U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIO I. BERMUDEZ and U.S. POSTAL SERVICE,
POST OFFICE, Miami, Fla.

Docket No. 97-2600; Submitted on the Record;
Issued May 25, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's medical compensation benefits effective November 27, 1996; and (2) whether the Office properly denied appellant's request for a hearing.

On September 16, 1993 while in the performance of duty, appellant sustained a lumbosacral strain due to work factors. The Office accepted the claim for the condition of a lumbosacral strain and paid appropriate compensation benefits. On November 27, 1996 the Office terminated appellant's compensation effective the same date on the grounds that the weight of the medical evidence established that appellant was no longer suffering from an employment-related medical disability. By decision dated July 14, 1997, the Office denied appellant's request for a hearing finding that his request was not timely filed and that the issue could be equally addressed by requesting reconsideration. In a September 23, 1997 merit decision, the Office denied appellant's request for modification of its prior decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective November 27, 1996.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] 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.[2] To terminate authorization for medical treatment, the Office must establish that

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

[2] *Id*.

appellant no longer has residuals of an employment-related condition which require further medical treatment.[3]

Dr. Aaron E. Boorstein, a Board-certified orthopedist and appellant's attending physician, continued to find appellant to be restricted in his duties as a result of his back injury.

The Office referred appellant to Dr. Gary M. Krulik, a Board-certified orthopedist, for an examination and a second opinion. In a March 9, 1995 report, Dr. Krulik stated:

> "[Appellant] has a history of thoracic and lumbosacral strain. He has subjective complaints, but there are no objective clinical findings. There is no disability at this time. There is no suggestion of any specific treatment. [Appellant] is physically able to work as a letter carrier without specific limitations."

The Office found a conflict in medical opinion between Drs. Boorstein and Krulik as to whether appellant's accepted work-related disability had ceased. Based on the conflict in medical opinion, the Office referred appellant, along with a statement of accepted facts and the case record, to Dr. Philip F. Averbuch, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.[4]

In an October 13, 1995 report, Dr. Averbuch stated:

> "At this time, [appellant] presents with a history of pain in the thoracic and lumbar sacral spine. We can find no objective orthopedic evidence of any abnormality. Based on this examination, we cannot find any disability at this time and feel that this claimant should be able to return to this normal work schedule and duties at the [employing establishment]. We would not recommend any additional treatment for the patient at this time."

Appellant continued to receive monthly treatments from Dr. Boorstein, but all of the physician's reports fail to contain any objective orthopedic evidence to support disability for work.

Where there exists a conflict of medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist is entitled to special weight if sufficiently well rationalized and based upon a proper factual review of the case.[5] The Board finds that Dr. Averbuch's October 13, 1995 report is sufficiently rationalized and responsive to the Office's inquiries to be entitled to special weight. He was provided with a statement of accepted facts, the entire medical record with treatment notes and diagnostic findings, and performed his own examination of appellant. Based on his findings,

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[3] *Id.*

[4] Section 8123(a) of the Federal Employees' Compensation Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician will be appointed to make an examination. 5 U.S.C. § 8123(a).

[5] *Glenn C. Chasteen*, 42 ECAB 493 (1991).

Dr. Averbuch provided an opinion that appellant had no continuing disability causally related to his work injury, but that such work-related disability had ceased. His report was based on accurate facts, thorough examination and all medical records and diagnostic results available. Dr. Averbuch's conclusion is supported by medical rationale and is fully responsive to the inquires of the Office. The Board finds that the report of the impartial specialist is entitled to special weight and is sufficient to support termination of appellant's wage-loss benefits. Moreover, appellant did not submit evidence with his request for reconsideration that was sufficient to overcome the report by Dr. Averbuch.

Appellant submitted physical therapy notes dated February 19 and March 19, 1997. The physical therapy notes, however, are insufficient to overcome Dr. Averbuch opinion that appellant was no longer disabled from his employment injury. The notes do not contain an opinion with medical reasons and objective findings explaining how and why the accepted work injury of September 16, 1993 resulted in continued disability on and after November 27, 1996.

Appellant submitted duplicate medical notes dated September 17, 1993 to December 5, 1996 from Dr. Boorstein. The Board notes that these pieces of evidence are duplicate copies of evidence previously submitted into the record file which were specifically considered when the November 27, 1996 decision was issued. The Board has found that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[6]

Medical notes from Dr. Boorstein dated October 28 and December 5, 1996 state that appellant is experiencing pain when casing mail, but no restricted range of motion could be found. The notes, however, do not demonstrate with objective findings that appellant has a disability related to the September 16, 1993 work injury. As such, they are insufficient to overcome the medical opinion of Dr. Averbuch.

A January 9, 1996 report from Dr. Richard D. Berkowitz states that appellant has been required to return to doing overhead work duties and this has reaggravated appellant's back problems. Dr. Berkowitz, however, does not provide any medical rationale or objective findings to support continued work-related disability due to the September 16, 1993 work injury. As such, his report is insufficient to overcome the medical opinion of Dr. Averbuch.

In his January 9 and February 11, 1997 reports, Dr. Berkowitz states that appellant has pain and his impression is that appellant has "thoracic and lumbar strain secondary to work injury three years ago with recurrence after returning to full duty with overhead activities." Dr. Berkowitz does not provide objective findings or medical rationale to support his opinion. As such, these reports are insufficient to overcome the medical opinion of Dr. Averbuch.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a hearing.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states:

[6] *Jerome Ginsberg*, 32 ECAB 31 (1980).

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[7]

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 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.[8]

In a letter dated April 24, 1997 and postmarked April 25, 1997, appellant requested an oral hearing before an Office representative. By decision dated July 14, 1997, the Office denied appellant's request for a hearing finding that his request was not timely filed and that the issue could be equally addressed by requesting reconsideration.

The Office, in its July 14, 1997 decision, properly determined that appellant was not entitled to a hearing as a matter of right since appellant's request was not made within 30 days after the issuance of a final decision. The Office rendered its decision on November 27, 1996 and appellant's request for an oral hearing was postmarked April 25, 1997, more than 30 days after the Office rendered its decision. The Office also exercised its discretion and further considered the hearing request but concluded that appellant could equally well pursue his claim by requesting reconsideration along with the submission of factual and medical evidence. For these reasons, the Office acted properly in denying appellant's April 24, 1997 request for a hearing.

[7] 5 U.S.C. § 8124(b)(1).

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

The decisions of the Office of Workers' Compensation Programs dated September 23 and July 14, 1997, and November 27, 1996 are hereby affirmed.

Dated, Washington, D.C.
May 25, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member