United States Department of Labor
Employees' Compensation Appeals Board

A.A., Appellant	)	
and	)	**Docket No. 07-2206**
	)	**Issued: November 14, 2008**
U.S. POSTAL SERVICE, LAKE OTIS STATION, Anchorage, AK, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 29, 2007 appellant, through his attorney, filed a timely appeal from an April 5, 2007 merit decision of the Office of Workers' Compensation Programs finding that he did not establish a recurrence of disability. He also appeals a June 11, 2007 nonmerit decision denying 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 this case and over the June 11, 2007 nonmerit decision.

ISSUES

The issues are: (1) whether appellant has established that he sustained a recurrence of disability on or after June 4, 2005 causally related to his accepted employment injury under file number xxxxxx190; and (2) whether the Office properly denied his request for a hearing pursuant to 5 U.S.C. § 8124 under file number xxxxxx328.

FACTUAL HISTORY -- ISSUE 1

On December 3, 2001 appellant, then a 44-year-old letter carrier, filed a recurrence of disability claim on November 5, 2001 causally related to a March 10, 1999 work injury.[1] The Office determined that his claim was for an occupational disease as he attributed his condition to the performance of his work duties. It accepted the claim, assigned file number xxxxxx190, for a herniated lumbar disc at L4-5.

Appellant stopped work on November 27, 2001 and returned to limited-duty employment on December 2, 2001. He underwent a hemilaminotomy at L4-5 on April 2, 2002 and a hemilaminotomy and discectomy at L4-5 on July 8, 2002. Appellant returned to limited-duty work in July 2003 but stopped work on September 7, 2003. He underwent a fusion at L4-5 on October 20, 2003.

On May 30, 2005 appellant returned to limited-duty work for four hours per day. On June 4, 2006 he sustained a right shoulder strain, a right elbow contusion and a contusion to the right side of the head in an employment-related motor vehicle accident, assigned file number xxxxxx328.[2] Appellant stopped work on June 4, 2005 and did not return. The Office continued to pay him compensation for four hours per day.

In a report dated June 28, 2005, Dr. Arthur D. Tilgner, a surgeon, diagnosed an improving contusion and strain of the right elbow. He reviewed the result of a June 15, 2005 magnetic resonance imaging (MRI) scan study which showed scar tissue in the left margin of the L4-5 dural sac extending into the left neural foramen and "some degree of incorporation of the bone graft into L5-S1 end plate areas." Dr. Tilgner diagnosed status post laminectomy and fusion with scar tissue at L4-5, chronic pain and possible narcotic addiction.

On July 10, 2005 Dr. Tilgner diagnosed nerve compression of the left lower back and found that appellant was unable to work from July 12 to 26, 2005. On July 12, 2005 he diagnosed residual chronic low back pain with left lower extremity symptoms following an L4-5 fusion. Dr. Tilgner opined that appellant was unable to work pending further evaluation.

Appellant filed claims for compensation on account of disability from July 18, 2005. The employing establishment indicated on the forms that he had not worked due to a new employment injury on June 4, 2005, assigned file number xxxxxx328.

In a report dated July 19, 2005, Dr. Gary L. Child, an osteopath, evaluated appellant for pain in his lower back, left knee, left foot, right elbow and right shoulder. He diagnosed status post lumbar fusion, lumbar disc degenerative disc disease and shoulder and elbow pain.

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[1] On March 10, 1999 appellant sustained an injury to his lower back, assigned file number xxxxxx198.

[2] In a report dated June 4, 2005, Dr. David G. Ingraham, Board-certified in emergency medicine, treated appellant for pain in his right shoulder, elbow and wrist and the right side of the neck following a motor vehicle accident. He diagnosed multiple contusions and cervical strain due to a motor vehicle accident.

On July 27, 2005 Dr. Tilgner related that the injuries to appellant's right shoulder, elbow and right head had resolved such that he could resume part-time work. He found that appellant's limitation resulted from his lumbar back injury under file number xxxxxx190. On August 3 and 15, 2005 Dr. Tilgner listed unchanged complaints of low back pain radiating into the left lower extremity.

In a report dated August 11, 2005, Dr. Susan T. Bertrand, a Board-certified physiatrist, discussed appellant's complaints of low back pain with pain and cramps in his left leg and numbness in his toes. She interpreted the June 15, 2005 MRI scan study as showing "enhancing soft tissue material surrounding the anterior left lateral and posterior left portions of the dural sac at the operative side and extending into the enlarged left foraminal opening." Dr. Bertrand recommended further diagnostic studies to "assess the amount of nerve involvement that is present from the scar tissue in his L4-5 foramen that is documented structurally on the MRI scan [study]." On September 8, 2005 she evaluated appellant for "burning, cramping, sharp, stabbing pain going down his left leg and into the left buttock." Dr. Bertrand stated:

> "It is important to note that [appellant] was receiving compensation eight hours per day as a result of his first claim until he returned to work for four hours per day. Then he was only receiving four hours a day of compensation for his first injury because he was working four hours a day. Now, [appellant] has had the second injury, so he is losing four hours a day of work. They are now refusing to compensate him for his four hours a day of lost work under the first claim because they think he has been covered onto the second and they had closed the second claim, so he is not being compensated under that one. The lost time at this point is related to [appellant's] L4 nerve root compression as a result of the low back injury not related specifically to the second injury accident but exacerbated by it."

