United States Department of Labor
Employees' Compensation Appeals Board

NEWELL L. TURNER, Appellant	)	
	)	**Docket No. 04-333**
and	)	**Issued: August 6, 2004**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Salt Lake City, UT, Employer	)	

Appearances:
Newell L. Turner, pro se
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
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 20, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 10, 2003, which denied his claim for a recurrence of disability. He also appealed an August 20, 2003 decision which denied his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability on March 1, 2002 causally related to the accepted employment injury of February 8, 1988; and (2) whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On February 16, 1988 appellant, then a 38-year-old engineering technician, filed a claim for compensation benefits alleging that he sustained an injury to his lower back when he slipped

down stairs. The Office accepted that appellant sustained an employment-related low back strain and decompression at L4-S1 and authorized surgery. He stopped work on February 8, 1988 and returned in 1993 and worked intermittently thereafter.[1]

Appellant was treated by Dr. Robert D. Baer, Board-certified in physical medicine and rehabilitation, from February 16, 1988 to June 5, 1990 and, who advised that he sustained a herniated disc as a result of a fall at work. Also submitted were multiple reports from Dr. Robert M. Berry, a Board-certified orthopedist, who noted a history of appellant's work-related injury and his subsequent surgeries. In an October 11, 1991 operative report, he performed decompression surgery at L4-5, stabilization at L5-S1 with unilateral, bilateral and posterolateral arthrodesis and a fat graft. He diagnosed instability and degenerative changes at L4-5 and L5-S1. On January 29, 1992 the physician performed exploration surgery and repaired the pseudoarthrosis with bilateral posterior lateral arthrodesis and a right illiac bone graft.

On March 31, 2003 appellant filed a Form CA-2a, notice of recurrence of disability. He indicated a recurrence of chronic back pain on March 1, 2002 due to employment-related injuries sustained on February 8, 1988. Appellant continued to work regular duty.

By letter dated May 6, 2003, the Office requested detailed factual and medical evidence from appellant, stating that the information submitted was insufficient to establish that he sustained a recurrence on March 1, 2002.

Appellant submitted various records from the employing establishment from January 14 to November 18, 2002. Medical records from January 14, 2002 noted his treatment for severe bilateral knee pain and indicated that he had a history of low back pain with radiculopathy which was related to a previous on-the-job injury. Other employing establishment medical records from February 6 to November 18, 2002 noted treatment for various conditions including diabetes, cough, fever, podiatric problems, due to diabetic neuropathy, right shoulder impingement syndrome caused by moving boxes, erectile dysfunction and shoulder tendinitis.

By decision dated June 10, 2003, the Office denied appellant's claim for recurrence of disability on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of disability on March 1, 2002 which was causally related to the accepted employment injury sustained February 8, 1988.

In a letter dated July 7, 2003 and postmarked July 11, 2003, appellant requested an oral hearing before an Office hearing representative.

By decision dated August 20, 2003, the Office denied appellant's request for an oral hearing. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered.

[1] The record indicates that appellant sustained a low back injury on May 3, 1995 which was accepted by the Office as a work-related injury, Claim No. A14-0304206. On September 12, 2002 the Office consolidated that claim with the present claim before the Board, file No. A14-360762.

LEGAL PRECEDENT -- ISSUE 1

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury.[2] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury.[3] Moreover, the physician's conclusion must be supported by sound medical reasoning.[4]

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[5] In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.[6] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[7]

ANALYSIS -- ISSUE 1

The Office accepts that appellant sustained a low back strain and decompression at L4-S1 on February 8, 1988. However, the medical record lacks a well-reasoned narrative from his physician relating his claimed recurrent condition, beginning March 1, 2002 due to the February 8, 1988 employment injury.

Medical records from the employing establishment for January 14, 2002 indicated that appellant was treated for severe bilateral knee pain and had a history of low back pain with radiculopathy which was related to a previous on the-job-injury. The employing establishment records from February 6 to 27, 2003 noted treatment for diabetes, cough, fever and podiatric problems due to diabetic neuropathy, but did not mention a back condition. Other employing establishment treatment notes from June 18 to July 30, 2002 advised that appellant was treated for right shoulder impingement syndrome, but failed to mention any treatment for a back

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[2] *Robert H. St. Onge,* 43 ECAB 1169 (1992).

