U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEE BLACK and DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, OFFICE OF FAIR HOUSING & EQUAL OPPORTUNITY, Washington, DC

Docket Nos. 99-347 and 99-620; Submitted on the Record;
Issued December 4, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the issue of the termination of his compensation; (2) whether the Office properly denied appellant's request for hearings on the issues of medical benefits for a pain management program and his schedule awards for 11 percent of the left arm, 8 percent of the right leg and 5 percent of the left leg; and (3) whether the Office properly suspended appellant's right to compensation for a bilateral foot condition for obstruction of a medical examination.

Appellant has had numerous appeals on these issues for which the Board has either issued decisions or orders. In a December 24, 1991 decision, the Board found that the Office had met its burden of proof in terminating appellant's compensation for cervical, thoracic and lumbar sprains effective June 30, 1989 based on the reports of Dr. Denis R. Harris, a Board-certified orthopedic surgeon. The Board, however, noted that the Office had found that subsequent evidence had created a new conflict in the medical evidence which led to the referral of appellant to Dr. C. James Duke, a Board-certified physiatrist to resolve the conflict. The Board found that Dr. Duke gave contradictory responses on whether appellant was able to perform the duties of his former position. The Board therefore remanded the case for clarification of his opinion.[1] In an August 22, 1996 order, the Board found that, in regard to appellant's appeal of a schedule award decision, the case record submitted on appeal did not contain the original documents and records necessary for a full review of the decision. The case was therefore remanded for reconstruction of the case record and a *de novo* decision.[2] In a September 9, 1996 decision, the Board found that the weight of the medical evidence established

[1] Docket No. 91-1194 (issued December 24, 1991). The history of the case up to that point is contained in this decision and is incorporated by reference.

[2] Order Remanding Case, Docket No. 96-102 (issued August 22, 1996).

that appellant did not have any disability after July 30, 1989 causally related to his April 2, 1978 and April 5, 1979 employment injuries.[3]

In a January 19, 1996 letter, appellant requested pain management services for residuals from his employment injuries. In an April 30, 1996 letter, the Office stated that it had received his January 1, 1996 request for pain management services for chronic pain disorder which he related to stress caused by adverse decisions in his claim.[4] The Office denied appellant's request on the grounds that chronic pain disorder was not accepted as causally related to his employment injuries and therefore authorization could not be granted.[5]

In a January 17, 1997 letter, appellant requested a hearing before an Office hearing representative. In a February 7, 1997 letter, he repeated his request for a hearing. Appellant contended in his request that Drs. Harris and Duke were improperly appointed as impartial medical specialists in his case. In an April 11, 1997 letter, the Office denied appellant's request for a hearing, finding that the Board had issued a final decision in his case on September 9, 1996 and that the Office did not have jurisdiction to review the decisions of the Board. The Office indicated that it had exercised its discretion to review appellant's request for a hearing and found that his claim could be equally well addressed by submitting new evidence and seeking reconsideration. The Office therefore denied appellant's request for a hearing.

In an August 22, 1997 letter, appellant requested reconsideration of the Office's July 13, 1993 decision, which was affirmed by the Board's September 9, 1996 decision. He submitted in support of his request an October 22, 1996 report from Dr. Babak Arvanaghi, an anesthesiologist, who indicated that appellant had chronic low back pain and neck pain, a history of hypertension, arrhythmia and depression, and was status post work-related injury, referring to appellant's April 2, 1978 employment injury. Dr. Arvanaghi indicated that appellant had complained of low back and neck pain for years with numbness in the left arm. He reported that appellant stated that pain was exacerbated by lifting, walking and climbing or descending stairs. Dr. Arvanaghi diagnosed chronic low back and cervical pain, history of a mild L2 compression fracture and degenerative disc disease in the cervical region. He indicated that appellant would receive a peripheral nerve stimulation treatment and intensive physical therapy and would be evaluated for a pharmacologic approach to his pain.

Appellant also submitted a March 29, 1995 report from Dr. Sonya Bethel, a Board-certified family practitioner, who stated that appellant had permanent impairments of 27 percent for the left arm, 10 percent for the right arm, 36 percent for the left leg and 35 percent for the right leg. Dr. Bethel diagnosed cervical and lumbar radiculopathies, myofascial pain in the right

[3] Docket No. 94-1972 (issued September 9, 1996). The history of the case between the December 24, 1991 decision and the September 9, 1996 decision is contained in this decision and is incorporated by reference. Also, in an August 28, 1996 decision the Board found that appellant was not entitled to a schedule award for his left index finger.

