

FACTUAL HISTORY

The Office accepted appellant's claim for a right shoulder impingement syndrome, right shoulder arthroscopy, right wrist tendinitis and right carpal tunnel release arising from his work as a meat cutter on or before February 19, 1996. Appellant returned to modified work on December 6, 1999 and stopped working on March 6, 2000. On January 24, 2000 the Office granted appellant a schedule award for a 26 percent permanent impairment to the right upper extremity.

Appellant submitted several reports from his treating physician, Dr. Antonio A. Ghiselli, a Board-certified orthopedic surgeon, including those dated March 3 and May 23, 2000. In his March 3, 2000 report, Dr. Ghiselli diagnosed carpal tunnel syndrome and overuse syndrome of the right shoulder and right arm. He stated that appellant continued to perform repetitive type of work and his shoulder bothered him as well as his arm and wrist/hand area. Dr. Ghiselli stated that appellant was "struggling a lot" with his work and was in constant pain. He took appellant off work for one week due to the repetitive nature of his work. In his May 23, 2000 report, Dr. Ghiselli stated that appellant was unable to return to work because of the pain in his right arm and because of the repetitive nature of his work.

By letter dated August 2, 2000, the Office informed appellant that, if he was claiming a recurrence of disability, commencing March 6, 2000, due to the February 19, 1996 employment injury, he must submit additional information including a narrative report from his treating physician explaining how his work-related condition worsened.

In a report dated July 21, 2000, Dr. Ghiselli stated that appellant was unable to work because only repetitive work was available to him and appellant could not do repetitive work. He stated that the condition was permanent.

By decision dated September 14, 2000, the Office denied appellant's claim for a recurrence of disability, commencing March 6, 2000, stating that the evidence did not establish that appellant's disability was due to his work-related injury. By letter dated August 28, 2001, the Office acknowledged receipt of appellant's July 30, 2001 claim for total disability from March 6, 2000 through May 1, 2001 on Form CA-7 and stated that it could not process the claim because his recurrence of disability was denied in the September 14, 2000 decision. The Office stated that appellant could exercise his appeal rights if he wished to dispute that decision.

By letter dated September 20, 2001, appellant requested review of his claim by the Branch of Hearings and Review and submitted medical reports from Dr. Ghiselli dated September 20, 2000 and August 7, 2001. In his September 20, 2000 report, Dr. Ghiselli stated the effects of the work injury had not ceased and the prognosis regarding recovery was poor. He stated that appellant could not use his right arm and shoulder for repetitive motions and was unable to work. In his August 7, 2001 report, Dr. Ghiselli stated that appellant had reached maximum medical improvement on July 30, 2001 and opined that appellant had an eight percent permanent impairment to his right upper extremity.

By decision dated November 6, 2002, the Branch of Hearings and Review denied appellant's request for an oral hearing because his letter requesting an oral hearing, which was

postmarked September 20, 2001, was not made within 30 days of the Office's September 14, 2000 decision and was, therefore, untimely. The Branch of Hearings and Review also stated that appellant's request could be addressed by requesting reconsideration from the district office and submitting new evidence.

By letter dated August 23, 2003, appellant requested reconsideration. Appellant stated that when he returned to work on December 6, 1999 he was placed as a cashier in direct conflict with Dr. Ghiselli's and Dr. Arredondo's recommendation. Appellant stated that both physicians stated that he could not perform repetitive motion. He contended that the Office ignored all his medical restrictions and limitations. Appellant requested that his recurrence of disability be approved from March 6, 2000 through August 28, 2001.

By decision dated September 29, 2003, the Office denied appellant's request for reconsideration, stating that his letter requesting reconsideration was dated August 23, 2003, more than a year after the Office issued the September 14, 2000 decision and, therefore, was untimely. The Office also found that appellant did not establish clear evidence of error.

LEGAL PRECEDENT

Any claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.¹ If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right. The Office has discretion, however, to grant or deny a request that is made after this 30-day period.² In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.³

ANALYSIS

On November 6, 2002 the Branch of Hearings and Review denied appellant's request for an oral hearing because his letter requesting an oral hearing, which was postmarked September 20, 2001, was not made within 30 days of the Office's September 14, 2000 decision and was, therefore, untimely. The Board finds however that appellant's request for hearing was not made from the Office's September 14, 2000 decision, but rather from the August 28, 2001 letter decision. The Office's August 28, 2001 letter clearly constituted a final decision with respect to appellant's July 31, 2001 claim for recurrence, even though the letter did not contain appeal rights.⁴ This decision effectively denied the claim for a recurrence of disability as it unequivocally advised that the Office would not develop such claim because the recurrence had

¹ 20 C.F.R. § 10.616(a) (1999).

² *Herbert C. Holley*, 33 ECAB 140 (1981).

³ *Rudolph Bermann*, 26 ECAB 354 (1975).

⁴ See 20 C.F.R. § 10.126 (regarding the contents of an Office decision).

been previously denied. It is, therefore, a final decision with respect to the July 31, 2001 recurrence claim.

The reason the Office provided for denying the July 31, 2001 recurrence claim was “your claim for disability can not be processed due to the denial of your claim for a recurrence that is addressed in the denial letter dated September 14, 2000.” The Office procedures provide that “it is possible to have a valid claim for recurrence in a denied case if the denial was limited to a specific period of time or particular medical services, and the claim for recurrence addresses a different time period or a change in job duties.⁵ The Office did not explain its finding that it could not develop the July 31, 2001 recurrence claim, which covered a different period of time than the previously denied recurrence claim. The period of disability denied on September 14, 2000 could not have encompassed the subsequent time periods claimed in July 31, 2001. The Board finds that the Office’s August 28, 2001 letter is a final decision. Appellant’s hearing request dated September 20, 2001 was therefore timely. This case must therefore be remanded to the Branch of Hearings and Review for hearing.

CONCLUSION

The Board finds that appellant’s September 20, 2001 hearing request was timely filed. Therefore, the Office improperly denied his hearing request. In light of the Board’s disposition of this issue, the issue of whether the Office properly denied the request for reconsideration on September 29, 2003 is moot.

⁵ Federal (FECA) Federal Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5(b) (January 1995).

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2002 decision is set aside and this case is remanded to the Office of Workers' Compensation Programs for further proceedings consistent with this opinion.

Issued: June 15, 2004
Washington, D.C.

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member