On August 29, 2005 Dr. Tilgner diagnosed chronic low back pain with left radiculopathy. He noted that his opinion that appellant's conditions due to his motor vehicle accident had resolved such that he could resume work "does not take into account his back problems which was an injury that preceded his motor vehicle accident."

On September 14, 2005 Dr. Bertrand related that she was treating appellant for a back injury assigned file number xxxxxx190. Appellant returned to part-time work but injured his neck, head, right elbow and shoulder at work in a motor vehicle accident, assigned file number xxxxxx328. The motor vehicle accident also exacerbated his back pain. Dr. Bertrand stated:

> "An MRI scan [study] done after that accident shows soft tissue in the L4-F5 foramen. It is compressing the nerve. This is consistent with [appellant's] increased pain. He is unable to return to the four hours of work he was doing because of that increase in pain radiating from his low back down his entire left leg. In order to return [appellant] to work, he needs treatment for this soft tissue mass in his L4-L5 foramen pressing on the L4 nerve root. Please assist me in knowing which claim number you would like this filed under since it is obviously related to his first injury with his surgery and exacerbated by the second injury."

On October 3, 2005 Dr. Bertrand diagnosed low back pain, L5 radiculopathy and leg effects from a low back injury and resulting surgery. She found that appellant should remain off work pending treatment.[3] In a January 4, 2006 work capacity evaluation, Dr. Bertrand diagnosed a herniated disc at L4-5 aggravated by a June 4, 2005 motor vehicle accident. She found that appellant could work four hours per day with restrictions. On March 3, 2006 Dr. Bertrand indicated that appellant had resumed part-time work.

By letter dated March 10, 2006, the Office noted that appellant returned to work with the employing establishment on February 1, 2006 but stopped work on March 9, 2006. It requested that he submit evidence supporting an employment-related recurrence of disability.

In a report dated April 6, 2006, Dr. James M. Eule, a Board-certified orthopedic surgeon, discussed appellant's history of employment injuries and diagnosed a solid L4-5 fusion and low back and left leg pain of unclear etiology.

By decision dated May 10, 2006, the Office terminated appellant's compensation effective April 22, 2006 on the grounds that he abandoned suitable employment under 5 U.S.C. § 8106(c). It issued the decision under file number xxxxxx328. On June 8, 2006 appellant requested an oral hearing. The Office held a telephonic hearing on October 5, 2006. In a January 9, 2007 decision, issued under file number xxxxxx190, the Office hearing representative reversed the May 10, 2006 decision. He determined that the Office failed to follow its proper procedures in terminating appellant's compensation for abandoning suitable work. The hearing representative indicated that he contacted the employing establishment on November 27, 2006. The employing establishment asserted that appellant had not returned to work since June 4, 2005.

On April 5, 2007 an Office hearing representative reopened the claim under 5 U.S.C. § 8128. He set aside the prior hearing representative's January 9, 2007 decision and affirmed the May 10, 2006 decision as modified to reflect that appellant failed to establish a recurrence of disability rather than abandoning suitable work. The hearing representative found that the medical evidence did not demonstrate a change in the nature and extent of appellant's employment-related back condition on or after June 4, 2005 such that he could not perform his part-time limited-duty employment.

FACTUAL HISTORY -- ISSUE 2

On June 8, 2005 appellant, then a 47-year-old modified carrier, filed a claim for injuries to the right side of his head, right elbow, right wrist, right knee and right shoulder due to a June 4, 2005 motor vehicle accident. He stopped work on June 4, 2005. The Office accepted appellant's claim, assigned file number xxxxxx328, for right shoulder strain, a right elbow contusion and a contusion to the right side of the head.

By decision dated May 10, 2006, the Office terminated appellant's entitlement to compensation effective April 22, 2006 under file number xxxxxx328 on the grounds that he abandoned suitable work under section 8106(c). It found that he had been offered a position as a city carrier. Appellant returned to employment but then stopped work.

[3] The record contains numerous progress reports from Dr. Bertrand from 2005 and 2006.

In a letter dated and postmarked July 6, 2006 to the Branch of Hearings and Review, a representative for injured workers requested assistance from the Office in helping appellant with his claim. On July 25, 2006 the Office acknowledged his request for an oral hearing or review of the written record and indicated that his request would be assigned to a hearing representative.

By decision dated June 11, 2007, the Office denied appellant's request for a hearing or review of the written record as untimely. It found that he had requested an oral hearing in a letter postmarked July 6, 2006. As appellant's request was not made within 30 days of the May 10, 2006 decision, he was not entitled to a hearing as a matter of right. The Office concluded that the issue of whether the job offer was suitable could be equally well addressed through the reconsideration process.

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.[4]

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.[5] 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.[6]

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility to see that justice is done.[7] Once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.[8]

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

[5] 20 C.F.R. § 10.5(x).

[6] *Id*.

[7] *Jimmy A. Hammons*, 51 ECAB 219 (1999).

