United States Department of Labor
Employees' Compensation Appeals Board

ABEL L. RAEL, Appellant	)	
and	)	**Docket No. 03-2231**
	)	**Issued: April 27, 2004**
DEPARTMENT OF THE ARMY, MATERIAL COMMAND, Toole, UT, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 15, 2003 appellant, through his attorney, filed a timely appeal from the Office of Workers' Compensation Programs' September 18, 2002 merit decision denying his claim for recurrence of disability and an August 20, 2003 decision, which denied his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant is entitled to compensation for wage loss beginning February 25, 1990, when he received a reduction in grade from warehouse worker foreman to warehouse worker resulting in a decrease of pay from $12.04 to $9.31 per hour; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing on the grounds that it was not timely filed.

FACTUAL HISTORY

This case has previously been before the Board on appeal. In a decision dated May 14, 2001, the Board found that appellant had received an overpayment of compensation in the amount of $46,476.05, for which he was not at fault, that the overpayment was not subject to waiver and that the Office properly proposed to recover the overpayment by withholding $1,000.00 from appellant's continuing compensation benefits. The basis for the overpayment was the finding that the Office improperly paid appellant based on a pay rate of $12.04 beginning on March 8, 1990, the date of his accepted recurrence of disability, when his recurrent pay rate was $9.31 per hour. The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.[1]

Appellant sustained an employment injury on February 21, 1989 accepted by the Office as lumbar strain. He returned to regular duty as a warehouse worker on March 10, 1989. On May 8, 1989 appellant was temporarily detailed from his position as a warehouse worker earning $9.22 per hour to a warehouse worker foreman. This detail expired on September 4, 1989. On November 19, 1989 appellant received a promotion to warehouse worker foreman not to exceed November 18, 1990. The pay rate for this position was $12.04. The personnel action stated: "Continued employment is subject to satisfactory completion of physical examination."

On January 22, 1990 an employing establishment physician found that appellant was limited in performing the duties of the position of warehouse worker foreman due to his inability to bend, stoop, carry or perform heavy lifting. Appellant sought medical treatment on January 22, 1990 but his physician did not alter his work restrictions from March 13, 1989.

In a memorandum dated February 7, 1990, appellant's supervisor requested a job search for appellant on the grounds that appellant could not perform major functions of the foreman position. On February 25, 1990 appellant was changed back from warehouse worker foreman to warehouse worker, a reduction in pay from $12.04 to $9.31. Another personnel action on March 5, 1990 changed appellant's position from warehouse worker to supply technician with no change in his pay rate of $9.31.

On appellant's March 20, 1990 notice of recurrence of disability, his supervisor noted that appellant was declared physically unable to assume the duties of a new job position because of a back injury, which existed prior to his selection in 1989. Appellant stopped work on March 8, 1990. The Office accepted the recurrence of disability on that date and authorized compensation benefits.

Appellant filed a claim for compensation on June 17, 2000 requesting wage-loss compensation from February 1990 to the present due to a downgrade.

By decision dated September 18, 2002, the Office found that the medical evidence submitted was not sufficient to establish a recurrence of disability on February 25, 1990 causally related to the February 21, 1989 employment injury.

[1] Docket No. 99-2398 (issued May 14, 2001).

Appellant, through his attorney, submitted a letter dated July 5, 2003, alleging that he requested an oral hearing on September 30, 2002.[2] By decision dated August 20, 2003, the Branch of Hearings and Review denied this request as untimely.

LEGAL PRECEDENT -- ISSUE 1

The Office's regulation define the term recurrence of disability, as follows:

> "*Recurrence of disability* means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn … or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."[3]

The Office procedure manual provides that when a claimant has returned to full duty for more than 90 days, substantial evidence must show that the recurrence of disability for work is directly related to the original injury.[4]

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his alleged recurrence of disability commencing February 25, 1990 and his February 21, 1989 employment injury.[5] 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.[6]

ANALYSIS -- ISSUE 1

Appellant sustained an employment injury on February 21, 1989, which the Office accepted as a back strain. Appellant returned to full duty on March 10, 1989. Therefore, a change in appellant's work requirements does not result in a finding of recurrence of disability as

[2] The record does not contain a copy of a September 30, 2002 letter, prior to the August 20, 2003 decision of the Branch of Hearings and Review. The record contains new evidence submitted to the Office following the August 20, 2003 decision. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

[3] 20 C.F.R. § 10.5(x).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(b) (May 1997).

