U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CRYSTAL E. ALLENBY and DEPARTMENT OF AGRICULTURE, DESCHUTES NATIONAL FOREST, Bend, OR

Docket No. 98-1889; Submitted on the Record;
Issued February 18, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant met her burden to establish that her current condition or disability of the low back was caused or aggravated by her accepted August 12, 1996 lower back injury; (2) whether appellant is entitled to a hearing before an Office of Workers' Compensation Programs' hearing representative under 5 U.S.C. § 8124(b)(1).

On August 12, 1996 appellant, a 16-year-old youth conservation corps worker, injured her lower back while shoveling. She filed a claim for benefits on August 13, 1996. Appellant's term as a youth worker ended on August 15, 1996.

On December 17, 1997 appellant filed a Form CA-2 claim for benefits, alleging that she sustained a recurrence of disability, which was caused or aggravated by her August 12, 1996 employment injury. In support of her claim, appellant submitted two reports dated August 14, 1996 from Dr. Laurie D. Ponte, a Board-certified family practitioner and reports dated August 19, August 22, August 26, August 30, September 5 and September 13, 1996 from Dr. Jim Wilkens, a chiropractor, which described appellant's complaints of back pain in the period immediately subsequent to her August 12, 1996 employment injury.[1] Appellant also submitted a December 16, 1996 report from Dr. Wesley J. Johnson, a Board-certified orthopedic surgeon. Dr. Johnson noted appellant's history of injury and stated that she had related a recurrence of her back pain on and off for the past few months. He advised based on his examination that appellant could possibly have a spondylolysis defect or a stress fracture. In a December 23, 1996 report Dr. Johnson stated, "the back pain has seemingly improved in the last week or so and perhaps with reduction in her overall physical activities in the next few weeks this will continue to improve. She is not to participate in any chiropractic at this time."

[1] The Board notes that a report from a chiropractor is not considered medical evidence unless it contains evidence that appellant received treatment consisting of manual manipulation of the spine to correct a subluxation shown by x-ray. 5 U.S.C. § 8101(2).

Two reports were submitted from Dr. Robert J. Hacker, a Board certified neurosurgeon, dated November 11, 1997. Dr. Hacker noted appellant's history of injury and opined that appellant had low back pain of uncertain etiology, perhaps related to vigorous work activities. He further stated that "the nature of her anatomic disorder is unclear and at the present time I would have to list either soft tissue injury or chronic adolescent low back pain as my main consideration. I am not convinced that there is a spondylosis or painful disc disorder at this time."

A November 17, 1997 magnetic resonance imaging (MRI) scan of the lumbar spine from Dr. Jon E. Ekstrom, a Board-certified radiologist, noted bilateral leg weakness and low back pain. Dr. Ekstrom advised that appellant had a normal vertebral alignment with minimal desiccation of the L4-5 level and some bulging of the disc annulus, with no bone abnormality. He concluded that appellant had a small, central disc protrusion at L4-5, superimposed on a slightly developmentally small canal, contributing to a mild to moderate canal stenosis and stated that the examination was otherwise unremarkable.

In a November 20, 1997 report, Dr. Hacker opined that the results of appellant's MRI indicated a disc protrusion or herniation centrally at the L4-5 level, which was sizable on the sagittal imaging and resulted in spinal canal stenosis of moderate degree because of a superimposed congenitally small canal at the L4-5 level. Dr. Hacker recommended conservative therapy.

By letter dated January 7, 1998, the Office advised appellant that it required additional medical evidence, including a comprehensive medical report, to support her claim that her current condition or disability was causally related to her accepted August 12, 1996 employment injury. The Office also requested that appellant submit a factual statement explaining the circumstances of her alleged recurrence. The Office stated that appellant had 30 days in which to submit the requested information.

In response, appellant submitted a December 15, 1997 treatment note from Dr. Michael E. Karasek, Board-certified in psychiatry and neurology, who noted appellant's complaints of pain, stated findings on examination and opined that appellant had a painful internal disc disruption. Appellant also submitted a December 23, 1996 bone scan report from Dr. James E. Johnson, a Board-certified radiologist, who indicated that the results of the scan were essentially negative. Appellant also submitted a written statement dated January 19, 1998 in which she described the history of her low back condition since the August 12, 1996 work injury.

By decision dated February 9, 1998, the Office accepted appellant's August 13, 1996 claim for low back strain, but denied her claim for a recurrence of disability, finding that she failed to submit medical evidence sufficient to establish that her current low back condition was caused or aggravated by the August 12, 1996 employment injury.

