

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NOEMI VIERA-ORTIZ and DEPARTMENT OF HEALTH & HUMAN  
SERVICES, SOCIAL SECURITY ADMINISTRATION, OFFICE OF HEARINGS &  
APPEALS, Hato Rey, P.R.

*Docket No. 96-2630; Submitted on the Record;  
Issued September 8, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective June 22, 1996; and (2) whether the Office properly denied appellant's request for a hearing as untimely under 5 U.S.C. § 8124(b).

The Board has duly reviewed the evidence of record and finds that the Office met its burden of proof in terminating appellant's compensation benefits effective June 22, 1996.

On June 9, 1994 appellant, then a hearings clerk, filed a traumatic injury claim assigned number A02-681797 alleging that on that date, she slipped and experienced pain in her waist to her ribs.<sup>1</sup> Appellant stopped work on June 10, 1994.<sup>2</sup>

The Office accepted appellant's claim for back spasm.

By letter dated August 3, 1995, the Office referred appellant along with a statement of accepted facts, a list of specific questions and medical records to Dr. Norberto Arbona, a Board-certified neurologist and psychiatrist, for a second opinion examination to determine the nature and extent of disability due to the employment injury. By letter of the same date, the Office advised Dr. Arbona of the referral.

Dr. Arbona submitted a September 20, 1995 medical report revealing that appellant no longer had any disability caused by the June 9, 1994 employment injury.

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<sup>1</sup> Previously, appellant filed a claim assigned number A25-0320419 for an injury sustained on March 22, 1988. The Office accepted appellant's claim for a back condition.

<sup>2</sup> The record revealed that appellant was terminated from the employing establishment.

In a notice of proposed termination of compensation dated April 3, 1996, the Office advised appellant that it proposed to terminate her compensation benefits because the evidence of record revealed that appellant no longer had any disability causally related to the June 9, 1994 employment injury. The Office further advised appellant to submit medical evidence supportive of her continued disability. In an accompanying memorandum dated April 4, 1996, the Office found that the weight of the medical opinion evidence rested with Dr. Arbona's September 20, 1995 medical report.

By decision dated May 17, 1996, the Office terminated appellant's compensation benefits finding the medical evidence of record failed to establish that the claimed medical condition or disability was caused by the June 9, 1994 employment injury<sup>3</sup> effective June 22, 1996.<sup>4</sup>

By letter dated July 3, 1996, appellant, through her counsel, requested an oral hearing before an Office hearing representative.

By decision dated July 24, 1996, the Office denied appellant's request for an oral hearing as untimely under section 8124 of the Federal Employees' Compensation Act. The Office further denied appellant's request on the grounds that the issue involved could be equally well resolved by requesting reconsideration from the District office and by submitting evidence not previously considered which established that there was a causal relationship between the claimed medical condition and the June 9, 1994 employment injury.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.<sup>5</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>6</sup>

In the present case, the Office accepted that appellant sustained a back disorder (back spasm) due to factors of her federal employment. In its proposed notice of termination, the Office advised appellant to submit additional medical evidence supportive of her continued disability. The Office terminated appellant's compensation benefits based on Dr. Arbona's opinion that appellant no longer had any disability causally related to the June 9, 1994 employment injury. In his September 20, 1995 medical report, Dr. Arbona provided a history of

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<sup>3</sup> The Board notes that the Office's decision listed a June 6, 1994 employment injury, rather than the June 9, 1994 employment injury.

<sup>4</sup> Subsequent to the Office's May 17, 1996 decision, appellant submitted additional medical evidence. The Board, however, cannot consider the new evidence submitted by appellant inasmuch as the Board's jurisdiction is limited to the evidence of record which was before the Office at the time of its final decision. *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c). Appellant may resubmit the evidence with a request for reconsideration. 20 C.F.R. § 10.138.

