U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES K. GOODLETT and U.S. POSTAL SERVICE,
POST OFFICE, Atlanta, Ga.

Docket No. 95-1383; Submitted on the Record;
Issued January 28, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof in establishing that he had any employment-related disability; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing made more than 30 days after the Office's decision.

On July 10, 1991 appellant, then a 34-year-old letter carrier, filed a claim for compensation benefits alleging that he injured his back and neck on June 27, 1991 when his postal vehicle was struck from behind by a truck. Appellant stopped working on June 29, 1991 and returned to limited duty on July 13, 1991.

Dr. Larry K. Haberski, a chiropractor, stated on August 7, 1991 that appellant's condition was due to his June 27, 1991 employment accident and that he should be able to return to work on July 22, 1991. He stated that he could not determine if the injury would result in permanent impairment and that there were no preexisting conditions or diagnoses. On August 19, 1991 Dr. Haberski diagnosed a hyperflexion/hypertension injury based on a history, range of motion tests, physical examination and x-rays. His treatment notes from July 12 through August 26, 1991 indicated that appellant continued to show symptoms of neck and back pain.

On October 2, 1991 Dr. Ralph D'Auria, a Board-certified orthopedic surgeon, examined appellant. Dr. D'Auria diagnosed a lumbosacral sprain/strain and stated that the prognosis was good. He indicated that magnetic resonance imaging (MRI) revealed no evidence of herniation or a bulging disc.

Upon the Office's request, Dr. Howard L. Hecht, a Board-certified orthopedic surgeon, examined appellant on November 26, 1991. Appellant then complained of persistent low back pain and an occasional neck ache. Dr. Hecht reviewed appellant's MRI and found some degenerative changes with some bulging at the L5-S1 level. He noted that it appeared appellant sustained a sprain of the lumbar spine secondary to his June 1991 accident, but that appellant had

a degenerative disc disease which preceded the accident. Dr. Hecht stated that appellant's pain was secondary to the degenerative arthritic changes of the lumbar spine. He, therefore, opined that appellant sustained a sprain of the lumbar spine from his June 1991 employment accident superimposed on his preexistent lumbar disc degeneration. Dr. Hecht stated that the sprains generally would resolve in 8 to 12 weeks, but that the preexistent arthritis may have prolonged his recovery. Dr. Hecht indicated that appellant was free of neurological abnormalities and that appellant should recover from his injury without further residual abnormalities.

On January 16, 1992 the Office medical adviser reviewed the medical evidence and found that appellant had no residual disability from the June 1991 employment injury. The medical adviser further found that there was not a subluxation of the spine as demonstrated by x-ray.

On February 20, 1992 Dr. Suzie C. Tindall, a Board-certified neurosurgeon, examined appellant. She found that appellant had some mild degenerative changes in his L5-S1 disc, but doubted that "they are related to the accident though the accident could have made him symptomatic." Dr. Tindall relied on x-rays of the cervical and lumbar spine which were normal and a lumbar MRI which showed mild degenerative changes at the L5-S1 disc with a minimal disc protrusion.

By a decision dated January 21, 1992, the Office terminated appellant's entitlement to chiropractic treatment because the weight of the medical evidence showed that a subluxation of the spine as demonstrated by x-ray, no longer existed.

In a May 31, 1992 statement, appellant indicated that he was hit by a tractor trailer on June 27, 1991 with such great force that he was injured. Appellant indicated that he was going to discontinue chiropractic treatment and seek treatment with a physician. Consequently, he requested assistance in finding a physician to diagnose and treat his back problem. Appellant stated that he injured his lower back in 1985, but that this injury had resolved prior to his June 1991 employment injury.

Dr. D'Auria reexamined appellant on September 3, 1992. He stated that appellant present with left hypoesthesia of T4-7 and tenderness in the cervical and lumbosacral region. Dr. D'Auria found that the cervical range of motion was reduced on flexion and extension, lateral flexion and rotation bilaterally. He also found that the lumbar range of motion was diminished on flexion and extension. Dr. D'Auria stated on September 11, 1992 that appellant's MRI revealed a broad-based posterior disc protrusion T11-12, possibly associated with calcification of the posterior longitudinal ligament at this level. He stated that no cord compression was identified and that no significant bulge or herniation was identified at the other thoracic levels.

