United States Department of Labor
Employees' Compensation Appeals Board

J.M., Appellant	)	
and	)	**Docket No. 07-1716**
	)	**Issued: February 6, 2008**
U.S. POSTAL SERVICE, BARNUM STATION, Bridgeport, CT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 13, 2007 appellant filed a timely appeal from a December 15, 2006 merit decision of the Office of Workers' Compensation Programs finding that he did not establish a recurrence of disability and a February 22, 2007 nonmerit decision denying his request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the February 22, 2007 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has established that he sustained a recurrence of disability beginning July 20, 2005 causally related to his February 3, 2005 employment injury; and (2) whether the Office properly denied his request for a review of the written record as untimely under 5 U.S.C. § 8124.

FACTUAL HISTORY

On February 3, 2005 appellant, then a 42-year-old letter carrier, filed a claim for an injury to his knees, back and shoulders occurring on that date when he fell down stairs after a stair

broke. He stopped work on February 7, 2005. The Office accepted appellant's claim for contusions of the knees and hands, a sprain/strain of the right shoulder and upper arm and a sprain/strain of the back and paid him compensation beginning March 24, 2005.

Dr. Herbert Hermele, a Board-certified orthopedic surgeon, treated appellant subsequent to his employment injury. On May 23, 2005 he found that appellant was disabled from employment due to a herniated lumbar disc at L4-5 and right shoulder pathology. In a progress report dated July 11, 2005, Dr. Hermele diagnosed an L4-5 herniated disc, rotator cuff tendinosis and mild arthropathy of the acromioclavicular (AC) joint of the right shoulder. In an accompanying duty status report, he opined that appellant could work with restrictions of no reaching over the right shoulder, twisting, stooping, operating a motor vehicle, squatting, kneeling, climbing and no lifting over 20 pounds.

The employing establishment offered appellant a job offer effective July 15, 2005 consistent with Dr. Hermele's work restrictions. In a form report dated July 18, 2005, Dr. Hermele diagnosed a central herniated disc at L4-5 and right shoulder tendinosis and mild AC arthropathy. He checked "yes" that the condition was caused by the February 3, 2005 employment incident of appellant falling onto his hands and knees when a step "failed." Dr. Hermele found that he was totally disabled from February 7 to July 18, 2005 and could return to sedentary work with no lifting, pushing, pulling or overhead work with the right arm as of that date.

Appellant returned to work on July 20, 2005. The employing establishment placed him on administrative leave effective July 21, 2005. A nurse assigned to appellant's case related that on July 20, 2005 appellant told her that he was told that he would need to work in the lobby which required constant standing. She spoke with the Office and the employing establishment. The employing establishment stated that appellant would be required to work in the lobby but would be given a chair. The Office told the nurse that the additional job duty should be added to the offer and again sent. On July 21, 2005 appellant called the nurse and stated that he "was walked out of the building and is on administrative leave for 30 days. Claimant stated, 'I can thank you for this.' Claimant informed that [nurse] knows nothing about administrative leave and that it was his [doctor] who determined that he had work tolerances…."

In progress reports dated July 26, 2005, Dr. Hermele diagnosed a herniated lumbar disc, rotator cuff tendinosis and AC arthopathy. In the July 26, 2005 progress report received by the Office on August 1, 2005, he opined that appellant's work capacity was unchanged. In the July 26, 2005 progress report received by the Office on June 29, 2006, Dr. Hermele indicated that appellant should not work pending a surgical consultation. On August 15, 2005 he diagnosed low back pain syndrome and an L4-5 herniated disc and right shoulder rotator cuff tendinosis and AC arthropathy. Dr. Hermele recommended consultations for appellant regarding his shoulder and back and found that he should remain off work pending the consultations.

In an August 18, 2005 electronic mail message, the nurse recommended a second opinion examination. She noted that appellant returned to work with restrictions on July 20, 2005 and "then, reportedly, was put on administrative leave for 30 days."

