United States Department of Labor
Employees' Compensation Appeals Board

G.H., Appellant	)	
and	)	**Docket No. 08-1722**
	)	**Issued: January 9, 2009**
DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, NORFOLK NAVAL SHIPYARD, Norfolk, VA, 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
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 3, 2008 appellant filed a timely appeal from the decision of the Office of Workers' Compensation Programs dated January 29, 2008 denying his claim for a recurrence of disability and an April 15, 2008 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 the claim.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of total disability on July 10, 2007 causally related to his accepted injury of March 8, 2006; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely.

FACTUAL HISTORY

On March 14, 2006 appellant, then a 65-year-old painter, filed a traumatic injury claim (Form CA-1) alleging he suffered a back injury after slipping and falling in an oily waste tank on

March 8, 2006. By letter dated April 10, 2006, the Office accepted his claim for lower back sprain/strain. Appellant received medical treatment and physical therapy.

By report dated June 22, 2006, Dr. Nickolas L. Pezzella, Board-certified in physical medicine and rehabilitation, indicated that appellant presented with a work-related injury with initial onset of lower back pain into the thighs. On this particular date, he reported that appellant's thigh pain had resolved although he reported still having significant lower back pain. Dr. Pezzella noted that he saw no pathology to account for appellant's back pain on a lumbar spine magnetic resonance imaging (MRI) scan. He stated that he would have expected appellant's condition to have improved over the past three months, not worsen. As appellant's symptoms had responded to his prior course of physical therapy, Dr. Pezzella prescribed another course of physical therapy, as well as twice-daily regiment of Voltaren, a nonsteroidal anti-inflammatory (NSAIDS) and a bone scan.

Dr. Pezzella submitted a Form CA-20 dated July 20, 2006. He reiterated his diagnosis of "unspecified back pain." Dr. Pezzella indicated that appellant's lumbar MRI scan, bone scan, and electromyogram (EMG) findings were all negative. He stated that he had no further treatment options and that neither he nor his office would be referring appellant to another physician. Dr. Pezzella also resubmitted a duty status report dated July 18, 2006. His clinical findings state that appellant reports pain but no pathology was found. The report stated that appellant was advised to return to work on July 13, 2006 with no restrictions. Finally, by note dated July 25, 2006, Dr. Pezzella released appellant from his care and told appellant to seek medical advice elsewhere. His note further reiterated that neither he nor his office would be referring appellant to another doctor.

Appellant sought treatment from Dr. Stefan Murza, a chiropractor. By Form CA-20 dated January 8, 2007, Dr. Murza stated a diagnosis of right sacroiliac subluxation. In a report received by the Office on February 7, 2007, he proffered a primary diagnosis of right sacroiliac subluxation with a secondary diagnosis of lumbar sprain/strain injury. Dr. Murza stated that this diagnosis was based upon: the history of appellant's injury; appellant's subjective complaints; the results of physical examination and radiographic analysis. An x-ray revealed that appellant's right iliac was inferior in positioning compared to the left iliac crest, correlating to the injury appellant previously sustained.

By letter dated February 8, 2007, the Office notified appellant that it had updated the accepted condition to include sacroiliac subluxation.

Appellant was referred to Dr. Arthur Wardell, a Board-certified orthopedic surgeon, by Dr. Murza. By note dated March 14, 2007, Dr. Wardell reported findings of: dorsolumbar tenderness, midline lumbar tenderness and midline lumbosacral tenderness. He noted a moderate restriction of low back flexion and that straight leg raising was positive. Dr. Wardell recommended facet joint injections and a trial of lumbar decompression therapy. The record indicates that appellant was examined by Dr. Wardell on numerous dates through March, April, May and June 2007 and underwent right L4-5 and L5-S1 facet injections.

The Office received a number of attending physician's reports from Dr. Wardell. In a report dated June 20, 2007, Dr. Wardell summarized that appellant had been partially disabled since January 29, 2007 and would continue with restrictions through July 2, 2007.