On October 19 and November 19, 1992 Dr. Joseph N. Saba, a Board-certified neurologist, diagnosed a soft tissue injury to the neck with radicular component to the upper extremity, consider herniated cervical disc, and post-traumatic disc herniation at the T11-12 level, possibly of no clinical significance, post-traumatic disc herniation at the L5-S1 level, getting worse, with the presence of a mild left S1 radiculopathy, and severe headaches, possibly

secondary to his first diagnosis. Dr. Saba relied on a history, MRI, electrocardiogram, electromyogram, myelogram, and physical and neurological examinations.

Dr. Saba performed a myelogram and epidural block on appellant on November 19, 1992. He diagnosed a soft tissue injury to the neck with mild degenerative joint disease at C4-5 and C5-6 and post-traumatic disc herniation, small, at T11-12, associated with osteophytosis. He also diagnosed an injury to the low back involving a central disc herniation at L5-S1, a mild disc bulge at L4-5, minor degenerative changes at L3-4, and possible priformis syndrome. Finally, he diagnosed a severe post-traumatic headache secondary to the soft tissue injury to the back. Dr. Saba repeated these diagnoses on February 2, 1993.

Dr. D'Auria examined appellant on March 3 and 16, 1993. He noted that appellant had minimal tenderness and muscle tightness in the trapezius and lumbosacral paravertebral muscles. On April 5, 1993 Dr. D'Auria noted that appellant presented with tenderness in the trapezius with a minimal amount of tightness in the lumbosacral paravertebral muscles. Dr. D'Auria stated on April 15, 1993 that strength tests on the cervical extension and lumbar extension muscles were markedly decreased and below average in male strength. He also stated that appellant's range of motion was limited. On April 27, 1993 Dr. D'Auria found that there was a slight limitation in range of motion of the cervical and lumbar spine secondary to a minimal amount of muscle tightness and tenderness in the trapezius and lumbosacral paravertebral muscles. Dr. D'Auria's May 8, 1993 electromyography indicated a left L5 lumbosacral radiculopathy. On May 19, 1993 Dr. D'Auria indicated that appellant's range of muscles had increased, but was still limited to 60 degrees. Dr. D'Auria then reviewed his previous diagnoses.

Dr. Haberski examined appellant on July 16, 1993. He stated that appellant's disc injuries would cause spinal instabilities with any movement, allowing for nerve root compression, which in turn causes pain. Dr. Haberski stated that the traumatized soft tissue injuries would now be more susceptible for exacerbation, aggravations, and activation of the original symptoms. Consequently, Dr. Haberski concluded that it was highly improbable that appellant would be able to return to his normal lifestyle or work at full capacity without restriction.

On October 15, 1993 Dr. Saba diagnosed a soft tissue injury to the neck with reasonable improvement. He further indicated that there was a mild degenerative disc disease at C4-5 and C5-6. He then stated that there was post-traumatic disc generation, small, at T11-12. In this regard, he found central disc herniation at L4-S1 with the presence of a mild, right S1 radiculopathy, a mild disc bulge at L4-5, and possible priformis syndrome.

By letter dated November 17, 1993, the Office referred appellant, along with a statement of accepted facts and the entire case record, to Dr. Thomas L. Dobson, a Board-certified orthopedic surgeon, for an impartial medical examination and an evaluation as to whether appellant had an employment-related disability.

Dr. Dobson examined appellant and found chronic lumbar discomfort with some leg pain, left greater than right. He stated that the magnitude of appellant's subjective complaints were not substantiated by objective clinical findings. Dr. Dobson found early degenerative disc disease and annular bulging at L5-S1 with no evidence of neural compromise or sequestral

herniation. He stated that there was possibly some early degenerative disease at T11-12 and L3-4. Dr. Dobson stated that appellant was capable of returning to work in an unrestricted capacity with the only restriction being that he needed to change positions frequently. He found that appellant had reached maximum medical improvement and that his impairment, based upon his injury to his lumbar spine, was seven percent of the whole person. Dr. Dobson found that it was conceivable that his injury occurred from his on-the job injury when he was hit from behind by a vehicle. He stated, however, that the magnitude of appellant's subjective complaints was not consistent with the objective evidence. Consequently, Dr. Dobson stated that this did not explain appellant's continued discomfort in a reasonable manner.

In a decision dated February 10, 1994, the Office denied appellant's claim for compensation because the evidence failed to demonstrate a causal relationship between the injury and the claimed condition or disability. In an accompanying memorandum, the Office found that because there were no objective signs of disability, compensation should be denied.

In a letter dated March 8, 1994, appellant indicated that he disagreed with the Office's latest decision and stated that he wanted his physicians to be able to treat him as they deem. On March 31, 1994 appellant stated that he was requesting a hearing.