[5] *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-9 (1982).

[6] *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

it would if appellant had returned to a light-duty position.[7] The employing establishment offered appellant a detail of 120 days to a supervisory position of warehouse worker foreman on May 8, 1989. Appellant worked in this position and on November 19, 1989 the employing establishment granted appellant a promotion to the position of warehouse worker foreman not to exceed November 18, 1990. As noted on the personnel action, the supervisory foreman position detail was contingent upon medical examination establishing his ability to perform the duties of this position. There is no indication in the record that this was a light-duty assignment made specifically to accommodate appellant's physical limitations due to his work-related injury. On January 22, 1990 an employing establishment physician found that appellant was limited in performing the duties of the warehouse worker foreman position due to his inability to bend, stoop, carry or perform heavy lifting.

Appellant submitted a report from his attending physician, Dr. Joseph M. Schroyer, dated January 22, 1990, which diagnosed cervical spine pain and lumbar disc syndrome, with disc disease. He released appellant light-duty work on March 13, 1989. Dr. Schroyer did not indicate that appellant was currently totally disabled but recommended surgery. He completed a report on February 16, 1990 indicating that he examined appellant on April 5, 1989 and not again until January 22, 1990. Dr. Schroyer recommended surgery. However, he did not provide work restrictions or provide an opinion regarding appellant's ability to work. Dr. Schroyer found appellant totally disabled on March 8, 1990 and the Office paid compensation from that date.

Disability is defined as the incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-related impairment prevents the employee from engaging in the kind of work he was doing when he was injured.[8] The Board has held that the fact that an injury might have prevented an employee from obtaining promotions does not establish a loss of wage-earning capacity.[9] Therefore, the mere fact that appellant's employment injury prevented him from meeting the physical requirements of his promotion to warehouse worker foreman, does not establish a loss of wage-earning capacity entitling him to compensation for the difference between his date-of-injury earnings of $9.12 per hours and the wages of the position, to which he was promoted of $12.04 per hour.

Appellant sought medical treatment on January 22, 1990 for the first time since March 1989 but his physician, Dr. Schroyer did not alter his work restrictions from March 13, 1989. In a memorandum dated February 7, 1990, appellant's supervisor requested a job search for appellant on the grounds that appellant could not perform major functions of his job of warehouse worker foreman. As previously noted, there is no indication in the record that the position of warehouse worker foreman was a light-duty assignment, that the position was made specifically to accommodate appellant's physical limitations, or that the physical requirements of this position were altered to exceed appellant's established physical limitations.

[7] *But see Terry R. Hedman*, 38 ECAB 222 (1986).

[8] *See Frazier V. Nichol*, 37 ECAB 528, 540 (1986).

[9] *Id.*

On February 25, 1990 appellant was changed from warehouse worker foreman to warehouse worker a reduction in pay from $12.04 to $9.31. Another personnel action on March 5, 1990 changed appellant's position from warehouse worker to supply technician with no change in his pay rate of $9.31. Appellant did not stop work until March 8, 1990.

Appellant has not established a recurrence of disability on February 25, 1990 as appellant did not stop work on that date and as he continued to be capable of earning the same wages he was receiving at the time of his injury. Furthermore, he has not established that the position of warehouse worker foreman was a light-duty assignment made specifically to accommodate his limitations. Although the evidence of record establishes that appellant was unable to perform the duties of the position, to which he was promoted, warehouse worker foreman, there is no medical evidence establishing that appellant was totally disabled until he stopped work on March 8, 1990.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Federal Employees' Compensation Act,[10] 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."[11]

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[12] Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.[13]

ANALYSIS -- ISSUE 2

In the instant case, the Office properly determined appellant's July 5, 2003 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's September 18, 2002 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

[10] 5 U.S.C. §§ 8101-8193.

[11] 5 U.S.C. § 8124(b)(1).

[12] *Tammy J. Kenow*, 44 ECAB 619 (1993).

[13] *Id.*

CONCLUSION

The Board finds that appellant has failed to establish that he is entitled to compensation for wage loss beginning February 25, 1990, when he received a reduction in grade from warehouse worker foreman to warehouse worker resulting in a decrease of pay from $12.04 to $9.31 per hour. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the August 20, 2003 and September 18, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 27, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member