United States Department of Labor
Employees' Compensation Appeals Board

J.Z., Appellant	)	
and	)	**Docket No. 09-576**
	)	**Issued: December 11, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Islandia, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 23, 2008 appellant filed a timely appeal[1] from an Office of Workers' Compensation Programs' nonmerit decision dated November 6, 2008 which denied his request for a hearing and an August 13, 2008 merit decision that terminated his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim and the denial of his request for a hearing.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective August 30, 2008; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

[1] Appellant requested an oral argument before the Board, which was originally scheduled for May 14, 2009. The oral argument was rescheduled for July 10, 2009 and then September 22, 2009. In an order dated September 16, 2009, the Board denied appellant's September 9, 2009 request to reschedule the September 22, 2009 oral argument. As appellant did not appear for the September 22, 2009 oral argument, the case will proceed with a decision on the record.

FACTUAL HISTORY

On February 7, 2005 appellant, then a 46-year-old clerk, filed a traumatic injury claim alleging that he injured his left knee and lower back in the performance of his federal duties. He stated that he was unloading a truck when a container tipped over and he jumped off the truck. Appellant stopped work on February 7, 2005 and has not returned. The Office accepted the claim for lumbar sprain and strain and paid appropriate compensation benefits.

By letter dated August 15, 2006, the Office referred appellant to Dr. Wayne Kerness, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Kerness was provided with appellant's medical record, a statement of accepted facts and a list of questions. In a September 8, 2006 report, he reviewed the history of injury, the medical records and presented his findings on examination. Dr. Kerness diagnosed mild lumbar radiculopathy and advised that appellant had not reached maximum medical improvement. He opined that appellant's disability was related to the work injury and that he was able to work light duty with restrictions of no heavy duty and no repetitive bending.

Dr. Nicholas R. Harding, a Board-certified orthopedic surgeon and appellant's treating physician, reported that his lumbar condition was employment related, totally disabling and might require back surgery.

The Office determined that a conflict in medical opinion arose between Dr. Kerness, the second opinion physician, and Dr. Harding, appellant's physician, regarding his ability to work. It referred appellant, together with a statement of accepted facts and the medical record, to Dr. Noah S. Finkel, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.

In a November 27, 2006 report, Dr. Finkel reviewed the history of injury and medical treatment. He conducted a physical examination and listed an impression of lumbosacral strain and myofascial lower back pain. Dr. Finkel noted that appellant had preexisting degenerative disc disease and despite his subjective symptomatology, a comprehensive review of the medical records and examination did not indicate any evidence of neurological loss. Appellant's complaints were all left sided while the magnetic resonance imaging (MRI) scan indicated a right-sided L4-5 disc. Dr. Finkel opined that appellant had recovered from the accepted lumbar sprain and there were no further diagnostic or treatment modalities related to the work injury. He opined that appellant was able to return to full-time employment with restrictions on heavy lifting and movement of large and heavy bags of mail but that such restrictions were premised not on the employment injury but on the preexisting degenerative disc disease in the lumbosacral area. Dr. Finkel further opined that there were no objective permanent residuals as a result of the accepted conditions and appellant had reached maximum medical improvement.

On October 3, 2007 the Office issued a notice of proposed termination of compensation, advising that the weight of the medical evidence, as represented by the report of Dr. Finkel, established that residuals of the February 7, 2005 injury had ceased.

In reports dated January 12, 2006 and October 15, 2007, Dr. Alexandre B. de Moura, a Board-certified orthopedic surgeon, advised that appellant's symptoms remained unchanged

since his last visit. He diagnosed lumbar radiculitis and lumbar herniated nucleus pulposus. Dr. de Moura stated that appellant was temporarily totally disabled and recommended a lumbar discectomy.

Appellant also submitted pain management notes dated November 21, 2007 and February 25, 2008, from a physician with an illegible signature. He had no new focal neurological defects on examination and he was to continue on the same medical regime.

By decision dated August 13, 2008, the Office terminated appellant's compensation benefits effective August 30, 2008.

In a letter dated September 19, 2008, appellant requested an oral hearing before a hearing representative. The Office received the letter on September 25, 2008.