By decision dated November 10, 1994, the Office exercised its discretion and denied appellant's request for a hearing because it was not made within 30 days of the February 10, 1994 decision denying compensation.

The Board finds that appellant has not met his burden of proof to establish that he has an employment-related disability.

In the present case, Dr. Haberski, a chiropractor, found that appellant's June 27, 1991 employment injury would continue to cause spinal instabilities with any movement, allowing for nerve root compression, which in turn would cause pain. He concluded that it was highly improbable that appellant could return to his normal lifestyle or work at full capacity without restriction.

Dr. Saba, a Board-certified neurologist, also found that appellant continued to suffer from a soft tissue injury to the neck with reasonable improvement. He stated that there was mild degenerative disc disease at C4-5 and C5-6, and that there was post-traumatic disc degeneration, small, at T11-12. Consequently, he found central disc herniation at the L4-S1 with the presence of a mild right S1 radiculopathy, a mild disc bulge at L4-5, and possible priformis syndrome. He did not address whether appellant had an employment-related disability.

Similarly, although Dr. D'Auria diagnosed appellant with back and neck problems, he did not address whether appellant suffered an employment-related disability.

In contrast, Dr. Hecht, a Board-certified orthopedic surgeon, stated that appellant's pain was secondary to the degenerative arthritic changes of the lumbar spine and that appellant should recover from the June 1991 injury without residual abnormalities. Moreover, the Office medical adviser found on January 16, 1992 that appellant had no residual disability from the June 1991 employment injury. Similarly, Dr. Tindall, a Board-certified neurosurgeon, found that appellant

had some mild degenerative changes in his L5-S1 disc, but that she doubted that they were related to the accident though the accident could have made him symptomatic."

Given the conflict of the medical evidence, the Office referred appellant, along with a statement of accepted facts and the case record, to Dr. Dobson, a Board-certified orthopedic surgeon. Dr. Dobson indicated that appellant suffered from lumbar discomfort with some leg pain, left greater than right. He stated, however, that the magnitude of appellant's subjective complaints were not substantiated by objective clinical findings. Dr. Dobson found early degenerative disc disease and annular bulging at L4-S1 with no evidence or neural compromise or sequestral herniation. He stated that there was possibly some early degenerative disease at T11-12 and L3-4. Dr. Dobson further found that appellant was capable of returning to work in an unrestricted capacity, but that he would need to change positions frequently. He found that appellant had reached maximum medical improvement and that his impairment, based upon injury to his lumbar spine, was seven percent of the whole person. Dr. Dobson further found that it was conceivable that appellant's injury resulted from his June 1991 employment injury.

When a case is referred to an impartial medical specialist for the purpose of resolving conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[1]

Dr. Dobson opined that appellant was capable of returning to work in an unrestricted capacity. He based his opinion on a thorough history, physical examination, and x-rays, and explained that his conclusions were based on the fact that the objective tests failed to support continued disability. Consequently, Dr. Dobson's opinion is well rationalized and based on a proper factual and medical background. It is, therefore, entitled to special weight. Dr. Haberski, a chiropractor, rendered the only medical opinion establishing that appellant suffered from an employment-related disability. His opinion, however, is entitled to little weight because a chiropractor is recognized as a physician "only to the extent that their reimbursable expenses are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[2] In this case, the record is devoid of evidence establishing that appellant has a subluxation as demonstrated by x-ray. Consequently, the Board finds that appellant failed to demonstrate that he has an employment-related disability.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

[1] *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

[2] 5 U.S.C. § 8101(2); *see Marjorie S. Greer*, 39 ECAB 1099, 1101-02 (1988).

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[3] 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.[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 for 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 to 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 the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated February 10, 1994 and, therefore, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated March 31, 1994 and postmarked April 5, 1994. Hence, the Office correctly stated that appellant was not entitled to a hearing as a matter of right because the request was not made within 30 days of the Office's February 10, 1994 decision. Moreover, appellant's letter dated March 8, 1994 cannot be considered a timely request for a hearing because it was received by the Office on March 29, 1994 and was not postmarked by the postal service within 30 days of the February 10, 1994 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office in its November 10, 1994 decision, properly exercised its discretion by stating that it considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence to establish that his injury was causally related to factors of employment. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and

[3] 5 U.S.C. § 8124(b)(1).

[4] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

[5] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[6] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[7] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[8] *John S. Henderson*, 34 ECAB 216, 219 (1982).

probable deduction from established facts.[9] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Programs dated November 10 and February 10, 1994 are hereby affirmed.

Dated, Washington, D.C.
January 28, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[9] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).