By report dated July 9, 2007, Dr. Wardell stated that appellant complained of lower back pain. According to him, appellant alleged that the pain was such that he was unable to perform his functions at work due to pain. Dr. Wardell stated that appellant was to remain off work until his next visit on July 16, 2007.

By report dated July 23, 2007, Dr. Wardell noted that appellant had improvement in his lower back pain after one week of physical therapy. He reported that appellant requested cancellation of his scheduled epidural due to the improvement.

By report dated August 20, 2007, Dr. Wardell stated that appellant continued to have pain in his lower back radiating in both legs.

On September 6, 2007 appellant filed a CA-2a, notice of recurrence, stating that, when he returned to work, he was not able to perform normal duties. He alleged that July 10, 2007 was the date of recurrence of total disability. Appellant stated that, since returning to work, despite undergoing three cortisone shots, three epidural shots and physical therapy, the injury he incurred in March 2006 kept him in constant pain. His supervisor noted that appellant was accommodated within the physician-recommended restrictions following the original injury and that when appellant did return to work he did not sustain any other injury or illness that affected his performance.

By report dated September 10, 2007, Dr. Wardell stated that the epidurals had helped appellant, but that he had had muscle spasms for the past few days. He opined that appellant was reaching maximum medical improvement. On September 24, 2007 Dr. Wardell stated that appellant reported that the pain in his back was better, though there was more pain in the buttock. He scheduled appellant for a right sacroiliac joint injection on October 8, 2007. On October 8, 2007 Dr. Wardell stated that appellant continued to have pain, mostly on the right side of his lower back. He stated that they are awaiting approval for sacroiliac joint injections. Dr. Wardell also noted that appellant would remain out of work.

In an attending physician's report dated October 8, 2007, Dr. Wardell indicated that appellant had been partially disabled until July 9, 2007 and totally disabled from July 10, 2007 continuing until October 23, 2007.

By narrative report dated November 7, 2007, Dr. Wardell stated that appellant's condition had changed. Although appellant was initially diagnosed with lumbosacral spine sprain, further testing revealed that he suffers a right L5 radiculopathy and lumbar facet injuries. Dr. Wardell stated that appellant's injuries were of a chronic nature.

By report dated December 7, 2007, Dr. Wardell stated that appellant had continued pain in his lower back that was particularly worse on the right side. He stated that he was still awaiting approval for appellant's injections, and that appellant will continue with physical therapy and would remain out of work. On January 11, 2008 Dr. Wardell reported that appellant still had pain in his lower back.

By decision dated January 29, 2008, the Office denied appellant's claim for recurrence because the evidence submitted failed to establish that the alleged recurrence resulted from the accepted work injury.

By letter postmarked March 8, 2008, appellant requested an oral hearing. On April 15, 2008 the Office denied appellant's request for an oral hearing as untimely because it was not made within 30 days. It noted that the decision of the district Office was issued on January 29, 2008 and appellant's request for an oral hearing to the Branch of Hearings and Review was postmarked March 8, 2008. The Office advised appellant that he could submit additional evidence and pursue a request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he 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 show that he cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[1] To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[2]

The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[3]

ANALYSIS

The Office accepted appellant's claim that he sustained a strain/sprain of lumbar region as a result of a fall on March 8, 2006. On July 13, 2006 appellant was released to regular duty status, by his then-treating physician, Dr. Pezzella, Board-certified in physical medicine and

[1] *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); 20 C.F.R. § 10.5(x) provides, "*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. 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."

[2] *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack* 50 ECAB 498, 503 (1999).

[3] *S.S. v. U.S. Postal Service* 108 LRP 4297 (2008); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

rehabilitation. Dr. Pezella noted that all of appellant's diagnostic test results were negative, including MRI scan bone scan and EMG examinations.

