United States Department of Labor
Employees' Compensation Appeals Board

THOMAS V. CHIRAYATH, Appellant	)	
and	)	**Docket No. 04-1808**
	)	**Issued: February 11, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX, Employer	)	

Appearances:
Thomas V. Chirayath, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 13, 2004 appellant filed an appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated June 4, 2004 which denied his request for an oral hearing, and a March 29, 2004 merit decision which denied his claim for a recurrence of disability causally related to his right shoulder strain and left shoulder strain injuries. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case and over the nonmerit hearing denial.

ISSUES

The issues are: (1) whether the Office properly denied appellant's claim for a recurrence of disability on and after October 17, 2003, causally related to his bilateral shoulder strain injuries; and (2) whether the Office properly denied appellant's request for a review of the written record.

FACTUAL HISTORY

On March 4, 2003 the Office accepted the occupational disease claim of appellant, then a 38-year-old distribution clerk, for left shoulder sprain/strain and right shoulder impingement

syndrome causally related to repetitive motion operating automation machines.[1] Appellant did not stop work, but continued in the same light-duty assignment casing mail in a modified case, or sitting at a table repairing and bagging damaged mail.

Appellant was diagnosed as having employment-related bilateral wrist tenosynovitis, early carpal tunnel syndrome and a shoulder strain with possible impingement. His treating orthopedic surgeon provided his light-duty working restrictions on April 2, 2003, which were lifting no more than 5 to 10 pounds intermittently, climbing stairs only intermittently and no pushing or pulling more than 5 to 10 pounds intermittently.

Appellant submitted an April 23, 2003 magnetic resonance imaging (MRI) scan of the left shoulder by Dr. Marc Berger, a Board-certified radiologist. He noted "very subtle signal alteration in the supraspinatus tendon suggesting a slight tendinitis. There is also a slight amount of fluid in the subdeltoid bursa which may represent a subtle subdeltoid bursitis. There is no significant impingement identified and there is no tear of the rotator cuff."

On May 7, 2003 appellant was seen by his physician complaining of bilateral shoulder pain, worse when working overhead. Bilateral shoulder tendinitis/bursitis/degenerative joint disease was diagnosed, and he was returned to work.

Appellant stopped work on June 28, 2003 and did not return until July 7, 2003. On June 30, 2003 appellant's treating orthopedist noted that he had flare-ups of bilateral shoulder and right wrist pain, that he had acromioclavicular joint tenderness bilaterally with giveaway weakness, and that he had a positive shocks test on the right. He completed a Form CA-7 claim for compensation on July 17, 2003 from June 28 through July 6, 2003.

On a Form CA-17 dated September 17, 2003 Dr. Michael Taba, the attending Board-certified orthopedic surgeon, restated his work activity restrictions, indicated that he could work at his own pace and further indicated that appellant was disabled due to bilateral shoulder tenosynovitis of the wrist.

Appellant took leave without pay from August 20 to September 5, 2003, and returned to limited duty on September 6, 2003.

A disability certificate dated October 20, 2003 from Dr. Taba indicated that appellant was totally incapacitated from October 17 to 18, 2003.

On October 31, 2003 appellant submitted a prescription from Dr. Taba which stated "[Patient] totally incapacitated from work work-related injury October 31, 2003 through November 1, 2003."

[1] Appellant noted on the claim form that he had sustained a bilateral wrist injury on May 13, 2001, to which the Office assigned No. 16202480. It appears from the record that appellant was assigned light duty following this injury.

On November 13, 2003 appellant filed a Form CA-7 claiming compensation for intermittent dates from October 17 until November 1, 2003.

In a letter dated November 20, 2003, the Office advised appellant that he needed to submit a statement regarding why he believed his current condition was causally related to his original injuries and a rationalized medical report discussing causal relationship.

Appellant explained that he submitted the claim form because he was experiencing pain which he attributed to federal employment. He claimed that the shoulder impingement resulted from repetitious motion and operating automation machines at work. In response appellant submitted copies of Form CA-17 duty status reports dated October 20 and November 26, 2003 indicating that shoulder impingement resulted from repetitive motion operating automation machines at work. In an unsigned November 26, 2003 medical narrative, Dr. Taba noted that appellant was being treated for repetitive overuse of his shoulder, that his diagnosis was right shoulder impingement, and that he was currently working in nixie mail which he was able to tolerate most of the time. Dr. Taba opined that "[appellant's] bilateral shoulder injuries were a direct result of his employment with the [employing establishment]." He stated that appellant's "symptoms are clearly related to overuse of his upper extremities."

In a January 5, 2004 unsigned medical narrative report, Dr. Taba indicated that appellant had experienced pain in both shoulders, that he did not work for four days, and that the right was worse than the left with a diffuse supraspinatus tendonopathy with partial thickness undersurface tear. Dr. Taba indicated that appellant had acromioclavicular joint tenderness, right worse than left, decreased external rotation, flexion and abduction and significantly reduced range of motion. He noted that appellant now showed a tear where last year he only showed tendonopathy. Surgery was recommended.

Appellant also claimed that he was disabled from February 23 to 24, 2004.

By decision dated March 29, 2004, the Office rejected appellant's recurrence claim finding that the evidence submitted did not establish that appellant sustained any disability, causally related to factors of his employment on or after October 17, 2003.

