United States Department of Labor
Employees' Compensation Appeals Board

TONY E. HAYNES, Appellant	)	
and	)	**Docket No. 04-886**
	)	**Issued: October 27, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Wichita, KS, Employer	)	

Appearances:
Tony E. Haynes, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 17, 2004 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated January 2, 2004, denying his request for a hearing as untimely under 5 U.S.C. § 8124. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the January 2, 2004 decision.

ISSUE

The issue is whether the Office properly denied appellant's request for a hearing as untimely under section 8124 of the Federal Employees' Compensation Act.

FACTUAL HISTORY

On March 18, 1985 appellant, then a 29-year-old mail processor, filed a claim for compensation for a traumatic injury occurring on March 16, 1985 in the performance of duty. Appellant stopped work on March 16, 1985 and returned to limited-duty employment on March 18, 1985. The Office accepted appellant's claim for low back strain and a herniated disc at L4-5.

Appellant sustained intermittent periods of temporary total disability in 1985.[1] On February 26, 1988 the employing establishment removed appellant from employment for cause.[2]

On March 17, 1992 appellant underwent a hemilaminectomy at L4-5 and L5-S1 on the right with an excision of the herniated disc. The Office authorized the surgery, paid appellant compensation from September 16, 1991 to March 7, 1992 and placed him on the periodic rolls effective March 8, 1992.

The Office referred appellant to vocational rehabilitation in October 1993; however, the Office ceased rehabilitation efforts in July 1995 due to unresolved medical issues. The Office again referred appellant for vocational rehabilitation in October 1997.[3]

The Office informed appellant, in a notice dated September 4, 1998, that it proposed to reduce his compensation on the grounds that he had the capacity to earn wages as a parking lot attendant. The Office noted that the rehabilitation counselor found that the position was within appellant's ability and reasonably available in his commuting area. The Office indicated that appellant had not found employment because he "failed to cooperate in the placement process."

In a decision dated October 30, 1998, the Office reduced appellant's compensation, effective November 8, 1998, on the grounds that he had the ability to perform the selected position of parking lot attendant.

On October 21, 2002 the Office requested a comprehensive medical report from appellant responding to questions regarding his condition and its relationship to his employment injury. Appellant sent a letter to his senator, dated October 24, 2002, requesting assistance in receiving an award for 100 percent disability from the Office and the Department of Veterans Affairs. The senator forwarded the letter to the Office, which responded with an explanation about disability entitlement under the Act[4] and reiterating that it needed a medical report in response to its October 21, 2002 letter.

Appellant submitted a work restriction evaluation from Dr. Ralph D'Auria, a Board-certified physiatrist, dated November 15, 2002. On November 29, 2002 the Office again

[1] In a decision dated January 27, 1987, the Office denied appellant's claim for total disability from December 27, 1985 to March 29, 1986. By decision dated August 22, 1988, the Office denied modification of its January 27, 1987 decision; however, in a decision dated March 13, 1989, the Office vacated the August 22, 1988 decision in part and accepted appellant's claim for disability compensation from December 30, 1985 through January 7, 1986. By decision dated September 8, 1989, the Office denied appellant's claim for compensation for intermittent dates of temporary disability from October 1986 to September 1987. In a decision dated June 4, 1991, a hearing representative affirmed the Office's September 8, 1989 decision.

[2] In a letter dated May 12, 1997, the employing establishment informed the Office that appellant had resigned "due to his pending removal from service" on February 26, 1988.

[3] The employing establishment submitted an investigative memorandum dated November 25, 1998 noting that it had videotaped appellant on multiple occasions performing manual labor. Investigators with the employing establishment requested that the Office refer appellant for another functional capacity evaluation based on the new evidence; however, the Office declined on the grounds that it was unlikely to increase his wage-earning capacity.

[4] 5 U.S.C. §§ 8101-8193.

requested that appellant submit a detailed narrative medical report. Appellant submitted a medical report from Dr. D'Auria dated November 15, 2002, received by the Office on December 9, 2002. The physician found that appellant could work part time with restrictions.

In a letter to his senator dated October 22, 2003, appellant requested assistance because his wage-earning capacity had decreased. He noted that the Act provided for an increase or decrease in compensation at any time based on the evidence. Appellant related:

> "A decrease in compensation was effective October 30, 1998 based on computation of wage[-]earning capacity of a[n] 8-hour work day. A periodic review was requested on October 21, 2002.
>
> "The treating physician['s] conclusion was [appellant's] earning capacity is limit[ed] to a 2-4 hour work day.
>
> "Based on these finding[s] the computation of wage[-]earning capacity warrants an increase in compensation."

