U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS E. SALVATORE and U.S. POSTAL SERVICE,
POST OFFICE, Fort Dodge, IA

Docket No. 03-856; Submitted on the Record;
Issued June 11, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether appellant has established that he sustained a recurrence of disability beginning January 7, 2002 causally related to his December 7, 1994 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for review of the written record pursuant to 5 U.S.C. § 8124(b)(1).

On December 7, 1994 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim alleging that, on that date, he hurt his left knee and arm, right leg and hip, right arm and lower back, when he slipped on the snow in a driveway after delivering the mail.[1] Appellant stopped work on December 8, 1994 and returned to limited-duty work on December 13, 1994.

By letter dated March 24, 1995, the Office accepted appellant's claim for subluxation at L2-3 and L4-5 and a lumbosacral strain.

On June 14, 2002 appellant filed a claim alleging that he sustained a recurrence of disability beginning January 7, 2002 accompanied by factual and medical evidence. The employing establishment indicated that appellant had not stopped work but was continuing to perform limited duty for five hours a day.

By letter dated June 28, 2002, the Office advised appellant that the evidence submitted was insufficient to establish his claim. The Office further advised appellant of the type of evidence he needed to submit to establish his recurrence claim.

In an August 13, 2002 decision, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability causally related to his December 7, 1994 employment injury. Appellant requested reconsideration by letter dated August 18, 2002 accompanied by factual and medical evidence.

[1] Prior to the instant claim, appellant filed a traumatic injury claim alleging that he hurt his left arm and back on January 2, 1988, when he fell getting out of a truck.

By decision dated September 19, 2002, the Office denied appellant's request for modification based on a merit review of the claim. He requested a review of the written record by letter dated November 26, 2002.

In a decision dated January 2, 2003, the Office's Branch of Hearings and Review denied appellant's request for a review of the written record. The Branch of Hearings and Review found that, since appellant had previously requested reconsideration on the same issue, he was not entitled to a review of the written record as a matter of right. The Branch of Hearings and Review also indicated appellant's request was further denied as the issue could be addressed by submitting new evidence with a request for reconsideration.

The Board finds that appellant has failed to establish that he sustained a recurrence of disability beginning January 7, 2002 causally related to his December 7, 1994 employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes he can perform the light-duty position, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability and that he cannot perform the light-duty position. As part of this burden, the employer 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.[2]

In this case, appellant has neither shown a change in the nature and extent of his injury-related condition or a change in the nature and extent of the limited-duty requirements. The record shows that following the December 7, 1994 employment-related subluxation at L2-3 and L4-5 and lumbosacral strain appellant returned to work in a limited-duty capacity.

In support of his recurrence claim, appellant submitted numerous medical reports and treatment notes regarding the treatment of his back and other conditions. Several reports and treatment notes dated between December 8, 1994 and February 16, 1995 reveal appellant's treatment for his back condition. A June 14, 2000 report referred to severe osteoarthritis sustained by appellant on June 8, 2000. Additional reports and treatment notes relate to the back and left shoulder conditions sustained by appellant prior to his December 7, 1994 employment injury. The Board has carefully reviewed these reports and notes that they do not relate to the subject of the present claim, *i.e.*, appellant's claim that he sustained a recurrence of disability beginning January 7, 2002 causally related to his December 7, 1994 employment injury.

Appellant submitted a February 13, 2002 report of Dr. John D. Birkett, a family practitioner and his treating physician. In this report, Dr. Birkett recommended that appellant limit his work duties so that he did not have to hold flats in his left arm when casing mail. He stated that appellant needed to be able to put the postal truck in park at each mile of a delivery stop to avoid twisting and reaggravation of his back injury. He also stated that appellant should only case and deliver two hours a day to his mounted route while working five-hour days, five days a week. In an August 22, 2002 report, Dr. Birkett recommended that appellant limit his

[2] *Terry R. Hedman*, 38 ECAB 222 (1986).

work duties due to his current medical problems. He stated that appellant should place his flats on his casing ledge to case the mail, case only route 19, deliver east lawn cases and place his truck in park at each delivery point. He also stated that appellant should work a maximum of 5 hours a day, 5 days a week, wearing his back brace and continue to take 400 milligrams of Celebrex each day. Dr. Birkett further stated that appellant could answer the telephone for the remainder of the day as tolerated. His reports are insufficient to establish appellant's burden because they failed to address whether appellant's physical limitations were due to his December 7, 1994 employment injury.

