U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN L. JOHNSON and U.S. POSTAL SERVICE,
POST OFFICE, Austin, TX

Docket Nos. 99-1892; 99-2382; and 00-120; Submitted on the Record;
Issued July 16, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective December 17, 1998; (2) whether appellant has established that he sustained a recurrence of disability on and after December 10, 1998 causally related to his August 23, 1998 employment injury; and (3) whether the Office properly denied appellant's request for a hearing pursuant to 5 U.S.C. § 8124.

On August 23, 1998 appellant, then a 50-year-old temporary casual clerk, sustained an injury to his left foot when a forklift ran over it. Appellant stopped work on September 1, 1998 and returned to modified duty on November 1, 1998. By letter dated September 18, 1998, the Office accepted the claim for fracture to the left great toe and paid appropriate benefits. Appellant was terminated from the employing establishment on or about December 10, 1998 for failure to report additional income from outside employment while in receipt of federal compensation benefits. Appellant filed a Form CA-8 for compensation benefits for December 10, 1998 and beyond.

In a report dated October 12, 1998, Dr. James A. Bowden, a Board-certified orthopedic surgeon, provided a history of injury and noted that x-rays taken that day revealed no fractures of the toes other than a preexisting fracture of the 5th metatarsal. Appellant had a lot of dysesthesias and soreness and pain. There was no swelling on examination, just a sore foot. Clinically, there was no deformity. The nail bed on the third toe, which was removed, was growing back and was almost two months post injury. There was no structural abnormality, no sensory abnormality for protective sensation, no signs of infection and no signs of other abnormality which might need a surgical procedure. Dr. Bowden stated that appellant's crush injury was resolving and opined that appellant had not been left with any kind of chronic edematous foot at this point. Appellant was advised to begin walking in a normal fashion and to quit limping.

In a report dated December 10, 1998, Dr. Will Gaines, a Board-certified internist specializing in occupational medicine, reported that appellant returned for a follow-up of his left third toe. He listed appellant's complaints regarding his left foot, regarding a supervisor screaming and retaliating against him and regarding hand and arm numbness at night from repeated motion at his jobs. Dr. Gaines stated that he was unable to elicit any factors, which appellant was doing at his current job that could account for this. Appellant also complained about his high blood pressure being related to his original injury. Dr. Gaines noted that appellant has refused to attempt to wear another shoe and continued to use the cast boot in spite of repeated recommendations to stop using it. He stated that observation of appellant walking in and out of the clinic revealed no evidence of any footdrop, stumbling, or trouble walking. However, once in the examination room, appellant refused to bear weight on the left foot, would lean forward, grab onto the examination table, hop over onto the right foot and then climb up onto the examination table. The skin examination of the left foot showed some age-related changes, but otherwise no hyperemia, no coldness, no redness or sweating. The skin was fully healed over the left third toe and dorsum of the foot. Musculoskeletal examination revealed a completely normal passive range of motion of the foot and toes with no complaint of pain while going through the range of motion exercises. Neurologic examination revealed normal sensation to sharp touch, normal Babinski on left foot, a normal deep tendon reflex at the left ankle. Motor strength against resistance was normal, except for appellant's cogwheeling and breaking away when extending the toes against resistance. Vascular and distal pulses were intact. Capillary refill over the toes was normal. A crush injury to the left toe was diagnosed along with left upper extremity pain and hypertension. Dr. Gaines noted that appellant refused to follow directions and alleged that he suffered severe nerve damage. Dr. Gaines noted no clinical documentation of any nerve damage on repeated examinations. Dr. Gaines stated that appellant exhibited high levels of nonorganic behavior during the course of his visits. Appellant was referred to Dr. James Albers, Board-certified in physical medicine and rehabilitation, for an evaluation of his continued complaints of pain.