By letter dated March 12, 1998, appellant requested a hearing before an Office hearing representative.

By decision dated May 1, 1998, the Office denied appellant's request for a hearing because it was not made within 30 days and she was not as a matter of right entitled to a hearing. The Office stated that appellant's request was further denied on the grounds that the issue in the case could be equally well addressed by requesting reconsideration from the district office and submitting evidence not previously considered which could establish that an injury was sustained as alleged.

The Board finds that appellant has not established that her current condition or disability of the low back was caused or aggravated by the August 12, 1996 employment injury.

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.[2]

The record contains no such medical opinion. Indeed, appellant has failed to submit any medical opinion containing a rationalized, medical opinion, which relates her current condition or disability to her August 12, 1996 employment injury. For this reason, she has not discharged her burden of proof to establish her claim that she sustained a recurrence of disability as a result of her accepted employment injury.

The only medical evidence appellant submitted in support of her claim for a recurrence of disability were medical reports from Dr. Wesley Johnson, dated December 1996 and from Dr. Hacker, dated November 1997, which noted appellant's history of injury and related appellant's complaints of pain; Dr. Ekstrom's November 17, 1996 MRI report, which diagnosed a small, central disc protrusion at L4-5, superimposed on a slightly developmentally small canal, contributing to a mild to moderate canal stenosis; Dr. James Johnson's December 1996 negative bone scan report; and Dr. Karasek's December 15, 1997 report, which merely stated that appellant had painful internal disc disruption. These reports indicated that appellant had intermittent low back pain in the two years following her August 12, 1996 employment injury and had some objective findings reflecting a possible spinal disorder at L4-5, but do not contain sufficient rationalized medical opinion to establish that appellant's current condition or disability was caused or aggravated by her August 12, 1996 employment injury. Therefore, the Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability.

The Board finds that the Office did not abuse its discretion in denying appellant's March 12, 1998 request for a hearing before an Office hearing representative, pursuant to 5 U.S.C. § 8124.

[2] *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. §10.121(a).

Section 8124(b)(1) of the Federal Employees' Compensation Act,[3] 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 for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." 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.[4]

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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[5] 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 for a hearing,[6] when the request is made after the 30-day period for requesting a hearing,[7] and when the request is for a second hearing on the same issue.[8] In these instances the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[9] 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.[10]

In the present case, the Office on February 9, 1998 issued its decision denying compensation on the grounds that appellant's current condition or disability was not caused or aggravated by the August 12, 1996 employment injury. On March 12, 1998 appellant requested a hearing before an Office hearing representative. By decision dated May 1, 1998, the Office denied appellant's request for a hearing because it was not made within 30 days. The Office exercised its discretion in considering appellant's request, noting that it had considered the matter and determined that the issue in the case could be resolved through the reconsideration process by submitting evidence not previously considered, which could establish that an injury was sustained as alleged.

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[3] 5 U.S.C. § 8124(b)(1).

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

[5] *Johnny S. Henderson*, 34 ECAB 216 (1982).

[6] *Rudolph Bermann*, 26 ECAB 354 (1975).

[7] *Herbert C. Holley*, 33 ECAB 140 (1981).

[8] *Johnny S. Henderson*, *supra* note 5.

[9] *Id.; Rudolph Bermann*, *supra* note 6.

[10] *Herbert C. Holley*, *supra* note 7.

An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, prejudice, partiality, intentional wrong or action against logic.[11] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request. The Board therefore finds that the Office properly denied appellant's request for a hearing on the grounds of untimeliness. A request for a hearing is timely only if it was mailed, as determined by the postmark, within 30 days of issuance of the district office's decision, timeliness from the postmark.[12] In the instant case, appellant's request is dated March 12, 1998 and the date-stamp on the request indicates that it was received on March 16, 1998. Thus, appellant's request for a hearing was untimely. The Office, therefore, exercised its discretionary powers in denying appellant's request for a hearing and in so doing did not act improperly.[13] The Board, therefore, affirms the Office's determination.

The decisions of the Office of Workers' Compensation Programs dated May 1 and February 9, 1998 are hereby affirmed.

Dated, Washington, D.C.
February 18, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

[11] *See Sherwood Brown*, 32 ECAB 1847 (1981).

[12] Federal [FECA] Procedure Manual, Part II, *Claims, Hearing and Review of the Written Record*, Chapter 2.1601.4 (June 1997).

[13] *Stephen C. Belcher*, 42 ECAB 696 (1991); *Ella M. Garner*, *supra* note 4.