Appellant submitted a medical report dated October 6, 2003 from Dr. D'Auria in support of his contention. Appellant's senator forwarded the material to the Office on October 27, 2003. In a letter dated November 10, 2003, the Office advised that, in order for appellant to establish modification of the October 30, 1998 wage-earning capacity decision, he should submit a notice of recurrence of disability and a detailed medical report from his attending physician explaining the change in his condition.

By letter dated and postmarked November 25, 2003 and addressed to the Branch of Hearings and Review, appellant stated, "This letter is requesting for and review for reconsideration to a decrease in compensation effective October 30, 1998. Since this time my condition has worsen[ed] to [the] point [in] which my earnings capacity is limited to [a] two [to] four hour work day." Appellant noted that he was submitting the Office's November 10, 2003 letter from his senator, a notice of recurrence of disability and a "detailed narrative medical report of the change in my medical condition by my treating physician.…"

In a decision dated January 2, 2004, the Office denied appellant's request for a hearing as untimely under section 8124. The Office found that appellant did not submit his request for a hearing within 30 days of the Office's October 30, 1998 decision and, therefore, he was not entitled to a hearing as a matter of right. The Office indicated that it had considered the matter in relation to the issue involved and denied appellant's request on the basis that the issue could be equally well addressed through the reconsideration process.

LEGAL PRECEDENT

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation 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."[5]

The Office regulation at section 10.616(a) provides that a claimant injured on or after July 4, 1966, who has received a final adverse decision by the Office, may obtain a hearing by writing to the address specified in the decision. 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. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[6] The request for the hearing may be either a request for an oral hearing or a request for a review of the written record.[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 claimant involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[8] when the request is made after the 30-day period established for requesting a hearing,[9] or when the request is for a second hearing on the same issue.[10] 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.[11]

ANALYSIS

In this case, appellant requested a review of the Office's wage-earning capacity determination in a letter addressed to the Branch of Hearings and Review dated and postmarked November 25, 2003. As noted above, section 10.616 of the Office's regulation provides: "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."[12] As the postmark date of appellant's request, November 25, 2003, was more than 30 days after the issuance of the October 30, 1998 wage-earning capacity decision, his request for a review of the written record was untimely filed. Therefore, the Office correctly determined in its January 2, 2004 decision

[5] 5 U.S.C. § 8124(b)(1).

[6] 20 C.F.R. § 10.616(a); *Brenton A. Burbank*, 53 ECAB ___ (Docket No. 00-2017, issued January 3, 2002).

[7] 20 C.F.R. § 10.615.

[8] *See Brenton A. Burbank*, *supra* note 6.

[9] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[10] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[11] *Sandra F. Powell*, 45 ECAB 877 (1994).

[12] 20 C.F.R. § 10.616.

that appellant was not entitled to a hearing as a matter of right because his request was not made within 30 days of the Office's October 30, 1998 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 January 2, 2004 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 the reconsideration process.

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.[13] In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

However, the Board finds that appellant's letter dated November 25, 2003, while addressed to the Branch of Hearings and Review, also constitutes a request by appellant for modification of the Office's October 30, 1998 wage-earning capacity decision. Appellant previously wrote his senator on October 24, 2002 and requested assistance on the grounds that he could now only work two to four hours per day. In a response dated November 10, 2003, the Office stated that, in order to establish modification of its October 30, 1998 wage-earning capacity determination, appellant should submit a notice of recurrence of disability (Form CA-2a) and a detailed medical report supporting a material change in his employment-related condition. In his November 25, 2003 letter to the Branch of Hearings and Review, appellant stated that he was requesting reconsideration and alleged that his condition had worsened since the October 30, 1998 wage-earning capacity decision, such that he could now only work two to four hours per day. He additionally noted that he was submitting evidence in support of his request, including a Form CA-2a and a medical report which he contended established that his condition had changed. It is evident from appellant's November 25, 2003 letter that he is seeking modification of the October 30, 1998 wage-earning capacity determination, in accordance with the instructions provided by the Office in its November 10, 2003 letter. It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.[14] The Board finds that appellant requested modification of the October 30, 1998 wage-earning capacity determination in his November 25, 2003 letter to the Office and is entitled to a merit decision on this issue. On remand, the Office should develop the record as necessary and issue a *de novo* decision with regard to appellant's loss of wage-earning capacity.[15]

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

[14] *See Tamra McCauley*, 51 ECAB 375, 377 (2000).

[15] Appellant submitted additional evidence with his appeal; however, the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision; *see* 20 C.F.R. § 501.2(a).

CONCLUSION

The Board finds that the Office properly denied appellant's request for a hearing under section 8124 as untimely. The Board will remand the case for further action by the Office on appellant's November 25, 2003 letter requesting modification of its October 30, 1998 wage-earning capacity decision on the grounds that his condition had worsened.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 2, 2004 is affirmed and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 27, 2004
Washington, DC

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member