In a December 14, 1998 report, Dr. Albers provided a history of injury and noted that the original x-ray films taken approximately six days after appellant's injury showed a prior fracture of the fifth metatarsal, which was felt to be an old fracture which had healed. There were no acute fractures attributable to the accepted injury. Appellant apparently had some swelling about his third toe and had the nail cut off in the emergency room when he had the x-rays. He noted that Dr. Bowden, an area orthopedist, thought appellant had dysesthesias in the foot from the crush area, but stated repeat x-rays of the area did not show any evidence of a fracture. Dr. Albers provided his findings on examination and diagnosed "multifactorial" left foot pain along with sleep disturbance and work problems. Dr. Albers opined that the pain was neuropathic. He noted that appellant's sensory deficit could be suggestive of a common peroneal nerve injury, but stated the mechanism of injury was not consistent. Appellant's complaints of numbness were more consistent with the sural distribution. Dr. Albers stated that appellant's motor examination was not overly helpful because of giveaway and stated that there was no obvious loss of muscle bulk. There was no evidence of reflex sympathetic dystrophy. He noted that appellant was having a lot of trouble sleeping and suspected that this more likely stress related. Dr. Albers advised that if the pain persisted for a couple of months, electrodiagnostics might be considered, but stated that he did not think it would be helpful.

In a December 17, 1998 report, Dr. Gaines noted that appellant was still wearing the cast boot, but walked with a normal, nonantalgic gait both before and after examination. He noted that, although Dr. Albers related that appellant may have suffered some contusions to the digital nerves in the peroneal or sural area of the right foot, this was questionable due to his inconsistency in testing. Dr. Gaines stated that he had yet to find any objective evidence related to the initial injury, or any evidence of ongoing problems such as consistent paresthesias, weakness, symptoms consistent with reflex sympathetic dystrophy, or evidence of any other trauma. Dr. Gaines explained to appellant that he was to resume normal activities and to quit wearing the cast boot. Appellant told Dr. Gaines that he had no intention to quit wearing the cast boot any time in the near future. Dr. Gaines advised appellant that there were no further options as there was medical concurrence that there was no evidence of serious injury.

The Office referred appellant and a statement of accepted facts to Dr. Donald Mauldin, a Board-certified orthopedic surgeon specializing in the foot and ankle, for a second opinion evaluation on January 28, 1999. Appellant objected to traveling to the Dallas area for financial reasons. The Office rescheduled the examination for February 16, 1999 and provided plane tickets. Appellant told Dr. Mauldin's office that he was refusing to attend the appointment and Dr. Mauldin advised the Office that he did not wish to evaluate appellant.

In a report dated February 12, 1999, Dr. Gaines provided a full-duty release based upon his December 17, 1998 examination.

By letter dated February 18, 1999, the Office issued a notice of proposed termination of compensation. The Office concluded that the medical and factual evidence did not support ongoing disability or residuals related to appellant's work injury of August 23, 1998.

On February 26, 1999 appellant filed a notice of recurrence claim, Form CA-2a, alleging that he experienced occupational stress and racism precipitated by the employing establishment, a conflict with his supervisor and that he was "run over by forklift on the job with evil intent" by a fellow employee. He submitted copies of medical receipts and previously submitted medical evidence, letters to congressional offices, letters from the employing establishment regarding his removal from employment, a U.S. District Court Petition and an eight-page statement charging the employing establishment with cruel and unusual punishment and civil rights violations.

On February 26, 1999 appellant submitted a 37-page rebuttal challenging the proposed termination of compensation benefits. Exhibits numbered "B" through "QQQ" were submitted. These consisted of medical reports already on file, appointment slips, eviction notices, a petition against appellant's supervisor alleging abuse and discrimination, an unemployment benefit denial, notification of separation from the employing establishment for failure to report his employment with the Waco Independent School District and various letters from the Office and the employing establishment.

By decision dated March 23, 1999, the Office terminated appellant's compensation benefits finding that he had recovered without residuals no later than December 17, 1998.

By decision dated March 23, 1999, the Office also denied appellant's recurrence claim, finding it was not causally related to the accepted injury of August 23, 1998.

In a letter postmarked April 23, 1999, appellant requested a hearing on the Office's March 23, 1999 decisions.

By decision dated May 24, 1999, the Office denied appellant's request for a hearing from the March 23, 1999 decisions, finding the request was not timely. The Office noted further considering the request, but found that appellant could have the matter equally well addressed by requesting reconsideration from the Office.

Appellant appealed to the Board on April 24, 1999 regarding the decisions of March 23, 1999, terminating compensation and denying his claim for a recurrence of disability. The appeal was docketed as No. 99-1892. On June 8, 1999 appellant requested review of the Office's decision dated May 24, 1999, denying his request for a hearing. The appeal was docketed as No. 99-2382. On September 3, 1999 appellant again appealed to the Board requesting review of the Office's decision of May 24, 1999 and an August 18, 1999 letter. An appeal was assigned Docket No. 00-120.

