

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**JOHN H. TALBOT, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Salem, OH, Employer**

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**Docket No. 04-2119  
Issued: February 7, 2005**

*Appearances:*  
*John H. Talbot, 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  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On August 31, 2004 appellant filed a timely appeal from a March 11, 2004 merit decision of the Office of Workers' Compensation Programs which denied his recurrence of disability claim, and a July 1, 2004 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 the case.

**ISSUES**

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability; and (2) whether the Office properly denied his request for a hearing.

**FACTUAL HISTORY**

On December 27, 2002 appellant, then a 49-year-old letter carrier, sustained an employment-related concussion with vertigo when he slipped and fell in the employing establishment parking lot. He returned to full duty the next day. On January 8, 2004 he filed a

recurrence of disability claim, alleging that pain in his right upper arm into his neck were caused by the December 27, 2002 employment injury. He did not stop work.

By letter dated January 14, 2004, the Office informed appellant of the type of evidence needed to support his claim. In a January 19, 2004 letter, he stated that he believed his current condition was related to the December 27, 2002 fall because he was sore for several weeks thereafter and experienced pain which would keep him awake. He described his usual job duties of casing and delivering mail and noted that at the end of the day he occasionally would have severe pain in his arm.

In support of his claim, appellant submitted medical evidence including head and sinus computerized tomography (CT) scans performed on December 27, 2002 which were read by Dr. Ralph J. Perrico, Board-certified in diagnostic radiology, as unremarkable. On March 24, 2003 Dr. Robert D. Kidder, also Board-certified in diagnostic radiology, interpreted CT scans of the cervical and lumbar spine as normal. On November 20, 2003 Dr. Perrico interpreted a magnetic resonance imaging (MRI) scan of the cervical spine as showing a minimal disc bulge in the lower cervical spine with the study being otherwise unremarkable.

Dr. Lori A. Crawl, an attending Board-certified family practitioner, provided treatment notes dating from March 19 to December 17, 2003 which noted appellant's complaints of persistent right arm pain with numbness and tingling. In a note dated December 5, 2003, Dr. Crawl advised that she was unable to come up with an appropriate diagnosis, stating that the MRI scan was basically unremarkable. A December 14, 2003 x-ray of the right shoulder was read by Dr. Perrico as unremarkable.

A November 25, 2003 electromyography (EMG) and nerve conduction studies of the upper extremities was interpreted as normal by Dr. Ronald M. Yarab, Board-certified in physical medicine and rehabilitation. In a report dated December 16, 2003, Dr. Yarab noted a history that appellant sustained a fall the previous December with subsequent arm, shoulder and neck pain. He noted unremarkable CT, MRI and EMG testing and reported good muscular strength with the exception of the supraspinatus muscle on the right and tenderness over the bicipital and supraspinatus tendons. The physician diagnosed supraspinatus and bicipital tendinitis.

By decision dated March 11, 2004, the Office denied appellant's recurrence of disability claim, finding that the medical evidence failed to contain an opinion regarding the cause of appellant's condition. In a letter postmarked May 18, 2004, appellant requested a hearing. In a decision dated July 1, 2004, an Office hearing representative denied the request on the grounds that it was untimely filed.<sup>1</sup>

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<sup>1</sup> The Board notes that the Office referred appellant for a second opinion evaluation to Dr. Normal W. Lefkowitz, a Board-certified orthopedist, who submitted reports dated April 13 and 16, 2004. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final merit decision. 20 C.F.R. § 501.2(c).

### **LEGAL PRECEDENT -- ISSUE 1**

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he or she 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. 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. Moreover, sound medical reasoning must support the physician's conclusion.<sup>2</sup>

### **ANALYSIS -- ISSUE 1**

Appellant alleged that the December 27, 2002 employment injury caused arm, shoulder and neck pain. The Board finds, however, that appellant did not submit medical evidence sufficient to establish that he sustained a recurrence of disability.

While appellant submitted a number of procedure notes and treatment notes from Dr. Crowl, these did not discuss the cause of appellant's condition, and medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.<sup>3</sup> In a December 16, 2003 report, Dr. Yarab noted findings of tenderness on examination and diagnosed supraspinatus and bicipital tendinitis. However, his report did not contain any opinion regarding the cause of appellant's complaints.<sup>4</sup> With regard to the diagnostic tests, the physicians of record noted that the findings were regarded as normal or unremarkable. The Board therefore finds the medical reports insufficient to establish that appellant sustained a recurrence of disability causally related to the December 27, 2002 employment injury. As appellant failed to submit rationalized medical evidence supporting that his current condition was caused by the December 27, 2002 employment injury, he failed to meet his burden of proof.

### **LEGAL PRECEDENT -- ISSUE 2**

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. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.<sup>5</sup> The Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act,<sup>6</sup> has the power to

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<sup>2</sup> *Ricky S. Storms*, 52 ECAB 349 (2001).

<sup>3</sup> *Michael E. Smith*, 50 ECAB 313 (1999).

<sup>4</sup> *Id.*

<sup>5</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>7</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

The Office denied appellant's request for a hearing on the grounds that it was untimely filed. In its July 1, 2004 decision, the Office found that appellant was not, as a matter of right, entitled to a written record review since his request, postmarked May 18, 2004, had not been made within 30 days of its March 11, 2004 decision. The Office considered the matter in relation to the issue involved and noted that appellant's request was denied on the basis that the issue in the instant case could be addressed through a reconsideration application. The Board finds that appellant's request for a hearing was postmarked May 18, 2004, more than 30 days after the date of issuance of the March 11, 2004 decision. The Office properly determined that appellant was not entitled to a hearing as a matter of right as his request was untimely filed.

While the Office also has the discretionary power to grant a request for a written record review when a claimant is not entitled to such as a matter of right, the Office, in its July 1, 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 on the basis that the issue in this case could be addressed through a reconsideration application. 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.<sup>9</sup> 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 a hearing which could be found to be an abuse of discretion. The Office properly denied his request.

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability causally related to the December 27, 2002 employment injury. The Board further finds that the Office did not abuse its discretion in denying his request for a hearing.

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<sup>7</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>8</sup> *Claudio Vazquez*, *supra* note 5.

<sup>9</sup> *See Claudio Vazquez*, *supra* note 5; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 1 and March 11, 2004 be affirmed.

Issued: February 7, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member