On April 29, 2004 and postmarked that date, appellant requested a review of the written record. In support she submitted two more Form CA-17 duty status reports, a certification of health care provider which noted that appellant's condition was chronic but could be off from one to several days, and an unsigned February 23, 2004 narrative report from Dr. Taba which diagnosed bilateral rotator cuff tears and indicated that appellant preferred to stay on limited duty.

Appellant also submitted an unsigned April 28, 2004 narrative from Dr. Taba which stated that it was his opinion that appellant's bilateral shoulder impingement was a direct result of his employment with the employing establishment. Dr. Taba called appellant's symptoms chronic.

By decision dated June 4, 2004, the Office denied a review of the written record finding that the request was untimely, such that he was not entitled by right to a review of the written record. The Office noted that the issue could equally well be addressed by requesting reconsideration and submitting further evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee returning to light duty, or whose medical evidence shows the ability to perform light duty, has the burden of proof to establish a recurrence of temporary total disability[2] by the weight of reliable, probative, and substantial evidence and to show that he cannot perform the light duty.[3] As part of his burden, the employee must show a change in the nature and extent of the injury-related conditions or a change in the nature and extent of the light-duty requirements.[4]

ANALYSIS -- ISSUE 1

In this case, appellant has not submitted evidence sufficient to established that he sustained a change in the nature and extent of his injury-related condition or factual evidence demonstrating a change in the nature and extent of his light-duty job requirements causally related to his prior accepted condition.

The April 23, 2003 MRI scan read by Dr. Berger which revealed very subtle alteration in the supraspinatus tendon suggesting slight tendinitis and possibly subtle subdeltoid bursitis. This report although suggesting an alteration in this condition, does not contain any opinion on causal relationship and therefore does not support appellant's recurrence of disability claim.

Appellant's treating orthopedist, Dr. Taba, opined in an October 20, 2003 disability certificate and prescription note that appellant had had a flare-up of bilateral shoulder and wrist pain and bilateral acromioclavicular tenderness and that he was disabled for work the period October 31 through November 1, 2003 but again he did not address causal relationship. Therefore this report does not support appellant's recurrence claim.

Dr. Taba provided work-related physical activity restrictions on CA-17 form reports and restated his diagnosis of shoulder impingement, but did not provide any medical rationale supporting a causal relationship between appellant's current condition and the accepted injury. On September 17, 2003 Dr. Taba opined that appellant was totally disabled due to bilateral shoulder/wrist tenosynovitis, however, no opinion on causal relationship was included. Accordingly this opinion is of diminished probative value and is insufficient to establish appellant's recurrence claim.

[2] A 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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness." 20 C.F.R. § 10.5(x).

[3] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[4] *Id.*

The November 26, 2003, January 5 and February 23, 2004 narratives by Dr. Taba are unsigned and thus do not constitute probative medical evidence as the preparer is not readily identifiable as a physician.[5]

As appellant has not submitted any rationalized medical evidence necessary to establish his recurrence claim, he has failed to meet his burden of proof.

CONCLUSION -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability on or after October 17, 2003, causally related to the accepted 2003 injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Federal Employees' Compensation Act,[6] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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." 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.[7] Any claimant dissatisfied with an Office decision shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. However, a request for either an oral hearing or a review of the written record must be submitted in writing within 30 days of the decision for which a hearing is sought. 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, nevertheless has discretion to grant or deny a request that is made after the 30-day period. In such case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the employee with reasons.[8]

Office regulations at 20 C.F.R. § 10.615 explain that a hearing is a review by a hearing representative of an adverse decision. Initially, the employee can choose between two formats: an oral hearing or a review of the written record.[9]

[5] *Merton J. Sills*, 40 ECAB 1121 (1989).

[6] 5 U.S.C. § 8124(b)(1).

[7] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

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

[9] *Claudio Vazquez*, 52 ECAB 347 (2001).

Further, the Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[10]

ANALYSIS -- ISSUE 2

In this case, appellant chose to request a review of the written record by the Office hearing representative. The Office's final decision with which appellant disagreed was dated March 29, 2004 and appellant filed his request for a review of the written record on April 29, 2004 which was a time period of 31 days later, 1 day beyond the time limitation for a review of the March 29, 2004 decision as a matter of right. As appellant exceeded the 30-day time limitation period in requesting a review of the written record, he was not, as a matter of right, entitled to a review of the written record. However, the Office has discretion to grant or deny a request that is made after the 30-day period. In such case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the employee with reasons.

In this case, the Office exercised its discretion and in considering appellant's evidence and his arguments upon review, determined that the issues about which he was concerned could equally well be addressed by submitting further probative evidence and/or argument to the Office with a request for reconsideration. The Office rejected appellant's untimely request for a review of the written record on that basis.

The Board finds that this determination is proper under the law and the facts of this case, such that the Office did not abuse its discretion in denying appellant's request for a review of the written record.

CONCLUSION -- ISSUE 2

The Board finds that the Office properly denied appellant's request for a review of the written record as untimely and properly exercised its discretion in further denying the request finding that the issue could be resolved through the reconsideration process.

[10] *Delmont L. Thompson,* 51 ECAB 155, 157-58, (1999); *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Program dated June 4 and March 29, 2004 are hereby affirmed.

Issued: February 11, 2005
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member