[4] Appellant's claim for an emotional condition due to stress from adverse decisions in his claim is the subject of a concurrent appeal pending before the Board, Docket No. 98-1258 (issued October 1, 1999).

[5] A review of the 9,440 page case record submitted on appeal has not revealed the January 1, 1996 letter to which the Office referred.

shoulder due to the April 2, 1978 employment injury, denervation of the L5 nerve root, thoracic paraspinal neuropathy, thorocolumbar spondylosis and scoliosis, bilateral knee effusion suprapatellar, abnormal meniscus of the right knee, bilateral osteoarthritis and genu recurvatum of both knees, ulnar neuropathy of the left arm, chronic neuroma and instability of both feet, chronic pain disorder related to both of appellant's employment injuries, bilateral hip instability and intervertebral disc disease affecting both arms and both legs. Appellant also submitted an April 3, 1997 work restriction evaluation form in which she indicated that appellant could stand or walk intermittently for two hours a day, stand intermittently for one hour a day and lift intermittently for a half hour a day. She reported that appellant could lift up to 10 pounds. She concluded that appellant could not work eight hours a day but could work only for the hours specified. Appellant also submitted medical evidence that had been submitted previously.

In an August 25, 1997 decision, the Office restated its issuance of a schedule award for an 11 percent permanent impairment of the left arm, an 8 percent permanent impairment of the right leg and a 5 percent permanent impairment of the left leg. In a separate August 25, 1997 decision, the Office reissued its April 30, 1996 decision denying appellant's request for treatment and pain management for chronic pain disorder.

In an August 25, 1997 letter, the Office referred appellant to Dr. Louis Levitt, a Board-certified orthopedic surgeon, for an examination on September 4, 1997. The Office warned appellant that failure to appear may lead to a suspension of his right to compensation. The Office indicated that the referral was to review appellant's claim for an employment-related bilateral foot condition, and to determine whether appellant continued to suffer from the effects of his employment-related injuries. In a September 8, 1997 letter, the Office indicated that appellant had not appeared for the September 4, 1997 examination and indicated that the examination had been rescheduled for September 23, 1997. It again warned appellant that his right to compensation might be suspended if he did not appear for the examination.

In a letter dated September 19, 1997, appellant requested a hearing on the issue of the denial of his request for pain management treatment. The Office marked the letter as received on October 17, 1997. The envelope containing the request did not have a postmark or a stamp. In a separate September 19, 1997 letter, appellant requested a hearing on the issue of the schedule award decision of August 25, 1997. This letter was also marked as received on October 17, 1997.

Appellant submitted a September 12, 1997 report from Dr. Peter I. Kenmore, a Board-certified orthopedic surgeon, who stated that he had recommended pain management for appellant for chronic pain disorder. Dr. Kenmore indicated that he did not relate appellant's chronic pain disorder to the claim that his condition was caused by stress relating to the denial of his claim for compensation. He stated that the chronic pain syndrome was consistent with appellant's spinal and hip pathology, based on appellant's history and symptoms as he had stated in previous reports and based on the reports of other physicians.

In a September 22, 1997 letter, appellant declined to undergo an examination by Dr. Levitt. He noted that his physicians were unable to attend the examination. Appellant stated that his physicians and *pro bono* counsel had advised him not to undergo the examination. He asked that the examination be canceled or postponed until his schedule award was finalized.

Appellant noted that he had undergone several examinations and requested that the Office medical adviser review the medical reports of record to determine the extent of his permanent impairment. He commented that he was willing to undergo examination for issues other than those related to his schedule award.

In an October 15, 1997 decision, the Office denied appellant's August 22, 1997 request for reconsideration on the grounds that he had not raised substantive legal arguments nor submitted new, relevant medical evidence in support of his request for reconsideration.

In an October 29, 1997 decision, the Office suspended appellant's right to a schedule award for his feet for failure to appear for an examination by Dr. Levitt.

In an October 29, 1997 letter, appellant requested reconsideration of the Office's October 15, 1997 decision. He contended that the reports of Dr. Duke showed he had cervical and lumbar conditions, which required accommodation. Appellant also argued that Dr. Harris was improperly selected as an impartial medical specialist but was designated a second opinion specialist and was appointed an impartial medical specialist after the examination of appellant. In a separate letter of the same date, appellant requested a review of the written record by an Office hearing representative, rather than a hearing, on the issue of his request for pain management treatment.

