U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILMONT L. WALLACE and DEPARTMENT OF TREASURY, U.S. CUSTOMS SERVICE, Detroit, MI

Docket No. 01-1951; Submitted on the Record;
Issued August 14, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issues are: (1) whether appellant sustained a recurrence of disability beginning July 21, 2000 and continuing due to his January 25, 2000 employment injury or his subsequent surgery of May 25, 2000; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

In this case, the Office accepted that appellant sustained a rotator cuff tear as a result of a work-related incident of January 25, 2000. The Office authorized surgical repair of appellant's shoulder, which he underwent on May 25, 2000. Appellant returned to light-duty status on July 6, 2000 and stopped work July 21, 2000. He underwent a cervical fusion operation on September 5, 2000. Appellant has not returned to work. The Office paid for all appropriate compensation.

On September 19, 2000 appellant filed a claim for a recurrence of total disability alleging that he suffered a cervical condition as a result of hyperextension of his neck while being administered anesthesia for the May 25, 2000 shoulder surgery and, consequently, required surgical intervention of his cervical spine on September 5, 2000. After appropriate development, the Office on December 19, 2000 denied appellant's claim for a recurrence of his work-related disability for the period of July 21, 2000 and continuing as there was neither a worsening of his accepted right rotator cuff tear or subsequent May 25, 2000 right shoulder surgery nor a change in his employment duties. Appeal rights were attached.

By letter dated September 19, 2000, the Office also informed appellant that a second opinion evaluation by an Office selected physician was necessary. The Office referral physician provided a report of January 15, 2001. After reviewing this report, the Office requested clarification by letter dated February 8, 2001. In a report dated February 19, 2001, the Office referral physician clarified his previous report.

By letter dated March 30, 2001, the Office advised appellant that the second opinion physician found that his conditions at the time of the July 2000 work stoppage were not due to his injury of January 25, 2000. Appellant was reminded of his appeal rights which were issued with the December 19, 2000 decision.

By letter dated April 25, 2001, appellant, through his attorney, requested an oral hearing.

By decision dated July 3, 2001, the Office denied appellant's request for a hearing as untimely under section 8124. It further exercised its discretion in finding that the issue could be equally addressed by requesting reconsideration.

The Board finds that appellant has not established that he sustained a recurrence of disability beginning July 21, 2000 and continuing due to his January 25, 2000 employment injury or subsequent surgery of May 25, 2000.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a limited or light-duty position or the medical evidence of record establishes that he can perform the duties of 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 limited-duty requirements.[1]

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between his recurrence of disability and his January 25, 2000 employment injury.[2] 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.[3]

The Office has accepted the condition of a right rotator cuff tear due to an injury of January 25, 2000. On May 25, 2000 appellant underwent a right shoulder arthroscopic surgery, which the Office has also accepted. Appellant returned to work in a limited-duty capacity on July 6, 2000 and worked until July 21, 2000, when he stopped working completely. The record indicates that appellant, a rails officer, worked with his left hand only, the firearm wearing and qualification were waived, and overtime was restricted because of the firearm waiver.

On Form CA-2a, appellant indicated that he stopped working on July 21, 2000 because he experienced difficulty breathing and was rushed to the hospital where he was diagnosed with spinal stenosis and later experienced total paralysis. Surgery for the spinal stenosis was

[1] *Barry C. Peterson*, 52 ECAB __ (Docket No. 98-2547, issued October 16, 2000); *Carlos A. Marrero*, 50 ECAB 117 (1998); *Terry R. Hedman*, 38 ECAB 222 (1986).

[2] *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes G. Davila*, 45 ECAB 139, 142 (1993); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

[3] *Alfred Rodriguez*, 47 ECAB 437, 441 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

performed on September 5, 2000. Appellant further indicated that he experienced hyperextension/neck injury due to the anesthesia administered during the May 25, 2000 surgery which resulted in the spinal stenosis and loss of mobility for which he underwent the surgical procedure of September 5, 2000. In a narrative statement, appellant alleged that his work stoppage of July 21, 2000 was medically connected to the surgery of May 25, 2000. Specifically, he stated that the work stoppage "was caused by hyperextension of [appellant's] neck during administrating anesthesia during the surgery.…" He also claimed the surgery exacerbated degenerative changes in his cervical spine resulting in a decompression/fusion performed on September 5, 2000.