The Board notes that, pursuant to section 501.2(c) of its *Rules of Procedure*,[1] the Board has "jurisdiction to consider and decide appeals from the final decision of the Office in any case arising under the [Federal Employees' Compensation] Act." Such final decisions must contain findings of fact and a statement of reasons explaining the Office's decision and must be accompanied by appeal rights.[2] In this regard, the August 18, 1999 letter to appellant from Branch of Hearings and Review merely advised appellant that the May 24, 1999 decision remained in effect and apologized for any confusion a subsequent letter of May 25, 1999 may have caused. Since this letter is purely informational in nature, it does not constitute a final Office decision from which appellant may properly appeal. With respect to the Office's decision dated May 24, 1999, the denial of a hearing, it is noted that the Board previously docketed this appeal under No. 99-2382. For this reason, the Board concludes that the appeal docketed as No. 00-0120 should be dismissed. As it is duplicative of the appeal in docket No. 99-2382. Accordingly, it is ordered that the appeal docketed as No. 00-0120 be and hereby is dismissed.[3]

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits on the basis that the medical evidence of record establishes that his injury-related medical condition ceased no later than December 17, 1998.

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment. Thus, the burden of proof is on the Office rather than the employee with

[1] 20 C.F.R. § 501.2(c).

[2] *See Elaine Pendleton*, 40 ECAB 1143 (1989); *see also* 20 C.F.R. § 501.2(c).

[3] The Board notes that, in the event the Office has issued a final decision since September 3, 1999, appellant has up to one year subsequent to the date of issuance, in which to file an appeal of that decision with the Board; *see* 20 C.F.R. § 501.3(d)(2).

respect to the period subsequent to the date when compensation is terminated or modified.[4] In the present case, the Office accepted appellant's claim for a fracture of the left great toe.

The Board notes that the Office properly terminated appellant's compensation effective December 17, 1998, in that the weight of medical evidence established that appellant was no longer disabled as a result of the August 23, 1998 work injury. In his report of February 12, 1999, Dr. Gaines released appellant to full duty based upon his December 17, 1998 examination of appellant. In his December 17, 1998 examination, Dr. Gaines found no evidence of any ongoing disability or residuals of the injury, such as paresthesis, weakness, symptoms consistent with reflex sympathetic dystrophy, or any other trauma. He noted that Dr. Albers indicated that, although appellant could have sustained contusions to the digital nerves in the peroneal or sural area of the foot, this was a questionable diagnosis due to appellant's inconsistency in testing on physical examination. Dr. Gaines noted that appellant no longer needed or required use of the boot cast. Appellant was advised by Dr. Gaines to resume normal activities and to quit wearing the boot cast. In his December 14, 1998 report, Dr. Albers found that appellant's multifactorial pain problems were not related to his accepted employment injury. Specifically, he noted that repeated x-rays of the foot did not show any evidence of a new fracture and, thus, ruled out dysesthesias in the foot from the crush area. Dr. Albers opined that, although appellant's pain was neuropathic, no specific nerve could be isolated as appellant's examination was not consistent with a common peroneal nerve injury. No objective findings were noted. In his report of October 12, 1998, Dr. Bowden found no objective evidence of any structural abnormality, sensory abnormality, signs of infection or any other abnormality and stated that appellant's crush injury was resolving appropriately. The medical evidence clearly establishes that appellant's accepted crush injury resolved as of December 17, 1998 and there is no objective evidence to support disability for work or residuals after that date. Accordingly, the Board finds that the weight of the medical evidence is sufficient to establish that appellant's disability related to his August 23, 1998 injury ceased by December 17, 1998. Moreover, as appellant was working limited duty until he was terminated for cause, appellant's work stoppage on December 10, 1998 was related to his own actions and not due to residuals of the accepted injury. None of the exhibits appellant submitted with his rebuttal establish any ongoing residuals related to his work injury.[5] It is further noted that appellant's description of his injury is exaggerated beyond the initial reported description of August 29, 1998, for which he underwent appropriate medical treatment.

Although appellant contendes that there had never been a full-duty release by Dr. Gaines, the record reflects that Dr. Gaines provided a full-duty release to the Office on February 12, 1999 based on his December 17, 1998 examination and report. As earlier noted, the December 17, 1998 report advised appellant to resume his normal activities and noted the concern of Dr. Gaines regarding appellant's continued use of the cast boot, as there was no medical need for its use. The Board finds that the reports of Dr. Gaines, appellant's treating

[4] *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922 (1989); *Edwin L. Lester*, 34 ECAB 1807 (1983).