In a work restriction evaluation dated August 23, 2005, Dr. Hermele found that appellant was totally disabled and recommended surgery. In a form report of the same date, he diagnosed a herniated disc at L4-5, right shoulder rotator cuff tendinosis and right shoulder AC joint arthropathy. Dr. Hermele checked "yes" that the condition was caused or aggravated by his employment.

On August 25, 2005 appellant filed a claim for compensation from July 21 to August 25, 2005. On August 29, 2005 the Office received his rejection of the July 15, 2005 modified job offer from the employing establishment. Appellant explained that he returned to work on July 20, 2005 and a manager told him that he would work standing in the lobby. The manager then had him work in an office sitting for hours and, when he got up and stretched, moved him to another office with only a stool to sit on and no desk on which he could perform his assignment. Appellant stated, "I was completely hunched over trying to read and write; after six hours of this abuse, I was in so much pain I had to leave. I called my physician and he advised me to stay out of work until he saw me again on July 26, 2005."

In a report dated September 27, 2005, Dr. Dante A. Brittis, a Board-certified orthopedic surgeon, diagnosed tendinosis with AC joint overgrowth by magnetic resonance imaging (MRI) scan study and recommended a subacromial decompression and AC resection. He found that appellant could perform light duty pending surgery. Dr. Brittis indicated that appellant returned to work in July but was "subsequently suspended for unknown reasons." In a form report dated October 24, 2005, he diagnosed a central herniated disc and right rotator cuff tendinosis and AC arthropathy. Dr. Brittis opined that appellant was totally disabled from February 12, 2005 to the present and was awaiting surgery. He checked "yes" that the condition was caused or aggravated by employment.

By letter dated November 16, 2005, the employing establishment informed the Office that it had terminated appellant effective October 5, 2005 "because of his failure to be regular in attendance [and] not because of any disability causally related to his accepted employment condition."

The Office paid appellant compensation from October 5 to December 24, 2005. On November 23, 2005 the Office notified him that it proposed to terminate his compensation as he had been terminated from the employing establishment for cause.

On December 15, 2005 appellant asserted that the employing establishment terminated him because of his work injury. He argued that his attendance only became an issue after his employment injury and noted that "three weeks had gone by since the last time I called in sick and the day of my injury." When appellant resumed work on July 20, 2005, a manager told him to work sitting down in a room with air condition and told him not to move "even to get up to stretch." Coworkers brought him water and a fan. Appellant stated,

> "When Mr. Hudson came in to check on me a[n] hour or so later he was outraged and decided to move me again. He moved me this time to a corner on a stool with no back support and expected me to continue to read and fill out the safety questionnaire without even a desk, so now I was completely hunched over trying to complete this assignment and was in excruciating pain. I contacted my doctor

> who advised me to come see him and at the same time I received an emergency [tele]phone call from my wife who was involved in an automobile accident on Interstate 95 with my [two] month old son and my two year old son[.] I went looking for Mr. Hudson and the supervisor to inform them that I had an emergency and neither one of them were there so I filled out a leave slip and left it on their desk."

Appellant asserted that the employing establishment terminated him for irregular attendance "six months after the fact." He argued that the employing establishment terminated his employment due to his work injury.

By decision dated January 25, 2006, the Office terminated appellant's compensation on the grounds that the employing establishment removed him from employment for administrative reasons. The Office indicated that it would pay compensation through February 18, 2006.

On February 16, 2006 appellant requested a review of the written record; on March 27, 2006 he requested an oral hearing instead of a review of the written record. In a decision dated April 25, 2006, an Office hearing representative found that the case was not in posture for a hearing and set aside the January 25, 2006 decision. He determined that as appellant was terminated for irregular attendance and there was no evidence he was not capable of performing his work duties, he was not disabled beginning July 21, 2005. The hearing representative noted, however, that appellant had submitted evidence showing that he was totally disabled from employment beginning August 14, 2005. He remanded the case for further development, including a comprehensive medical report from Dr. Hermele addressing the extent of appellant's disability and whether he sustained a low back condition due to his employment injury. The hearing representative further instructed the Office to obtain a report from Dr. Brittis explaining whether the employment injury caused a right shoulder condition.