The Board has reviewed the evidence submitted to support appellant's claim. He made no assertion and the record fails to support that he was unable to continue working because of a change in his limited-duty job requirements on or before his work stoppage of July 21, 2000. Appellant instead submitted medical opinion evidence to support his claim. This evidence, however, fails to show how the nature and extent of his accepted shoulder condition or the resultant arthroscopic surgery of May 25, 2000 caused appellant's subsequent paralysis or exacerbated his cervical spine condition such that he could no longer work his limited-duty position.

What the evidence tends to show is that appellant experienced a cervical condition and paralysis. However, the evidence fails to establish that appellant's cervical condition or paralysis was caused or aggravated by his accepted work injury or the subsequent May 25, 2000 surgery.

In a note dated August 7, 2000, Marie Tabbakh, a nurse practitioner neurosurgery, advised that appellant was hospitalized for sudden onset of quadriplegia after neck manipulation. She stated that appellant was diagnosed with spinal stenosis with cord (cervical) compression. However, this note signed by a nurse practitioner is not probative towards the issue of causal relationship since a nurse practitioner is not a "physician" within the meaning of the Federal Employees' Compensation Act.[4]

An August 4, 2000 note from a physician at Huran Valley Sinai Hospital indicated that appellant has been off work since July 15, 2000 due to bilateral leg and arm weakness which was due to cervical stenosis. The physician indicated that appellant was hospitalized and would be having surgery and would continue to be off work for the forseeable future. A September 7, 2000 disability slip indicated appellant had spinal stenosis surgery and would return to work in December, approximately three months from the surgery date.

A September 11, 2000 CA-20, attending physician's report, signed by Dr. John Steele, a neurosurgeon, provided a diagnosis of central cord syndrome with cervical spondylosis. Dr. Steele provided a history of preexisting cervical spinal stenosis and right rotator cuff surgery

[4] 5 U.S.C. § 8101(2) which defines "physician" as including surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law; *see also Joseph N. Fassi*, 42 ECAB 231 (1991) (medical evidence signed only by a registered nurse or nurse practitioner is generally not probative evidence).

with quadriplegia for five days, and although appellant's condition improved, he had experienced a progressive deterioration until August 4, 2000 when appellant had sudden quadriplegia post magnetic resonance imaging (MRI) scan central cord syndrome. He opined that appellant's current condition was not caused or aggravated by employment activity by placing a checkmark in a "no" box.

In an October 23, 2000 report, Dr. Daniel B. Michael, a Board-certified neurosurgeon, stated that he first encountered appellant on or about August 7, 2000, when he was admitted to the hospital for weakness in all four limbs to the point where he could not walk. Past medical history was noted to be significant for diabetes and degenerative disease of the cervical spine. Physical and neurological examination findings were provided as well as a review of an MRI scan of the cervical spine showed cervical stenosis due to spondylosis particularly at C3-4, C4-5 and C5-6, the worst level being C3-4. Dr. Michael opined that his impression at the time was that appellant suffered a central cord syndrome, which was exacerbated by his preexisting cervical spondylosis. He indicated that surgery was an appropriate form of treatment and discussed appellant's postoperative care. Dr. Michael, however, failed to provide an opinion regarding causal relationship to the accepted conditions.

As the above evidence did not establish that appellant's cervical condition was caused or aggravated by his January 25, 2000 work injury or subsequent May 25, 2000 surgery, the Office, in a letter dated November 8, 2000, wrote Dr. Ronald Lederman, a Board-certified orthopedic surgeon and appellant's attending physician for the right shoulder condition, requesting additional medical evidence in support of appellant's recurrence claim. Specifically, the Office requested a copy of the May 25, 2000 surgical report as well as copies of all treatment notes following the surgery. The Office further asked Dr. Lederman to discuss whether a medical connection is present between the May 25, 2000 surgery and subsequent cervical condition with surgery. The Office inquired as to whether the surgery, more specifically the anesthetic, required appellant to stop working due to his cervical condition and to undergo surgical intervention. Dr. Lederman was requested to provide a well-rationalized opinion followed by objective findings. In a separate letter of the same date, the Office advised appellant that although it wrote Dr. Lederman to obtain medical evidence, it remained appellant's responsibility to ensure the appropriate medical documentation was received.

Although a report from Dr. Lederman was never received, the Office received copies of surgical reports from appellant's May 25, 2000 right shoulder surgery, a June 20, 2000 laryngoscopy and the September 5, 2000 anterior decompression and fusion of the cervical spine. The September 5, 2000 surgical report indicated that appellant experienced quadriparesis following a fall two to three weeks prior. Physical therapy and treatment notes following the September 5, 2000 surgery were also received.

