U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN E. BEATTY and DEPARTMENT OF THE NAVY, MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

Docket No. 02-1452; Submitted on the Record;
Issued April 21, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's compensation benefits effective October 7, 2001; and (2) whether the Office properly found that appellant had abandoned his request for a hearing before an Office hearing representative.[1]

On October 22, 1982 appellant, then a 32-year-old pipe fitter, filed a claim alleging that during the week of November 19, 1981, he sustained an injury to his left knee while in the performance of duty. Appellant stopped work on February 1, 1982, returned to light duty on February 23, 1982 and returned to full unrestricted duty as a pipe fitter within six months. The Office accepted appellant's claim for a left medial meniscus tear and arthroscopic surgery and paid all appropriate compensation benefits, including a schedule award for a two percent permanent impairment of the left lower extremity. On February 5, 1992 appellant, then a 43-year-old work control director, filed a claim for a traumatic injury alleging that he injured his back in the performance of his duties. Appellant stopped work on February 6, 1992 and returned to full unrestricted duty as a work control director on February 11, 1992. The Office accepted appellant's claim for a subluxation at L5 and paid all appropriate compensation benefits.

[1] This case has previously been before the Board. In an order issued September 24, 2002, the Board remanded this case to the Office for reconstruction and proper assemblage of the case record, followed by the issuance of an appropriate decision. On November 26, 2002 the Board issued a second order again remanding the case to the Office for reconstruction and proper assemblage of the case record, followed by the issuance of an appropriate decision. On December 19, 2002 the Director of the Office filed a "Petition to Set Aside Order Remanding Case and Submission of the Record." The Director requested that the Board set aside its November 26, 2002 remand order and stated that "the case record … is hereby transmitted for decision by the Board." The case record was transmitted to the Board on December 19, 2002. Appellant was served with a copy of the Director's petition and filed an answer, which requested that his appeal go forward. In an order issued February 5, 2003, the Board granted the Director's request for reconsideration and the appeal is now going forward.

On April 1, 1996 the employing establishment closed. At the time of the base closure, appellant's official job classification was that of mechanical systems inspector. Appellant retired and began receiving OPM benefits. However, appellant subsequently elected to receive the Office compensation benefits, effective April 2, 1996. Appellant was referred for vocational rehabilitation, but chose to pursue his own educational goals instead.

In support of his claim for continuing compensation benefits, appellant submitted periodic medical reports and treatment notes from his treating physician, Dr. James O. Gemmer, a Board-certified orthopedic surgeon, documenting his condition and progress.

By letter dated February 28, 2001, the Office referred appellant together with a statement of accepted facts and a list of questions to be addressed, to Dr. Thomas D. Schmitz, a Board-certified orthopedic surgeon, for a second opinion. In a report dated March 23, 2001, Dr. Schmitz reviewed appellant's history and the prior medical evidence and recorded his findings on physical examination. He diagnosed degenerative arthritis of the lumbar spine and status postmedial meniscectomy, left knee. He explained that appellant's lumbar condition was due to the natural progression of the disease, appellant's weight and his nonindustrial diabetes mellitus and was not related to appellant's accepted work injury. Dr. Schmitz concluded that, at the time of his physical examination, appellant had no injury related factors of disability. He further stated that appellant had no physical restrictions due to his left knee condition, but stated that he should work within certain physical restrictions in order to accommodate his underlying back condition.

In response to Dr. Schmitz's report, appellant submitted a May 3, 2001 report from Dr. Gemmer, his treating physician. He stated that, while admittedly, appellant's disability was not severe, appellant continued to have ongoing problems with his left knee and low back and estimated that 50 percent of appellant's back and knee problems were related to the degenerative process and 50 percent were related to his employment injuries.

The Office found that there was a conflict in the medical evidence between Dr. Schmitz, the Office referral physician and Dr. Gemmer, appellant's treating physician, regarding whether appellant continued to have residuals from his February 5, 1992 or November 19, 1981 accepted conditions. An impartial medical examination was scheduled with Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon.

In a June 6, 2001 report, Dr. Auerbach reviewed the medical evidence of record, a statement of accepted facts and a list of questions to be addressed. After noting his findings on physical examination, Dr. Auerbach stated:

> "The patient's left knee diagnosis is history of a left knee injury and medial meniscus tear in November 1981, post [February 1, 1982] left knee arthroscopic partial medial meniscectomy, with an excellent result….
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> "The left knee condition at this time is not mechanically connected with the one week of cumulative trauma to [November 19, 1981] as described in the statement of [a]ccepted [f]acts either by direct cause, aggravation, precipitation or acceleration. The [appellant] originally had a left knee injury and meniscus tear,

> [cumulative trauma] to [November 19, 1981], that was treated by arthroscopic surgery, in 1982 from which he essentially recovered completely and returned to his regular workload. After that over the years because of complications of diabetes, overweight and a nonindustrial right knee problem he developed accelerated degenerative arthritis of the left knee secondary to natural progression of same. Thus, the [appellant's] present left knee problem is in no way related to the original injury, cumulative trauma to [November 19, 1981], as I believe he had completely recovered from that original injury and surgery.
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> "As far as the back in concerned, the diagnosis is established. He has chronic degenerative disc disease and arthritis, without present evidence of active or chronic nerve root irritation from the back into either low extremity.
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> "The diagnosed condition is not medically connected to a specific injury of [February 5, 1992], which appeared to be an L5 subluxation traumatic injury from which he has recovered. The [appellant] developed a natural progression of degenerative disease in the lumbar spine related to poor conditioning, overweight and his nonindustrial medical condition of diabetes mellitus. He has long since recovered from the specific incident of [February 5, 1992]."