In an April 10, 2006 form report, Dr. Hermele diagnosed chronic rotator cuff tear, AC arthropathy and a herniated L4-5 lumbar disc. He checked "yes" that the condition was aggravated by employment and noted that appellant was "out of work until further notice." In a progress report dated April 20, 2006, Dr. Hermele diagnosed chronic rotator cuff tendinosis, AC arthropathy and a herniated L4-5 lumbar disc. He noted that appellant was currently between jobs. On January 23, 2006 Dr. Hermele listed unchanged findings and noted that he was going to have surgery on his shoulder.[1]

On June 20, 2006 appellant filed a notice of recurrence of disability on June 20, 2005 causally related to his February 3, 2005 employment injury. He noted that he worked only six hours on July 26, 2005. On October 5, 2005 appellant informed the Office that his attendance only became an issue after his February 3, 2005 employment injury.

In a report dated October 20, 2006, Dr. Hermele diagnosed a herniated lumbar disc by MRI scan study and low back syndrome. He stated that appellant could no longer perform the limited-duty assigned to him. An MRI scan documented a herniated lumbar disc and chronic low back pain syndrome. He also had a chronic rotator cuff tendinosis of the right shoulder.

[1] The record contains additional progress and form reports dated 2005 and 2006 from Dr. Hermele.

Dr. Hermele referred to his progress notes for further information. He found that appellant's February 2005 employment injury caused his low back strain. Dr. Hermele opined that the disc herniation preexisted his work injury but that the work injury aggravated his low back pain. He also attributed his rotator cuff tendinosis, which currently required surgery, to his February 2005 injury.

On October 20, 2006 appellant noted that he worked only one day and "was assigned duties that were not agreed upon in the revised light-duty work assignment." He maintained that management assigned him to work on a stool without back support.

By decision dated December 15, 2006, the Office found that the evidence failed to establish that appellant sustained a recurrence of disability on July 20, 2005. The Office found that there was no evidence that he stopped work on that date due to his physical condition.

In a letter dated January 17, 2007, appellant requested a review of the written record. On February 22, 2007 the Office denied his request under 5 U.S.C. § 8124 as untimely.

LEGAL PRECEDENT -- ISSUE 1

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[2]

Office regulations provide that 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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[3] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[4]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained contusions of his knees and hands and sprains/strains of the right shoulder, upper arm and back due to a February 3, 2005 employment injury. He returned to a full-time limited-duty position with the employing establishment on

[2] *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

[3] 20 C.F.R. § 10.5(x).

[4] *Id*.

July 20, 2005. Appellant stopped work after six hours on July 20, 2005. He maintained that the employment establishment assigned him work that differed from the duties in the limited-duty job offer and asserted that after working six hours he was unable to continue. Appellant further noted, however, that his wife telephoned him on July 20, 2005 to say that she had been in an automobile accident. He looked for a manager to request leave to attend to the emergency. Appellant additionally told a nurse assigned to the case that on July 21, 2005 the employing establishment "walked him out of the building" and put him on administrative leave. It thus appears that he stopped work because he was placed on administrative leave rather than because of the effects of his employment injury. Under *Hedman*, the burden of proof thus shifts to appellant as the evidence indicates that he could perform the position and the stoppage of work was not related to the employment injury.[5]

The medical evidence is insufficient to establish that appellant sustained an increase in disability such that he was unable to perform his limited-duty position. In a progress report dated July 26, 2005, Dr. Hermele diagnosed a herniated lumbar disc, rotator cuff tendinosis and AC joint arthopathy but found that appellant's work capacity was unchanged. In another July 26, 2005 progress report, he indicated that appellant should not work pending a surgical consultation. As Dr. Hermele did not explain the inconsistencies in his progress reports regarding disability from employment, these reports are insufficient to show that appellant was disabled from employment due to residuals of the accepted injury.