In another report dated February 13, 2002, Dr. Birkett stated that appellant's worsening pain and right sciatic-type symptoms related back to his December 7, 1994 employment injury. In his August 14, 2002 report, Dr. Birkett stated that appellant's current condition was related to his original injury. He further stated that appellant did not recover from the original injury and he experienced lingering symptoms of persistent pain, loss of rotation of the spine and lifting ability. Dr. Birkett stated that appellant's recurrence was due to continued lifting and bending, related to his limited-duty position and the unresolved original injury. He opined that the first and second injuries were definitely connected and the initial condition was definitely prone to recurrence as noted above because it was a chronic progressively worsening problem. Dr. Birkett's concluded that appellant did not have any precipitating factors that caused his condition itself. His reports failed to provide any medical rationale explaining how or why appellant's pain and symptoms were caused by his accepted employment injury.

A July 23, 2002 report of Dr. Mark K. Palit, an orthopedic surgeon, revealed a history of appellant's December 1994 employment injury, medical treatment and social background. He provided his findings on objective and physical examination and diagnosed lumbar degenerative disc disease. Dr. Palit recommended medical treatment including, a back brace and additional physical therapy. He did not address whether appellant's back condition was caused by the December 7, 1994 employment injury.

Dr. Birkett's October 7, 2002 treatment notes indicated that appellant injured himself in 1994 and since that time he had been having low back pain and discomfort with pain radiating to both lower extremities. He further indicated that lately the pain was getting worse. Dr. Birkett's October 21, 2002 report provided a history of treatment beginning December 8, 1994. He noted that appellant was seen by two orthopedic specialists who concured that appellant had a progressive disease and no surgical correction was available. In an October 4, 2002 report, regarding the results of the magnetic resonance imaging scan of the lumbar spine, Dr. Marlin J. Fugate, a Board-certified radiologist, noted his findings and diagnosis of mild degenerative changes throughout the lumbar spine. He stated that there appeared to be a slight interval progression of these findings when compared to a prior examination on December 10, 1994. Neither Dr. Birkett nor Dr. Fugate addressed whether appellant's progressive back condition was caused by the December 7, 1994 employment injury.

As there is insufficient medical evidence in the record to establish that appellant experienced a change in the nature and extent of his employment-related back condition and the record is devoid of any evidence that his duties has changed, the Office properly denied appellant's claim of recurrence.

The Board further finds that the Office properly denied appellant's request for review of the written record pursuant to 5 U.S.C. § 8124(b)(1).

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... 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."[3] Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[4] The 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."[5] The regulations also provide that "the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."[6]

In this case, appellant submitted a request for reconsideration and received merit review of his claim on September 19, 2002. Since he had previously requested reconsideration of the same decision, appellant is not entitled to a review of the written record as a matter of right.[7]

Although appellant was not entitled to a review of the written record as a matter of right, the Office has discretionary authority with respect to granting the request and the Office must exercise such discretion.[8] In this case, the Office advised appellant that the issue could be addressed through the reconsideration process and the submission of new evidence. This is considered a proper exercise of the Office's discretionary authority.[9] There is no evidence of an abuse of discretion in this case.

[3] 5 U.S.C. § 8124(b)(1).

[4] 20 C.F.R. § 10.615.

[5] 20 C.F.R. § 10.616(a).

[6] *Id.*

[7] *See Peggy R. Lee*, 46 ECAB 527 (1995); *Michael J. Welsh*, 40 ECAB 994 (1989).

[8] *See Cora L. Falcon*, 43 ECAB 915 (1992).

[9] *Id.*

The January 2, 2003 and September 19 and August 13, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
June 11, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member