United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 09-43**
	)	**Issued: February 23, 2009**
U.S. POSTAL SERVICE, LINTHICUM INCOMING MAIL FACILITY, Linthicum, MD, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 6, 2008 appellant filed a timely appeal of the December 3, 2007 merit decision of the Office of Workers' Compensation Programs, denying his recurrence of disability claim and a September 8, 2008 nonmerit decision, denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained a recurrence of total disability on October 5, 2005 causally related to his accepted employment-related injury; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124.

FACTUAL HISTORY

On February 21, 2001 appellant, then a 47-year-old mailhandler technician, hurt the left side of his lower back as a result of slipping on the ice near his car. On September 2, 2003 the Office accepted the claim for low back strain.

On August 30, 2007 appellant filed a claim alleging that he sustained a recurrence of total disability on October 5, 2005. Following his February 21, 2001 employment injury, he performed limited-duty work four hours per day and light-duty work four hours per day. Appellant experienced pain in his lower back and right leg while performing his work duties.

By letter dated September 20, 2007, the Office advised appellant that its records indicated that he had returned to his regular work duties. It advised appellant that the evidence submitted was insufficient to establish his recurrence of total disability claim. The Office requested additional factual and medical evidence.

Appellant submitted a November 9, 2007 request for prepayment of medical records.

By decision dated December 3, 2007, the Office denied appellant's recurrence of disability claim. It found the medical evidence of record insufficient to establish that appellant sustained a disability on October 5, 2005 causally related to his accepted employment-related injury.

On January 7, 2008 appellant requested a telephonic oral hearing before an Office hearing representative. He submitted medical records covering the period September 12, 2005 through May 3, 2007 which addressed his back and lower extremity conditions and medical treatment. In a June 8, 2008 letter, appellant stated that he had not returned to full-duty work. He performed limited light-duty work four to six hours per day.

By decision dated September 8, 2008, the Office denied appellant's request for a hearing on the grounds that it was untimely under section 8124 of the Federal Employees' Compensation Act. As appellant's January 7, 2008 request was dated more than 30 days after the issuance of the December 3, 2007 decision, he was not entitled to a hearing as a matter of right. The Office considered the matter in relation to the issue involved and determined that it could be addressed equally well on reconsideration, by submitting evidence establishing that the claimed recurrence of disability was causally related to the accepted February 21, 2001 employment injury.

LEGAL PRECEDENT -- ISSUE 1

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.[1] 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, non-performance of job duties or a reduction-in-force) or when the

[1] 20 C.F.R. § 10.5(x).

physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[2]

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-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 cannot perform such limited-duty work. 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 limited-duty job requirements.[3]

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.[4]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a low back strain on February 21, 2001. Following this injury, appellant returned to limited light-duty work. He claimed a recurrence of total disability on October 5, 2005 causally related to his accepted employment injury. Appellant must demonstrate either that his accepted condition has changed such that he could not perform the activities required by his modified job or that the requirements of the limited light-duty jobs changed or were withdrawn. The Board finds that the record contains no evidence that the limited light-duty job requirements were changed or withdrawn or that appellant's employment-related condition had changed to the point that it precludes him from engaging in limited light-duty work.

Appellant submitted a November 9, 2007 request for prepayment for medical records. This evidence, however, does not provide any opinion addressing his disability for work on or after October 5, 2005. There is no medical evidence addressing the causal relationship between appellant's accepted employment injury and his disability as of that date.[5] The Board finds that the medical evidence of record is insufficient to establish his claim. Appellant has not met his burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the limited light-duty requirements which would prohibit him from performing the limited light-duty positions he assumed after he returned to work.

[2] *Id.*

[3] *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[4] *James H. Botts*, 50 ECAB 265 (1999).

[5] *See Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

LEGAL PRECEDENT -- ISSUE 2

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of a final decision by the Office.[6] Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[7] 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.[8]

Section 10.616(a) of Title 20 of the regulations 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."[9]

The Board has held that 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, including when the request is made after the 30-day period for requesting a hearing and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[10] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[11]

ANALYSIS -- ISSUE 2

Appellant's request for a hearing before an Office hearing representative was dated January 7, 2008. His hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated December 3, 2007. Thus, appellant is not entitled to a hearing as a matter of right.

The Office properly exercised its discretion and determined that appellant's request for an oral hearing could be equally well addressed by requesting reconsideration and submitting additional evidence establishing that he sustained a recurrence of disability on October 5, 2005 causally related to his February 21, 2001 employment injury.[12] The Board has held that the only

[6] 5 U.S.C. § 8124(b)(1).

[7] 20 C.F.R. § 10.615; *Gerard F. Workinger*, 56 ECAB 259 (2005).

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

[9] 20 C.F.R. § 10.616(a). *See also Gerard F. Workinger*, *supra* note 7.

[10] *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

[11] *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

[12] *See Joseph R. Giallanza*, 55 ECAB 186 (2003).

limitation on the Office's discretionary authority is reasonableness. 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 logic and probable deduction from established facts.[13] The Board finds that the Office did not abuse its discretion in denying appellant's request. The Office's denial of appellant's request for an oral hearing was proper under the law and the facts of this case.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained a recurrence of total disability on October 5, 2005 causally related to his accepted employment-related injury. The Board further finds that the Office properly denied appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2008 and December 3, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 23, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

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