On August 15, 2005 Dr. Hermele diagnosed low back pain syndrome and an L4-5 herniated disc and right shoulder rotator cuff tendinosis and AC arthropathy. He recommended consultations for appellant regarding his shoulder and back and found that he should remain off work pending the consultations. Dr. Hermele, however, did not address the cause of appellant's condition and disability. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[6]

On September 27, 2005 Dr. Brittis diagnosed tendinosis with AC joint overgrowth and recommended a subacromial decompression and AC resection. He found that appellant could perform light duty pending the surgery. Dr. Brittis noted that appellant had returned to work but then was "suspended for unknown reasons." As he did not find appellant disabled from his limited-duty employment, his report is of diminished probative value and does not support appellant's claim.

In a form report dated October 24, 2005, Dr. Brittis diagnosed a central herniated disc and right rotator cuff tendinosis and AC arthropathy. He opined that appellant was totally disabled from February 12, 2005 to the present and was awaiting surgery. Dr. Brittis checked "yes" that the condition was caused or aggravated by employment. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes"

[5] *Cf. Janice F. Migut*, 50 ECAB 166 (1998) (where appellant returned to work for two days and there was no probative evidence that the stoppage of work was unrelated to the employment injury).

[6] *Conrad Hightower*, 54 ECAB 796 (2003).

to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.[7]

In an April 10, 2006 form report, Dr. Hermele diagnosed chronic rotator cuff tear, AC arthropathy and a herniated L4-5 lumbar disc. He checked "yes" that the condition was aggravated by employment and noted that appellant was "out of work until further notice." As noted, an opinion on causal relationship that consists of a checkmark, without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[8]

In a report dated October 20, 2006, Dr. Hermele diagnosed a herniated lumbar disc, low back syndrome and rotator cuff tendinosis. He indicated that appellant "could no longer perform the limited duty assigned to him." Dr. Hermele attributed his low back pain and rotator cuff tendinosis to his February 2005 employment injury. He indicated that appellant's herniated lumbar disc preexisted the work injury. As Dr. Hermele did not provide any rationale for his opinion that appellant was unable to work in his limited-duty employment or specifically related the disability to the February 2005 employment injury, his report is insufficient to meet appellant's burden of proof.[9]

As appellant has not submitted rationalized medical evidence supporting that he was disabled from his limited-duty position beginning July 20, 2005, the Office properly denied his claim for compensation.

LEGAL PRECEDENT -- ISSUE 2

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."[10] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[11]

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."[12]

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[7] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[8] *Id*.

[9] *See Lois E. Culver (Clair L. Culver*), 53 ECAB 412 (2002) (medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet a claimant's burden of proof).

[10] 5 U.S.C. § 8124(b)(1).

[11] *Frederick D. Richardson*, 45 ECAB 454 (1994).

[12] 20 C.F.R. § 10.615.

Section 10.616(a) further provides, "A claimant injured on or after July 4, 1966, who had received a final adverse decision by the district 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."[13]

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 claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue.[14] 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.[15]

ANALYSIS -- ISSUE 2

The Office issued a decision on December 15, 2006 finding that appellant did not establish a recurrence of disability. He sought a review of the written record on January 17, 2007. The Office denied appellant's hearing request as untimely by decision dated February 22, 2007. As his request for a review of the written record was dated January 17, 2007, more than 30 days after the Office issued its December 15, 2006 decision, he was not entitled to a hearing as a matter of right.

The Office 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 or right.[16] The Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for an oral hearing on the basis that the case could be resolved by submitting additional evidence to the Office in a reconsideration request. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An 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.[17] In this case, the evidence of record does not establish that the Office committed any action 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 her/his request for an oral hearing as untimely under section 8124 of the Act.

[13] 20 C.F.R. § 10.616(a).

[14] *See André Thyratron*, 54 ECAB 257 (2002).

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

[16] *Afegalai L. Boone*, 53 ECAB 533 (2002).

[17] *See André Thyratron*, *supra* note 14.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability beginning July 20, 2005 causally related to his February 3, 2005 employment injury. The Board further finds that the Office properly denied his request for a review of the written record as untimely under 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 22, 2007 and December 15, 2006 are affirmed.

Issued: February 6, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board