pain and decreased movement.

In a report dated December 9, 1999, Dr. Bajwa stated that he saw appellant on November 30, 1999, that she continued to be symptomatic regarding her low back pain and had muscle spasm, tenderness and limited range of motion. He prescribed medication, physical therapy and treatment at a spa. In a report dated January 7, 2000, Dr. Bajwa additionally stated that appellant had a positive straight leg raising test.

By letter dated April 3, 2000, the Office informed appellant that additional evidence was needed including contemporaneous medical evidence describing a connection between objective findings, appellant's physical limitations and the January 24, 1995 employment injury.

In a disability note dated April 14, 2000, Dr. Bajwa listed the dates October 18, November 5, 11, 15 and 25, 1999 and stated that due to her severe low back condition, it was necessary for appellant to take sporadic days off. Appellant also submitted medical reports from Dr. Bajwa dated April 12 and 19, May 2 and 9 and June 16, 2000 and disability notes dated May 8 and 9, 2000 which do not address her medical condition in October and November 1999.

By decision dated July 5, 2000, the Office denied appellant's claim, stating that the evidence of record did not establish whether the claimed periods of disability were causally related to the January 24, 1995 employment injury.

In an undated letter received by the Office on March 5, 2001, appellant requested an oral hearing.

By decision dated April 2, 2001, the Office's Branch of Hearings and Review denied appellant's request for a hearing, stating that appellant's letter requesting a hearing was postmarked April 2, 2001, more than 30 days after the Office issued the July 5, 2000 decision and that, therefore, appellant's request was untimely. Branch of Hearing and Review informed appellant that she could request reconsideration by the Office and submit additional evidence.

Appellant submitted additional medical reports from Dr. Bajwa dated January 25, February 5, March 15, April 9, 12 and 19, May 9, June 5, August 18, November 10 and December 19, 2000 which address appellant's ongoing symptoms of low back pain, muscle spasm, tenderness and limited range of motion in the year 2000.

By decision dated May 2, 2001, the Office awarded appellant compensation for time missed due to her medical appointments on June 14, 17, 21, 29 and July 15, 20 and August 2, 13, 20 and 24, 1999 which totaled 27 hours. The Office stated that the medical evidence did not demonstrate that appellant was totally disabled or attended medical appointments on the remaining dates from June 14 to October 15, 1999.

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

Section 8124(b)(1) of the Federal Employees' Compensation 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."² Section 10.615 of the Office's federal regulations implementing this section of the Act, provides that a claimant can choose between an oral hearing or a review of the written record.³ The regulation also provides that in addition to the evidence of record, appellant may submit new evidence to the hearing representative.⁴

Section 10.616(a) of the Office's regulations⁵ provides in pertinent part:

"A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district [O]ffice may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought...."

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.⁶ 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

² 5 U.S.C. § 8124(b)(1).

³ 20 C.F.R. § 10.615.

⁴ *Id.*

⁵ 20 C.F.R. § 10.616(a).

⁶ *Henry Moreno*, 39 ECAB 475, 482 (1988).

hearing,⁷ when the request is made after the 30-day period for requesting a hearing⁸ and when the request is for a second hearing on the same issue.⁹

The Office stated the postmark date of appellant's undated hearing request was March 2, 2001. Documentation of the postmark date is not in the record but appellant's letter requesting a hearing was date stamped received by the Office on March 5, 2001. Regardless of whether appellant's letter requesting a hearing was postmarked March 2, 2001 or received by the Office on March 5, 2001, appellant's letter which was filed more than 30 days after the Office's July 5, 2000 decision is untimely. The Branch of Hearings and Review determined that appellant's letter requesting the hearing was untimely is proper.

The Board finds that, the Office properly found that appellant was not totally disabled from June 14 to September 7 1999 and from September 18 to October 15, 1999 and was not disabled on October 18, November 5, 11, 15 and 25, 1999 but erred in failing to address appellant's entitlement to compensation for additional dates she received medical treatment.

To establish disability, appellant must submit evidence from a qualified physician who on the basis of a complete and accurate factual and medical history, concluded that the disability is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹⁰

None of Dr. Bajwa's medical reports contain the requisite medical rationale to establish that appellant's alleged periods of disability were due to the January 24, 1995 employment injury.

The Office erred, however, in failing to address whether appellant was entitled to compensation for additional dates on which appellant received medical treatment and the medical treatment was causally connected to the original injury. The Board has held that appellant is entitled to disability compensation for loss of wages while receiving medical treatment and for loss of wages incidental to treatment for which he or she did not receive pay.¹¹ In this case, Dr. Bajwa's attending physician's report dated August 13, 1999 lists August 12, 1999 as the date of the examination. Dr. Bajwa's duty status report dated September 17, 1999 indicates that he examined appellant on that date. His undated duty status report received by the Office on November 2, 1999 indicates that he examined appellant on October 14, 1999. Dr. Bajwa's undated duty status report received by the Office on December 2, 1999 indicates that he examined appellant on November 30, 1999, within the time period appellant sought compensation. Thus, the Office did not award appellant compensation for four dates, August 12, September 17, October 14 and November 30, 1999 on which she was treated for her condition.

⁷ *Rudolph Bremen*, 26 ECAB 354, 360 (1975).

⁸ *Herbert C. Holly*, 33 ECAB 140, 142 (1981).

⁹ *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

¹⁰ *See Carolyn F. Allen*, 47 ECAB 240, 245 (1995); *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

¹¹ *Henry Hunt Searls*, 46 ECAB 192, 196 (1994).

The case must be remanded for the Office to address whether appellant is entitled to compensation for these dates and provide reasons for its findings.¹²

Other than the issue of whether appellant is entitled to compensation for the above referenced dates, appellant failed to submit rationalized medical evidence establishing that she was totally disabled for the time period and dates claimed. She, therefore, has failed to establish her claim.

The April 2, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed. The Office's May 2, 2001 and July 5, 2000 decisions of the Office are hereby affirmed in part and remanded in part for further action consistent with this decision.

Dated, Washington, DC
April 22, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

¹² See *Beverly Dukes*, 46 ECAB 1014, 1017 (1995).