<sup>5</sup> *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

<sup>6</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

appellant's injuries including, the 1988 and June 9, 1994 employment injuries, medical treatment, his findings on physical examination, and a review of medical records and the statement of accepted facts. Dr. Arbona opined that appellant had muscle spasm and tenderness that could not be specifically related to the June 1994 employment injury. Dr. Arbona noted that appellant had a long-standing inflammatory condition that was temporarily aggravated and opined that the present findings were consistent with the myofascial pain syndrome and fibromyalgia which were present before the employment injury. Dr. Arbona stated that the persistent symptoms and findings were explained on the basis of a chronic inflammatory process with characteristics, remissions and exacerbations. Dr. Arbona further stated that appellant had an emotional condition that was responsible for additional disability. Dr. Arbona concluded that appellant was disabled from her previous position of hearing clerk and any other gainful position due to appellant's subjective pain and depression which interfered with concentration, memory, ability to follow direction, and handle stress and interpersonal relations. Dr. Arbona further concluded that based only on the accepted work-related condition, appellant was able to perform her work as a hearing clerk. In an accompanying work capacity evaluation for musculoskeletal conditions dated August 30, 1995, Dr. Arbona indicated that appellant could work six to eight hours per day with physical restrictions. Inasmuch as Dr. Arbona provided a rationalized medical opinion based on an accurate factual and medical background, the Board finds that the Office properly terminated appellant's compensation benefits.

The record reveals a December 18, 1995 medical report of Dr. Alvin Morales, appellant's treating physician. In this report, Dr. Morales indicated that appellant was treated for neck and shoulder injuries sustained as a result of being hit in the upper back by a nephew. This report is insufficient to establish continued disability inasmuch as Dr. Morales did not opine that appellant's neck and shoulder injuries were caused by the June 9, 1994 employment injury rather, Dr. Morales indicated that appellant's conditions resulted from an intervening incident, being hit in the upper back by her nephew.

Dr. Morales submitted a January 18, 1996 medical report clarifying his December 18, 1995 medical report. In this report, Dr. Morales stated that appellant's back condition was caused by the employment injury. Dr. Morales' opinion is insufficient to establish continued disability because he failed to provide any medical rationale for his opinion.

In response to the Office's notice of proposed termination, appellant submitted an April 10, 1996 duty status report (Form CA-17) of Dr. Raul M. Valle Flores revealing an illegible diagnosis and appellant's physical restrictions. Appellant also submitted medical treatment notes dated July 19 through November 19, 1995 regarding her abdominal and neck pain, and back and emotional conditions. Additionally, appellant submitted diagnostic test results regarding her pelvic, abdomen and heart. Further, appellant submitted Dr. Morales' April 15, 1996 medical report revealing appellant's medical and family histories, and his findings on physical and objective examination. Dr. Morales diagnosed profound muscular spasm, myositis and degeneration of the lumbar and cervical spine, and concomitant depression. Dr. Morales opined that appellant had not reached maximum medical improvement and that appellant could not return to work at that time. The Board finds that Dr. Valle's Form CA-17, the medical treatment notes, diagnostic test results and Dr. Morales' medical report are

insufficient to establish continued disability because they failed to address whether appellant had any disability causally related to the June 9, 1994 employment injury.

The Board further finds that the Office properly denied appellant's request for a hearing as untimely under 5 U.S.C. § 8124(b).

Section 8124(b)(1) of the Act provides that a "claimant for compensation not satisfied with the 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."<sup>7</sup> 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.<sup>8</sup>

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 the Office must exercise this discretionary authority in deciding whether to grant or deny a hearing. 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, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.<sup>9</sup>

In this case, the Office issued its decision terminating appellant's compensation benefits on May 17, 1996. Appellant requested an oral hearing in a July 3, 1996 letter. Inasmuch as appellant did not request a hearing within 30 days of the Office's May 17, 1996 decision, she is not entitled to a hearing under section 8124 as a matter of right. The Office also exercised its discretion but decided not to grant appellant a discretionary hearing on the grounds that she could have her case further considered on reconsideration by submitting relevant medical evidence. Consequently, the Office properly denied appellant's hearing request.

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<sup>7</sup> 5 U.S.C. § 8124(b)(1).

<sup>8</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

<sup>9</sup> *Henry Moreno*, 39 ECAB 475 (1988).

The July 24 and May 17, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.  
September 8, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member