U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN A. ANDERSEN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Salt Lake City, UT

Docket No. 01-1376; Submitted on the Record;
Issued February 19, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant, a purchase and hire employee, was not eligible to receive compensation for wage loss following his termination due to lack of funding for his crew; and (2) whether the Office properly denied appellant's request for an oral hearing on the grounds that it was untimely filed.

The Office accepted that on December 29, 1994, appellant, then a 40-year-old carpenter in "purchase and hire" status,[1] sustained a right elbow fracture with epicondylitis, when he slipped on ice and caught his right elbow between a railing and a support beam. He underwent a right elbow arthroscopy with removal of loose bodies on August 10, 1995. Appellant received compensation from July 7, 1995 to March 2, 1996.[2] He returned to light-duty work on March 18, 1996 working until a September 3, 1999 recurrence of disability. Appellant returned to light-duty work in early 2000 and continued working intermittently through July 29, 2000.

On July 25, 2000 appellant filed a claim for compensation (Form CA-7) for the period July 30 to August 8, 2000. Appellant alleged that he would sustain a recurrence of disability on July 29, 2000 when the purchase and hire crew of which he was a member would be terminated due to a lack of funding.[3]

By decision dated November 29, 2000, the Office denied appellant's claim for compensation on and after July 30, 2000. The Office found that appellant's purchase and hire

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[1] A "purchase and hire" employee is hired for the duration of a specific project and receives no salary when off work. *See William H. Van Buren*, 31 ECAB 628 (1980).

[2] The Office used August 10, 1995, the date appellant's disability began, to calculate his rate of compensation.

[3] On July 28, 2000 the employing establishment offered appellant a temporary position as a GS-5, Step 10 supply technician, beginning approximately August 13, 2000, with the appointment not to exceed 120 days.

position was terminated on July 29, 2000 due to a loss of funding for the entire crew, rather than the effects of the accepted injury. The Office noted that appellant's employment from June 1996 to July 2000 demonstrated his ability to perform his job without loss of wages, as his actual wages met or exceeded the wages of the job held when injured.

Appellant disagreed with this decision and, in a January 3, 2001 letter, requested an oral hearing. Appellant asked for "a few extra days on the deadline" because of the holidays, a death in the family and work delays caused by coworkers being on holiday leave.

By decision dated February 15, 2001, the Office denied appellant's request for an oral hearing on the grounds that it was not made timely within 30 days of the Office's final decision. The Office found that appellant's request for an oral hearing was postmarked January 3, 2001, more than 30 days after the Office's November 29, 2000 decision. The Office exercised its discretionary authority and denied his request for a hearing on the grounds that the relevant issue could be addressed equally well by a request for reconsideration and submission of additional evidence.

The Board finds that the Office properly determined that appellant, a purchase and hire employee, was not eligible to receive wage-loss compensation following his termination due to lack of funding for his crew.

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 establish that the employee 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 total disability and to show that he or she 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 light-duty job requirements.[4]

Appellant contends that he sustained a recurrence of disability effective July 29, 2000, when he and the other members of the purchase and hire crew were terminated due to a lack of funding. However, the Office's procedure manual states that a recurrence of disability does not include a work stoppage caused by the termination of a temporary position, if the claimant was a temporary employee at the time of injury.[5]

The Office's procedure manual provides that a recurrence of disability includes a work stoppage caused by an objective, spontaneous, material change in the accepted condition, a recurrence or worsening of disability due to an accepted consequential injury; or withdrawal of a

[4] *Mary G. Allen* 50 ECAB 103 (1998); *Terry R. Hedman* 38 ECAB 222 (1986) (when a recurrence is claimed following a return to light-duty work).

[5] *Terry L. Adams*, Docket No. 2000-1859 (issued May 18, 2001) (where the Board found that the termination of appellant's position due to the closure of the military base where she worked did not constitute a recurrence of disability due to the accepted medical condition); *Mary Stromberg Kelly*, Docket No. 99-1827 (issued October 27, 2000) (where the Board found that appellant, a temporary employee in a 359-day position at the time of her accepted injury, did not sustain a recurrence of disability when her temporary position was terminated due to a reduction-in-force affecting other employees).

light-duty assignment made to accommodate the work-related injury condition, for reasons other than misconduct or nonperformance. A recurrence of disability does not include a work stoppage caused by the termination of a temporary appointment, if the claimant is a temporary employee at the time of the injury; or cessation of special funding for a particular position or project.[6]

The record demonstrates that appellant was a purchase and hire employee at the time of the December 29, 1994 injury. Appellant's entire purchase for hire crew was terminated on July 29, 2000 due to loss of a funding. This is precisely the factual situation contemplated by the Office's procedure manual, a work stoppage due to termination of a temporary appointment where the claimant is a temporary employee at the time of injury. The July 29, 2000 termination affected all members of the purchase and hire crew, not only appellant. There is no evidence of record that the July 29, 2000 termination was related to anything other than a lack of funding and not residuals of the accepted injury. Therefore, the Office's November 29, 2000 decision finding that the July 29, 2000 termination did not constitute a recurrence of disability was proper.

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

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant 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."[7]

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

Appellant's request for an oral hearing was dated and postmarked January 3, 2001, more than 30 days after the issuance of the Office's November 29, 2001 decision. Appellant acknowledged in his January 3, 2001 letter that his request was beyond the 30-day time limitation, asking for "a few extra days on the deadline" due to a death in the family and work delays. For this reason, appellant was not entitled to a hearing as a matter of right.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997).

[7] 5 U.S.C. § 8124(b)(1).

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

The Board finds that the Office properly exercised its discretion and found that appellant could advance the relevant issue equally well on reconsideration. The Office explained that appellant should submit new evidence establishing that the position of purchase and hire employee did not represent his wage-earning capacity. The Board finds that the February 15, 2001 decision was proper.

The February 15, 2001 and November 29, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 19, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member