By decision dated November 6, 2008, the Office denied appellant's hearing request as untimely and determined that his claim could be addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] Having determined that, an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[3] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

Section 8123(a) of the Federal Employees' Compensation Act provides that, 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.[5] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

ANALYSIS -- ISSUE 1

The Office found a conflict of medical opinion arose regarding appellant's ability to work as a result of the February 7, 2005 work injury. Dr. Kerness, an Office referral physician, opined that appellant was able to work light duty with restrictions as a result of his employment-related

[2] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[3] *Id.*

[4] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[5] *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

[6] *Gary R Sieber*, 46 ECAB 215, 225 (1994).

condition. Dr. Harding, appellant's physician, supported ongoing employment-related disability due to the accepted conditions. The Office properly referred appellant to Dr. Finkel, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In a November 27, 2006 report, Dr. Finkel addressed appellant's history of injury and medical treatment and conducted a physical examination. He opined that appellant recovered from the work-related lumbar strain, there were no objective permanent residuals of the accepted conditions and there was no further indication for diagnostic or treatment modalities for injuries related to the accepted conditions. Dr. Finkel advised that, despite subjective symptomatology, appellant's preexisting degenerative disc disease had not changed as a result of the work injury. An MRI scan showed a right-sided L4-5 disc but he noted that appellant's complaints were all left sided. Dr. Finkel found that appellant had fully recovered from the lumbar strain and was able to return to full-time employment with restrictions based on appellant's preexisting degenerative disc disease.

The Board finds that Dr. Finkel's opinion is entitled to special weight as his report is sufficiently well rationalized and based upon a proper factual background. Because the opinion of the impartial medical specialist is based on a proper history and is sufficiently rationalized, the Board finds it must be accorded special weight in resolving the conflict.

Appellant did not submit sufficient medical evidence to overcome the weight of Dr. Finkel's opinion or to create a new conflict. In reports dated January 12, 2006 and October 15, 2007, Dr. de Moura recommended that appellant undergo surgery for lumbar radiculitis and lumbar herniated nucleus pulposus conditions. He did not specifically address whether appellant's lumbar conditions or the recommended medical treatment were causally related to his accepted employment injury. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[7] As to conditions not accepted by the Office as being employment related, such as the lumbar radiculitis and lumbar herniated nucleus pulposus, it is appellant's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove any such relationship.[8] The Board finds that Dr. de Moura's reports are of diminished probative value and are out weighed by the well-rationalized opinion of Dr. Finkel.[9]

The pain management notes submitted by appellant had illegible signatures and are not considered probative on the medical issue in this appeal.[10]

The weight of the medical opinion evidence supports that appellant no longer has residuals due to the February 7, 2005 work injury. The Board finds that the Office met its burden of proof to terminate his compensation benefits effective August 30, 2008.

[7] *Willie M. Miller*, 53 ECAB 697 (2002).

[8] *Alice J. Tysinger*, 51 ECAB 638 (2000).

[9] *See Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

[10] *See K.W.*, 59 ECAB ___ (Docket No. 07-1669, issued December 13, 2007) (medical form reports with illegible signatures did not constitute competent medical evidence).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act,[11] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection(a) of this section 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.

Section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[12] When the Office revised its regulations effective January 4, 1999, the new regulations provided that a hearing was a review of an adverse decision by a hearing representative and that a claimant could choose between two formats: an oral hearing or a review of the written record.[13] These regulations also provide that the request for either type of hearing must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[14]

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, including when the request is made after the 30-day period for requesting a hearing and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[15] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[16]

ANALYSIS -- ISSUE 2

Appellant requested an oral hearing before the Office hearing representative regarding the August 13, 2008 termination decision in a letter dated September 19, 2008 and received by the Office September 25, 2008. In this case, his September 19, 2008 request was more than 30 days from the August 13, 2008 decision. As appellant's request for a hearing was made more than 30 days after the date of issuance of the Office's August 13, 2008 decision, the Office correctly found that appellant was not entitled to a hearing as a matter of right.

The Office properly exercised its discretion and determined that appellant's request for an oral hearing could be equally well addressed by requesting reconsideration and submitting additional evidence. The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of discretion is generally shown through proof of manifest

[11] 5 U.S.C. § 8124(b)(1).

[12] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[13] 20 C.F.R. § 10.615.

[14] *Id*. at § 10.616. *See Leona B. Jacobs*, 55 ECAB 753 (2004).

[15] *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

[16] *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and probable deduction from established facts.[17] The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of his request for an oral hearing was proper under the law and the facts of this case.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective August 30, 2008. The Board also finds that the Office properly denied his request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the November 6 and August 13, 2008 decisions of the Office of Workers Compensation Programs are affirmed.

Issued: December 11, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[17] *See André Thyratron*, 54 ECAB 257 (2002).