[8] *Melvin James*, 55 ECAB 406 (2004).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a herniated disc at L4-5 due to factors of his federal employment. Appellant underwent a hemilaminotomy at L4-5 on April 2, 2002, a hemilaminotomy and discectomy at L4-5 on July 8, 2002 and a fusion at L4-5 on October 20, 2003. He returned to work for four hours per day with restrictions on May 3, 2005 but stopped work on June 4, 2005.

Appellant has not alleged a change in the nature and extent of his light-duty job requirements. Instead, he attributed his recurrence of disability to a change in the nature and extent of his employment-related conditions. Appellant must thus provide medical evidence establishing that he was disabled due to a worsening of his accepted work-related lumbar back condition.[9]

On June 4, 2005 appellant sustained contusions of the right elbow and head and a right shoulder strain in an employment-related motor vehicle accident. On July 10, 2005 Dr. Tilgner diagnosed nerve compression of the left lower back and opined that appellant was unable to work. In a report dated July 27, 2005, Dr. Tilgner related that the injuries to appellant's right shoulder, elbow and head had resolved such that he could resume part-time work. He attributed his limitations to his lumbar back injury under file number xxxxxx190. On August 29, 2005 Dr. Tilgner noted that, while he found that appellant's injuries due to his motor vehicle accident had resolved, he still had back problems from his prior work injury.

On August 11, 2005 Dr. Bertrand interpreted a June 15, 2005 MRI scan study as showing soft tissue surrounding the left anterior lateral and posterior left dural sac extending into the left foraminal opening. In a September 8, 2005 report, she noted that appellant received compensation for four hours per day until his second injury, when he stopped work. Dr. Bertrand attributed appellant's disability from work to "his L4 nerve root compression as a result of the low back injury not related specifically to the second accident but exacerbated by it." In a September 14, 2005 report, she reiterated that the June 4, 2005 motor vehicle accident exacerbated appellant's low back pain. Dr. Bertrand stated, "An MRI scan [study] done after that accident shows soft tissue in the L4-F5 foramen. It is compressing the nerve. This is consistent with his increased pain. "[Appellant] is unable to return to the four hours of work he was doing because of that increase in pain radiating from his low back down his entire left leg." Dr. Bertrand requested that the Office inform her which claim number to file her report under as "it is obviously related to his first injury with his surgery and exacerbated by the second injury."

It is well established that proceedings under the Act are not adversarial in nature and that while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[10] Although Dr. Bertrand's reports do not provide sufficient rationale to discharge appellant's burden of proving by the weight of the reliable, substantial and probative evidence that he sustained a recurrence of total disability on or after June 4, 2005, her opinion raises an inference of causal relationship sufficient to require

[9] *See Jackie D. West, supra* note 4.

[10] *Allen C. Hundley*, 53 ECAB 551 (2002).

further development by the Office.[11] Additionally, the record does not contain any contradictory medical evidence. The case will, therefore, be remanded to the Office for further development of the medical evidence to determine whether appellant was totally disabled due to his low back injury beginning June 4, 2005 and, if so, the nature and extent of any disability or need for medical treatment. On remand, the Office should combine the case files for file numbers xxxxxx190 and xxxxxx328. After such further development as it deems necessary, it shall issue a *de novo* decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states that: "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."[12] 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.[13]

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."[14]

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 it 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.[15] 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.[16]

[11] *Phillip L. Barnes*, 55 ECAB 426 (2004); *John J. Carlone*, 41 ECAB 354 (1989).

[12] 5 U.S.C. § 8124(b)(1).

[13] *Leona B. Jacobs*, 55 ECAB 753 (2004).

[14] 20 C.F.R. § 10.616(a).

[15] *See Andre Thyratron*, 54 ECAB 257 (2002).

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

ANALYSIS -- ISSUE 2

By decision dated May 10, 2006, the Office terminated appellant's entitlement effective April 22, 2006 on the grounds that he abandoned suitable work. On July 6, 2006 a representative for injured workers wrote the Branch of Hearings and Review and requested information on how to assist appellant. On July 25, 2006 the Office notified appellant that it had received his request for an oral hearing or review of the written record and indicated that his request would be assigned to a hearing representative. By decision dated June 11, 2007, it denied his request for a hearing or review of the written record as untimely.

The Office informed appellant on July 25, 2006 that it considered the July 6, 2006 letter a request for an oral hearing or a review of the written record. It, however, took no further action on the request until June 11, 2007, almost one year later. By the time the Office issued its June 11, 2007 decision denying a hearing or review of the written record, appellant did not have the opportunity to timely request reconsideration before the Office under 5 U.S.C. § 8128 or appeal the merits of the Office's May 10, 2006 decision to the Board. The Board thus finds that the Office abused its discretion. On remand, the Office should grant appellant a merit review of his claim.[17] Additionally, as discussed above, on remand the Office should combine the case records for file numbers xxxxxx328 and xxxxxx190.

CONCLUSION

The Board finds that the case is not in posture for decisions.

[17] *Marilyn F. Wilson*, 51 ECAB 234, 235 (1999); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 11 and April 5, 2007 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 14, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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