An emergency room report dated July 25, 2000 from Dr. Rebecca Behrends, who indicated that appellant had a history of diabetes, hypertension and right rotator cuff surgery on May 25, 2000. Appellant was doing well until six weeks post operation when he began his occupational therapy. Since then, he has had progressive weakness of his left arm and legs to the point where he has gone from using nothing to using a wheelchair in order to ambulate. A history of diabetic neuropathy in the lower extremity was noted along with, what sounded like,

an anxiety attack on July 21, 2000. Appellant's emergency department medical record was reviewed and details of the current medical examination was provided. A neurological and cardiological evaluation was recommended to determine whether appellant's condition was due to a cardiovascular accident or spinal cord compression. No opinion was rendered on the causal relationship between appellant's current condition and his accepted conditions.

In a July 26, 2000 report, Dr. Thomas Mladsi, a Board-certified internist specializing in cardiovascular disease, noted appellant's history of hypertension, diabetes and surgery for a right rotator cuff tear in May. He also related the history of the progression of appellant's current symptoms. Findings on physical examination along with laboratory studies were provided. Dr. Mladsi opined that a cerebrovascular accident was doubtful, but would defer a final opinion until appellant's neurologic problem was better understood.

Appellant's claim that the anesthesia administered during the shoulder surgery caused or aggravated a cervical condition or paralysis has not been established through a medical connection. The medical record is devoid of a showing that appellant's condition from July 21, 2000 onwards was related to his accepted employment conditions by causation, precipitation, acceleration or aggravation. The Office had previously denied appellant's claim for recurrence.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124.

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing, states that or states, "Before review under section 8128(a) of this title, a claimant for compensation 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."[5] As section 8124(b)(1) is unequivocal in setting forth the time limitation 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.[6]

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,[7] when the request is made after the 30-day period established for requesting a hearing,[8] or when the request is for a second hearing on the same issue.[9] The Office's procedures, which require the Office to exercise its discretion

[5] 5 U.S.C. § 8124(b)(1).

[6] *Frederick D. Richardson*, 45 ECAB 454 (1994).

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

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

[9] *Johnny S. Henderson*, 34 ECAB 216 (1982).

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]

In this case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated December 19, 2000 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated April 25, 2001, which the Branch of Hearings and Review advised was postmarked April 26, 2001.[11] Hence, the Office was correct in stating in its July 3, 2001 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's December 19, 2000 decision.

On appeal, appellant's attorney argues that the Office's December 19, 2000 decision should not be deemed a "final" decision as the Office sent a letter the same day advising appellant that a second opinion evaluation was necessary. Appellant's attorney contends that the March 30, 2001 letter from the Office which advised that the second opinion physician found that appellant's conditions at the time of his July 2000 work stoppage were not due to the injury of January 25, 2000 should be treated as a final decision of the Office as opposed to the December 19, 2000 decision. Accordingly, appellant's attorney argues that the 30-day time limitation of section 8124 should run from March 30, 2001, the date of an information letter.

Although the Office did notify appellant the same day as it issued the December 19, 2000 decision that a second opinion evaluation was necessary, the December 19, 2000 decision is the only final decision in this case and not the March 30, 2001 letter from the Office. The Office's regulations state that a decision "shall contain findings of fact and a statement of reasons. It is accompanied by information about the claimant's appeal rights."[12] The Office's March 30, 2001 letter was not accompained by information on appellant's appeal rights and did not contain findings of fact, nor did the letter explain how the second opinion's physician's opinion, which was consistent with the findings of the December 19, 2000 decision, placed appellant at a greater disadvantage than the December 19, 2000 decision. Under these circumstances, the Office's March 30, 2001 letter is not a final decision and is, therefore, not reviewable by the Board.[13]

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its July 3, 2001 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by requesting reconsideration from the district Office and submitting evidence not previously considered which establishes that appellant sustained a recurrence of work-related disability for the period of July 21, 2000 and continuing as a result of the accepted right shoulder injury and

[10] *Sandra F. Powell*, 45 ECAB 877 (1994).

[11] The Board notes that the envelope containing the postmark is not in the record. However, as the Branch of Hearings and Review advised that the postmark was April 26, 2001, the Board will accept that date as to when appellant filed his request for an oral hearing.

[12] 20 C.F.R. § 10.126.

[13] *See Asline Johnson*, 41 ECAB 438 (1990).

surgery. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[14] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated July 3, 2001 and December 19, 2000 are hereby affirmed.

Dated, Washington, DC
August 14, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[14] *Daniel J. Perea*, 42 ECAB 214 (1990).