[3] Section 10.104(a)-(b) of the Code of Federal Regulation provide that, when an employee has received medical care as a result of the recurrence, he or she should arrange for the attending physician to submit a detailed medical report. The physicians report should include the his opinion with medical reasons regarding the causal relationship between the employee's condition and the original injury, any work limitations or restrictions and the prognosis. 20 C.F.R. § 10.104 (1999).

[4] *See Robert H. St. Onge, supra* note 2.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship,* Chapter 2.805.2 (June 1995).

[6] For the importance of bridging information in establishing a claim for a recurrence of disability, s*ee Robert H. St. Onge, supra* note 2; *Shirloyn J. Holmes,* 39 ECAB 938 (1988); *Richard McBride,* 37 ECAB 748 (1986).

[7] *See Morris Scanlon,* 11 ECAB 384, 385 (1960).

condition. None of the medical records submitted most contemporaneously with the date of the alleged recurrence specifically mention that appellant sustained a recurrence of disability due to back pain on March 1, 2002 which is causally related to the accepted employment injury of February 8, 1988.[8] The Board has found that vague and unrationalized medical opinions on causal relation have little probative value.[9] The physicians neither mentioned that appellant's condition was a recurrence of the earlier injury of February 8, 1988, nor did they otherwise provide medical reasoning explaining why any current condition or disability was due to the February 1988 employment injury or to any other employment factors.[10] Therefore, these reports are insufficient to meet appellant's burden of proof.

Other treatment notes from the employing establishment from August to November 2002, indicated that appellant was treated for diabetes, cough, fever, podiatric problems due to diabetic neuropathy and erectile dysfunction.[11] However, as noted above, the physicians neither mentioned treatment for a low back injury, nor did they otherwise provide medical reasoning explaining why any current condition or disability was due to the February 8, 1988 employment injury or to any other employment factors.[12]

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Federal Employees' Compensation Act provide 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."[13] Section 10.617 and 10.618 of the federal regulation implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[14] Although, there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers, grant or deny appellant's request and must exercise its discretion.[15] The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

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[8] The Board has consistently held that contemporaneous evidence is entitled to greater probative value than later evidence; *see Katherine A. Williamson*, 33 ECAB 1696 (1982); *Arthur N. Meyers*, 23 ECAB 111 (1971).

[9] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[10] *Id.*

[11] For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship. *Alice J. Tysinger*, 51 ECAB 638 (2000).

[12] *Id.*

[13] 5 U.S.C. § 8124(b)(1).

[14] 20 C.F.R. §§ 10.616, 10.617.

[15] *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

"If the claimant is not entitled to a hearing or review (*i.e*. the request was untimely, the claim was previously reconsidered, etc.), H&R will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."[16]

ANALYSIS -- ISSUE 2

In the present case, appellant requested an oral hearing by an Office hearing representative in a letter postmarked July 11, 2003. Section 10.616 of the federal regulation provide: "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."[17] As the postmark date of the request was more than 30 days after issuance of the June 10, 2003 Office decision, appellant's request for an oral hearing was untimely filed. Therefore, the Office was correct in finding in its August 20, 2003 decision, that appellant was not entitled to an oral hearing as a matter of right because his request was not made within 30 days of the Office's June 10, 2003 decision.

While the Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right, the Office, in its August 20, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for an oral hearing on the basis that the case could be resolved by submitting additional evidence to establish that a diagnosed condition was causally related to his employment. 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.[18]

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 request for an oral hearing, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for an oral hearing under section 8124 of the Act.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained a recurrence of disability or a medical condition beginning March 1, 2002 causally related to his accepted February 8, 1988 employment injury. The Board further finds that the Office properly denied appellant's request for an oral hearing as untimely.

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[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

[17] 20 C.F.R. § 10.616.

[18] *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT August 20 and June 10, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 6, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member