Appellant was placed on light duty as of January 2007. On February 8, 2007 the Office updated appellant's accepted condition to include sacroiliac subluxation based upon Dr. Murza's reports.

Appellant filed a recurrence of disability claim alleging that he was totally disabled as of July 10, 2007 due to his March 8, 2006 employment injury. He therefore has the burden of proof to show a change in the nature and extent of his injury-related condition or a change in the nature and extent of his limited-duty job requirements. Appellant's supervisor reported that appellant was always allowed to work within his medical restrictions and he has not alleged that his light work was withdrawn. Rather appellant has alleged that he became totally disabled as of July 10, 2007.

Appellant did not submit sufficient reasoned medical evidence however to establish that his present condition was causally related to his accepted injury and that it was totally disabling.

In support of his claim, appellant submitted numerous progress notes and reports from Dr. Wardell whose reports reiterate appellant's subjective complaints of pain and discomfort and note the conservative treatments offered by Dr. Wardell. Absent from Dr. Wardell's reports however is any semblance of medical rationale addressing why appellant was totally disabled on or after July 10, 2007 causally related to his accepted March 8, 2006 injury. In his report dated November 7, 2007, Dr. Wardell noted that appellant had been initially diagnosed with lumbosacral spine sprain, but that his condition had changed such that appellant had an L5 radiculopathy and lumbar facet injury. His opinion is of limited probative value. Dr. Wardell does not acknowledge that by July 2006 all of appellant's examinations, including MRI scan, bone scan and EMG testing were negative. Most importantly, he does not explain with medical rationale how appellant would have developed a totally disabling L5 radiculopathy in July 2007, causally related to his March 8, 2006 injury, if appellant's examination findings were normal in July 2007. Furthermore, although Dr. Wardell indicated that appellant was totally disabled as of July 10, 2007 and continuing through October 23, 2007, he offers no explanation as to why the diagnosed L5 radiculopathy would be totally disabling. The Board notes that Dr. Wardell indicated in his progress notes from August 2007 that appellant's condition was improving.

Dr. Wardell has essentially allowed appellant to self-certify his disability for entitlement and, therefore, his reports are of diminished probative value.

The Office advised appellant of the evidence required to establish his claim; but, he failed to submit such evidence. The Board finds that the medical evidence appellant submitted to support his claim of recurrence is of diminished probative value and, therefore, not sufficient to discharge his burden of proof. Accordingly, the Office properly denied appellant's recurrence claim.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Federal Employees' Compensation Act 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 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.[4]

The Office, in its discretion, however, has the authority 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.

ANALYSIS -- ISSUE 2

The Office issued the decision denying appellant's recurrence of disability claim on January 29, 2008. The 30-day period during which appellant could request an oral hearing commenced on January 30, 2008.[5] Although appellant's request was dated March 7, 2008 the record reflects that it was not postmarked until March 8, 2008, more than 30 days after the Office's decision.[6] Therefore, appellant was not entitled to a hearing before an Office hearing representative as a matter of right. The Office exercised its discretion in this case and found that appellant's claim could equally well be addressed by requesting reconsideration and submitting additional evidence. The only limitation on the Office's authority is reasonableness. 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 deductions from known facts.[7] There is no evidence of record that the Office abused its discretion in denying appellant's request for a hearing under these circumstances.

CONCLUSION

The Board finds the appellant did not meet his burden proof to establish a recurrence of disability beginning July 10, 2007 causally related to the March 8, 2006 employment injury and the Office did not abuse its discretion by denying appellant's request for hearing.

[4] 5 U.S.C. § 8124(b)(1).

[5] *See Angel M. Lebron, Jr.*, 51 ECAB 488 (2000) (the date of the event from which the designated period of time begins to run shall not be included when computing the time period).

[6] *See* 20 C.F.R. § 10.616(a) (the hearing request must be sent within 30 days as determined by postmark or other carrier's date marking).

[7] *See Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the April 15 and January 29, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 9, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board