In a December 23, 1997 decision, the Office denied appellant's October 29, 1997 request for reconsideration on the grounds that he had not submitted substantive legal arguments nor submitted new, relevant evidence, which would warrant a merit review of the prior decisions in his case.

In a February 3, 1998 decision, the Office found that appellant received a decision on August 25, 1997 and his request for a hearing was postmarked October 17, 1997. The Office stated that, since appellant's request for an oral hearing was not made within 30 days of the Office's decision, he was not entitled to a hearing as a matter of right. The Office further considered appellant's request for a hearing and determined that his claim could be equally well addressed by submitting evidence not previously considered and requesting reconsideration. The Office therefore denied appellant's request for a hearing.

In a series of August 7, 1998 letters to the Board, appellant requested appeals of the denial of a hearing on the issue of his pain management treatment, the suspension of his right to compensation and the denial of his request for reconsideration dated December 23, 1997. In an October 18, 1998 letter, appellant appealed the August 25, 1997 schedule award decision.

The Board finds that the Office properly denied appellant's request for reconsideration.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that, when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the

claim.[6] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[7] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[8]

Appellant submitted numerous medical reports and documents which had been submitted previously and which had been considered by the Board in previous appeals. He also submitted additional reports from Drs. Bethel, Arvanaghi and Kenmore which discussed appellant's pain and need for pain management treatment which is not relevant to the issue of whether appellant had any disability after July 30, 1989 causally related to his employment injuries. Drs. Bethel and Kenmore related appellant's pain to his employment injury but these statements are repetitive of previous statements by Drs. Bethel and Kenmore. The medical reports therefore are insufficient to require further review of the Office's and the Board's decisions on this matter.

Appellant has contended that Dr. Harris was improperly designated as an impartial specialist after appellant was referred to him for an examination. A review of the record shows that Dr. Harris was designated as an impartial medical specialist by the Office at the time he was requested to examine appellant. In its February 8, 1988 letter, which referred appellant to Dr. Harris, the Office did not state that the purpose of the examination was to resolve a conflict in the medical evidence. Rather, the Office indicated that the evaluation was for further examination and indicated that appellant could have a physician of his choice present at the examination. Therefore, the Office, in the February 8, 1988 letter, treated the referral to Dr. Harris as a referral for a second opinion, not for the purpose of resolving a conflict in the medical evidence. However, based on further development of the medical evidence, Dr. Harris' status is rendered moot. Appellant was referred to Dr. Duke for an impartial medical evaluation and was properly informed that this examination was for the purpose of resolving a conflict in the medical evidence. The medical evidence in appellant's case has been fully and appropriately reviewed. As a result of this subsequent development of the medical evidence, any error in the designation of Dr. Harris as an impartial medical specialist is moot.

The Board further finds that the Office's February 3, 1998 decision denying appellant's request for a hearing was improper.

The Office, in its decision, indicated that appellant had requested a hearing based on an August 25, 1997 decision. The record shows that the Office issued two decisions on August 25, 1997, one denying the request for pain management treatment and the other reaffirming the schedule awards for his legs and his left arm. Appellant requested hearings before an Office hearing representative on both decisions. As the February 3, 1998 decision of the Office did not distinguish between these decisions and requests for a hearing, the Board will treat the decision as referring to both of appellant's requests for a hearing. Appellant's appeal regarding the pain management treatment was contained in an August 7, 1998 letter to the Board. The Board's jurisdiction extends to decisions issued by the Office within one year prior to the appeal to the

[6] 20 C.F.R. § 10.138(b)(2).

[7] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[8] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

Board.[9] While the Board, therefore, would have jurisdiction to consider the denial of appellant's request for pain management treatment, appellant only appealed the decision denying his request for a hearing on this issue. The Board's decision will therefore be restricted to consideration of the February 3, 1998 decision. Appellant did not state any request to seek an appeal of the schedule award decision until an October 18, 1998 letter. The Board, therefore, does not have jurisdiction to review the Office's August 25, 1997 decision issuing the schedule awards. In regard to the issue of schedule awards, the Board only has jurisdiction to consider the denial of appellant's request for a hearing on the issue of his schedule awards.