[5] Appellant submitted medical reports already on file, appointment slips, eviction notices, a petition against appellant's supervisor alleging abuse and discrimination, an unemployment benefit denial, notification of separation from the employing establishment for failure to report employment with the Waco Independent School District and various letters from the Office and the employing establishment addressed to appellant.

physician, are sufficient to establish that appellant's disability due to his accepted foot injury had resolved by December 17, 1998.

The medical evidence submitted subsequent to the termination decision, which includes the evidence in appellant's recurrence claim, is also insufficient to establish any continued injury-related disability beyond December 17, 1998. The only new medical evidence of record is an April 15, 1999 report from Dr. Brett J. Bolte, Board-certified in physical medicine and rehabilitation, who noted that appellant was a very exaggerated historian[6] and reviewed the medical records from October to December 1998. Results of the examination were reported and an impression of "complaints of left foot pain with normal foot examination" was provided. Dr. Bolte noted that he could find nothing wrong with appellant's foot and that appellant had no limitations in function. Accordingly, there is no evidence contrary to the Office's conclusion that appellant's disability related to his August 23, 1998 work injury ceased by December 17, 1998.

The Board further finds that appellant has not established that he sustained a recurrence of disability on and after December 10, 1998 causally related to his August 23, 1998 employment injury.

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[7]

The record reflects that at the time of the claimed recurrence, December 10, 1998, appellant was working modified duty. He was terminated on or about December 10, 1998 for cause. The record further reflects that the Office advised appellant in a letter dated January 27, 1999, the type of factual and medical evidence needed to support a recurrence of disability claim. The only new medical evidence was the April 15, 1999 report of Dr. Bolte which, as noted above, presented a normal foot examination with no limitations in function. Although appellant has alleged racism, abuse by the employing establishment and submitted evidence of his removal from the employing establishment, these materials are irrelevant as the question as to appellant's alleged disability is medical in nature. The evidence submitted does not establish that appellant's limited-duty work has changed or that there was a change in his injury-related condition. There is no factual or medical evidence to show that there was a change in appellant's limited-duty assignment or a worsening of appellant's medical condition and appellant has failed to meet his burden of proof.

[6] Dr. Bolte noted that appellant initially claimed there were multiple broken bones then stated that "there was some controversy about the fractures," and then stated that there were no fractures. He further stated that when appellant was asked whether he had "reconstructed surgery," he stated that he did not but went on to say in fact that all it was was a nail removed from the left foot.

[7] *Terry R. Hedman*, 38 ECAB 222 (1986).

The Board further finds that the Office properly denied appellant's request for a hearing of its March 23, 1999 decisions, under section 8124(b) of the Act.

The Office, in its 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 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,[8] when the request is made after the 30-day period established for requesting a hearing,[9] or when the request is for a second hearing on the same issue.[10] 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.[11]

In the present case, appellant's request for a hearing on the Office's March 23, 1999 decisions was made more than 30 days after the date of issuance of that decision and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter postmarked April 23, 1999, the 31st day following issuance of the Office's decisions. Hence, the Office was correct in stating in its May 24, 1999 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's March 23, 1999 decisions.

While the Office has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office properly exercised its discretion by considering 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 requesting reconsideration and submitting additional evidence to establish that he continues to suffer residual disability due to a work-related medical condition. 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 probable deduction from established facts.[12] 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.

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

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

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

[11] *Sandra F. Powell*, 45 ECAB 877 (1994).

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

The May 24 and March 23, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.[13]

Dated, Washington, DC
July 16, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[13] The Board notes that appellant's appeal to the Board was accompanied by new evidence. The Board's jurisdiction on appeal is limited to a review of the evidence which was in the case record before the Office at the time of the final decision; *see* 20 C.F.R. § 501.2(c). Therefore, the Board is precluded from reviewing this evidence. Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 10.606(b) (1999). The Board further notes that appellant filed an additional form CA-2 claims on July 28, 1999 for lower and upper lumbar injury, mental and emotional distress, which he alleged arose from his original injury of August 23, 1998. As no final decision has been issued on these claims, the Board is precluded from reviewing this evidence. Lastly, the Board notes that the case record from pages 2161 to 2185 pertain to a different claimant.