Dr. Auerbach concluded that appellant has no permanent residuals of either his November 19, 1981 left knee injury or February 5, 1992 low back injury and, therefore, has no physical limitations resulting from either accepted condition. He explained that, while appellant does have physical limitations, these are causally related to his overweight and deconditioned state, his prior nonindustrial right knee problem and to the nonindustrial natural progression of degenerative arthritis of the low back and degenerative joint disease of the left knee. On an accompanying work capacity evaluation form, Dr. Auerbach reiterated that appellant had no physical limitations causally related to his accepted employment injuries.

On August 17, 2001 the Office issued a notice of proposed termination of wage-loss compensation and medical benefits to appellant. The Office found that the weight of the medical evidence, as represented by Dr. Auerbach's referee opinion, established that he had no residuals of his employment-related injuries and that any physical limitations were not based on his employment injuries. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not respond.

By decision dated September 19, 2001, the Office terminated appellant's compensation, effective October 7, 2001.

By letter dated September 29, 2001 and postmarked October 2, 2001, appellant requested an oral hearing before an Office representative. He did not submit any additional evidence or arguments with this request.

By letter dated October 23, 2001, the Office acknowledged appellant's request for an oral hearing.

In a response dated November 23, 2001, appellant notified the Office that its October 23, 2001 letter had been sent to an incorrect address.

By letter dated February 13, 2001, sent to appellant's correct address, the Office informed appellant that a hearing would be held on March 26, 2001.

In a decision dated April 8, 2002, the Office found that appellant abandoned his request for a hearing, as he failed to appear at the time and place set for the hearing and did not show good cause for his failure to appear.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective October 7, 2001.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his 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.[3] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[4] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.[5]

In this case, appellant's treating physicians continued to support appellant's disability and need for medical treatment due to his accepted conditions. In a report dated March 23, 2001, Dr. Schmitz, a Board-certified orthopedic surgeon and Office referral physician, opined that appellant's accepted conditions had resolved and that appellant had no injury related factors of disability.

Section 8123(a) of the Federal Employees' Compensation Act[6] provides, "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." In this case, in accordance with the Act, the Office referred appellant for an impartial medical evaluation by Dr. Auerbach, a Board-certified orthopedic surgeon. In his June 6, 2001 report, Dr. Auerbach advised that there are no permanent residuals of either appellant's November 1981 left knee injury or February 5, 1992 low back injury and that, therefore, appellant has no physical limitations resulting from either accepted condition. The Office relied on Dr. Auerbach's opinion in its September 19, 2001 termination decision, finding that appellant's employment-related conditions had resolved.

In situations were there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[3] *Id.*

[4] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[5] *Id.*

[6] 5 U.S.C. §§ 8101-8193, 8123(a).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[7] The Board finds that as Dr. Auerbach's opinion was based on a proper factual background and based on objective physical findings in support of his conclusion that appellant had no residuals of his accepted employment injuries, his report is entitled to the weight of the medical evidence. Although Dr. Auerbach recommended that appellant work within certain physical restrictions, he explained that these are not a result of the employment injuries, but causally related to appellant's overweight and deconditioned state, his prior nonindustrial right knee problem and to the nonindustrial natural progression of degenerative arthritis of the low back and degenerative joint disease of the left knee. Therefore, the Office properly relied on this report in determining that appellant was no longer entitled to compensation, effective October 7, 2001.

Dr. Auerbach's report established that appellant ceased to have any residuals of his accepted conditions or any disability causally related to his employment, thereby justifying the Office's termination of benefits effective October 7, 2001.[8]

The Board also finds that appellant abandoned his request for a hearing before an Office hearing representative.

In a decision dated April 8, 2002, the Office found that appellant abandoned his September 29, 2001 request for an oral hearing before an Office hearing representative. The Office noted that the hearing was scheduled for March 26, 2002, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain his failure to appear.

Section 10.137 of Title 20 of the code of federal regulations, revised April 1, 1997 previously set forth the criteria for abandonment:

> "A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant.
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> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for hearing that another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[9]

These regulations, however, were again revised April 1, 1999. Effective January 4, 1999 the regulations now make no provision for abandonment. Section 10.622(b) addresses requests

[7] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

[8] *See Joe Bowers*, 44 ECAB 423 (1993).

[9] 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.[10] Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

> "e. *Abandonment of Hearing Requests*.
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> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present:
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> > [T]he claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
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> "Under these circumstances, [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district Office]. In cases involving prerecoupment hearings, [Branch of Hearings and Review] will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.
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> "(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, [Branch of Hearings and Review] should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.
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> "This course of action is correct even if [Branch of Hearings and Review] can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[11]

In this case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on March 26, 2002. The record shows that while a prior letter to appellant had been sent to an incorrect address, the Office mailed appropriate notice of the oral hearing to appellant at his last known correct address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the

[10] 20 C.F.R. § 10.622(b) (1999).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).

Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

The decisions of the Office of Workers' Compensation Programs dated April 8, 2002 and September 19, 2001 are hereby affirmed.

Dated, Washington, DC
April 21, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member