The Office found that appellant was not entitled to a hearing because his request was made more than 30 days after the August 25, 1997 decisions. The record shows that the requests were made in separate letters addressed to the Office's Branch of Hearings and Review, dated September 19, 1997 and date stamped as received by the Office on October 17, 1997. The envelope contained in the case record does not reveal a postmark nor a stamp. The Office's procedures require that, if a letter requesting a hearing is sent to a district branch of the Office and the envelope with the postmark is not retained, then the timeliness of the request will be judged by the date stamp. Requests for hearings addressed to the Branch of Hearings and Review are required to retain the envelope.[10] However, the Office's procedures do not address the circumstance of the absence of a postmark on the envelope. In this circumstance, other evidence of timeliness must be considered. The record does not contain any other evidence such as affidavits, mail receipts or certification documents. The record, however, does contain an October 17, 1997 letter from the Chief of the Office's Branch of Hearings and Review to appellant's congressional representative. In that letter, the Office stated that appellant's case record was requested by the Branch of Hearings and Review from a district branch of the Office on September 23, 1997. He indicated that the case record would be reviewed and appellant would be advised of his entitlement to an oral hearing. In an October 24, 1997 letter, the Office informed appellant that his case record had been requested on September 23, 1997 and he would be advised of his entitlement to a hearing. These statements that the case record was requested on September 23, 1997, provides evidence that appellant made, and the Office received, appellant's September 19, 1997 request for a hearing within 30 days of the Office's August 27, 1997 decision denying the pain management treatment. So as to protect appellant's right to a hearing, the Board will, under these circumstances, use the date of appellant's letter, in conjunction with the Office's letters, as evidence on the timeliness of mailing the request for a hearing.[11] Appellant's request for a hearing on the denial of pain management treatment therefore was timely. As a result, the case will be remanded for a hearing on that issue.

Under the same rationale, appellant's request for a hearing on the issue of the schedule awards would be considered timely. However, appellant has already had a hearing on the issue of his schedule awards in which an Office hearing representative, in a May 24, 1995 decision, affirmed the schedule awards issued by the Office on February 25, 1995, which was identical to

[9] 20 C.F.R. § 501.3(d).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (June 1997).

[11] *See Gus N. Rodes*, 43 ECAB 268 (1991).

the August 25, 1997 decision. The Board's August 22, 1996 order did not set aside the May 24, 1995 decision but only remanded the case for reconstruction of the case record to be followed by an appropriate decision to protect appellant's right to appeal. Appellant, therefore, is not entitled to a second hearing on the same issue.[12] The Office's denial was based on the grounds that the request for a hearing was untimely, not on the grounds appellant had previously received a hearing on the same issue. The case will be remanded for the Office to exercise its discretion on whether appellant should be granted a second hearing on the issue of his schedule awards under the circumstances of this case.

The Board also finds that the Office properly suspended appellants right to compensation for obstruction of a medical examination.

Section 8123(a) of the Federal Employees' Compensation Act authorizes the Office to require an employee who claims compensation for an employment injury to undergo such physical examination as it deems necessary. The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office. If an employee refuses to submit to or obstructs an examination, his or her right to compensation is suspended until the refusal or obstruction stops.[13] A time must be set for the examination and appellant must fail to appear for that appointment without an acceptable excuse or reason before the Office can suspend appellant's entitlement to compensation on the grounds that he failed to submit to or obstructed a medical examination.[14]

In this case, the Office referred appellant to Dr. Levitt for a second opinion examination to determine whether he had an employment-related condition of his feet, which would entitle him to an additional schedule award, and whether he had residuals of his employment injuries. He was warned of the penalties if he did not appear for the scheduled examination. Appellant failed to appear for the September 4, 1997 examination. The examination was rescheduled for September 23, 1997. In a September 22, 1997 letter, appellant indicated that he refused to undergo an examination until his schedule award was finalized. He did not appear for the September 23, 1997 examination. Appellant's reason for his refusal to undergo the examination was not a proper reason as the purpose of the examination was to assist in further development of the schedule award issue. A claimant cannot use participation in a medical examination as leverage or a bargaining chip to force the Office to comply with his requests for action in his case. The Office therefore properly suspended appellants right to compensation.

The decisions of the Office of Workers' Compensation Programs, dated February 3, 1998 and December 23, 1997, are hereby set aside and the case remanded for further action in accordance with this decision. The decision of the Office, dated October 29, 1997, is hereby affirmed.

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[12] *Mary G. Allen*, 40 ECAB 190 (1988); *Fred Tripo*, 34 ECAB 290 (1982).

[13] *Herbert L. Dazey*, 41 ECAB 271 (1989).

[14] *Delores W. Loges*, 38 ECAB 834 (1987).

Dated, Washington, DC
December 4, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member