U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUCILE W. YOUNG and DEPARTMENT OF AGRICULTURE, AGRICULTURE RESERACH SERVICE, College Station, TX

Docket No. 03-2103; Submitted on the Record;
Issued January 13, 2004

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence on or after July 22, 2002 due to her accepted October 5, 1994 employment injury; and (2) whether appellant is entitled to a review of the written record before an Office hearing representative under 5 U.S.C. § 8124(b)(1).

On October 5, 1994 appellant, a 52-year-old biological science lab technician, filed a traumatic injury claim alleging that she injured her lower back when she lost her balance and fell backward after jumping off a cotton picker. The Office of Workers' Compensation Programs accepted the claim for lumbar strain and appellant returned to regular duty in February 1995.

Appellant filed a claim for a recurrence on July 22, 2002. She noted that she had never fully recovered from her 1994 employment injury and continued to have chronic back problems from this injury, which required medical treatment.

In a letter dated November 6, 2002, the Office advised appellant regarding the medical and factual information required to support her recurrence claim. No evidence was received.

By decision dated December 27, 2002, the Office denied appellant's recurrence claim on the basis that the evidence was insufficient to support her claim.

In a letter dated January 21, 2003 and received by the Office on February 4, 2003, appellant requested a review of the written record before an Office hearing representative. A postmark on the envelope indicates it was mailed on January 29, 2003.

By decision dated March 27, 2003, the Office denied appellant's request for a review of the record because it was not made within 30 days and she was not entitled, as a matter of right, to such a review. 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 there is a causal relationship between the accepted work injury and the claimed recurrence.

In a letter dated April 23, 2003, appellant requested reconsideration. In support of her request she submitted a letter from Robert D. Stipanovic, research leader; x-ray interpretations dated October 5 and December 29, 1994; an August 6, 1982 report by Dr. Stewart D. Stephenson, a chiropractor, who diagnosed a subluxation of the fifth vertebrae; a magnetic resonance imaging (MRI) scan test dated December 29, 1994; and a January 16, 1974 report by Dr. James I. Lindsay, an attending physician.

By decision dated June 16, 2003, the Office denied appellant's request for modification.

The Board finds that appellant has failed to meet her burden of proof to establish that she sustained a recurrence of disability on or after July 22, 2002 due to her accepted October 5, 1994 employment injury.

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence, that the disability for which he claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basic of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.[1] A recurrence of disability is defined by the Office regulations as an inability to work, caused by a spontaneous change in a medical condition that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[2]

The record contains no medical opinion containing a rationalized, probative report, which relates her disability for work as of July 22, 2002 to her October 5, 1994 employment injury. The letter by Mr. Stipanovic is insufficient to qualify as a medical report or meet appellant's burden of proof as he is not a physician nor has he treated appellant.[3] For these reasons, she has not discharged his burden of proof to establish her claim that she sustained a recurrence of disability as a result of her accepted employment injury.

Appellant submitted the following medical evidence x-ray interpretations dated October 5 and December 29, 1994, an August 6, 1982 report by Dr. Stephenson, a chiropractor, who diagnosed a subluxation of the fifth vertebrae; an MRI scan test dated December 29, 1994 and a January 16, 1974 report by Dr. Lindsay. None of these reports contain a probative, rationalized opinion as to whether appellant's current condition was causally related to appellant's October 5, 1994 employment injury. Neither reports from Drs. Lindsay and Stephenson provided a rationalized, probative medical opinion causally connecting his current condition to the accepted

[1] *Ronald A. Eldridge*, 53 ECAB ___ (Docket No. 01-67, issued November 14, 2001).

[2] *Bernitta L. Wright*, 53 ECAB ___ (Docket No. 01-1858, issued May 1, 2002).

[3] The Federal Employees" Compensation Act defines the term "physician" to include physicians who have an M.D. or O.D. degree, surgeons, podiatrists, dentists, clinical psychologists, optometrists and chiropractors within the scope of their practice as defined by state law; *see Sheila A. Johnson*, 46 ECAB 323 (1994). While appellant refers to Mr. Stipanovic as "Dr." in her reconsideration request, the record contains no evidence showing what his qualifications are.

October 5, 1994 employment injury.[4] Thus, appellant has not met her burden of proof in establishing that she sustained a recurrence of disability.[5]

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

Section 8124(b)(1) of the Act,[6] 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 [a] 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."[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 30-day requisite.[8] The Board has held that section 8124 provides the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing" and that such a review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.[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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[10]

The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing.[11] Under Office procedures, the postmark of the envelope that contains the letter requesting a hearing determines the timeliness of a hearing request.[12] The Office's procedures, which require

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[4] *William C. Thomas*, 45 ECAB 591 (1994).

[5] On appeal appellant submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision; *see Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, n.5 (1952); 20 C.F.R. § 501(c)(1). Appellant may resubmit this evidence to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501(c).

[6] 5 U.S.C. § 8124(b)(1).

[7] *James D. Langteau*, 53 ECAB ___ (Docket No. 01-1788, issued March 7, 2002).

[8] *Afegalai L. Boone*, 53 ECAB ___ (Docket No. 01-2224, issued May 15, 2002); *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[9] *See Michael J. Welsh*, 40 ECAB 994 (1989); 20 C.F.R. § 10.616.

[10] *Steven A. Andersen*, 53 ECAB ___ (Docket No. 01-1376, issued February 19, 2002); *Johnny S. Henderson*, 34 ECAB 216 (1982).

[11] *Johnny S. Henderson, supra* note 10*; Herbert C. Holley*, 33 ECAB 140 (1981); *Rudolf Bermann*, 26 ECAB 354 (1975).

[12] *Carolyn O'Neal*, 53 ECAB ___ (Docket No. 02-198, issued July 3, 2002).

the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[13]

In the present case, the Office on December 27, 2002 issued its decision denying benefits based on an alleged recurrence of disability. Appellant requested a review of the written record by an Office hearing representative in a letter postmarked January 29, 2003. By decision dated March 27, 2003, the Office denied appellant's request for a review of the written record 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 in regard to whether she sustained a recurrence of disability as of July 22, 2002.

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.[14] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's request for a review of the record. The Office exercised its discretionary powers in denying appellant's request for a review of the written record and in so doing did not act improperly.[15]

As the case record reveals no such abuse of discretion by the Office, the Office properly denied appellant's request for a review of the written record by an Office hearing representative pursuant to section 8124 of the Act. The Board, therefore, affirms the Office's March 27, 2003 decision denying appellant a review of the written record by an Office hearing representative.

[13] *Steven A. Andersen*, *supra* note 10; *Herbert C. Holley*, *supra* note 11.

[14] *Dorothy Dillard*, 53 ECAB ___ (Docket No. 02-180, issued July 19, 2002).

[15] *Stephen C. Belcher*, 42 ECAB 696 (1991); *Ella M. Garner*, *supra* note 8.

The decisions of the Office of Workers' Compensation Programs dated March 27 and June 16, 2003 and December 27, 2002 are hereby affirmed.

Dated, Washington, DC
January 13, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member