

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLES H. GAINES and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 02-168; Submitted on the Record;
Issued September 17, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective March 25, 2001; and (2) whether the Office abused its discretion by denying appellant's request for an oral hearing under section 8124(b) of the Federal Employees' Compensation Act.

Appellant sustained a prior work-related injury on August 8, 1986. Under case number 030116489, the Office accepted the conditions of lumbosacral strain and left sciatic neuralgia. By decision dated June 15, 1990, the Office terminated compensation for wage-loss and medical benefits based on the weight of the medical evidence. By decision dated August 19, 1991, an Office hearing representative affirmed the June 15, 1990 decision. The record reflects appellant returned to work in August 1990.

On February 6, 1991 appellant, then a 45-year-old mailhandler, sustained injury to his back while lifting a box off a shelf. He stopped work the same day and did not return to duty. Under case number 030161969, the Office accepted appellant's claim for a low back sprain, lumbar radiculopathy and chronic pain syndrome and approved appropriate compensation benefits. By decision dated October 16, 1998, the Office terminated appellant's entitlement to compensation benefits. By decision dated April 7, 1999, an Office hearing representative reversed the October 16, 1998 decision on the grounds that there was an unresolved conflict in medical opinion as to whether appellant had continuing disability causally related to his February 6, 1991 employment injury. The case was remanded for referral to an impartial medical specialist.

The record reflects that appellant underwent an impartial medical evaluation with Dr. Martin A. Blaker, a Board-certified orthopedic surgeon.¹ By decision dated October 20, 1999, the Office terminated appellant's compensation benefits on the basis that Dr. Blaker's opinion represented the weight of the medical evidence. By decision dated July 18, 2002, an Office hearing representative reversed the October 20, 1999 decision. The Office hearing representative found that the reports from Dr. Blaker were insufficient to constitute the weight of the medical evidence as they were unrationalized. The Office hearing representative further noted that Dr. Blaker had not been informed that appellant had an accepted 1986 work-related lumbar strain and appellant had testified that Dr. Blaker had served as a referee medical examiner with respect to his 1986 work injury. The case was remanded to the Office for further development.

The Office doubled appellant's prior case for his work-related injury of August 8, 1986 into the current record of the February 6, 1991 injury.

By decision dated March 23, 2001, the Office terminated benefits effective March 25, 2001 based on the report of Dr. Menachem M. Meller, a Board-certified orthopedist selected as the impartial medical specialist, which established that the accepted conditions had resolved.

By letter dated March 24, 2001, which the Office received June 4, 2001, appellant requested an oral hearing before an Office hearing representative. An envelope postmarked May 24, 2001 was of record along with a copy of a postal return receipt postmarked April 25, 2001 with appellant's annotation "proof of letter sent to [the Office]."

By decision dated July 13, 2001, the Office denied appellant's request for an oral hearing on the grounds that his request was not made within the 30-day time period and that he could submit additional evidence through the reconsideration process.

The Board finds that the Office properly terminated appellant's compensation benefits effective March 25, 2001, as the evidence establishes that his employment-related residuals ceased.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

¹ The Office had issued a July 9, 1999 decision suspending appellant's entitlement to compensation based on his failure to undergo the originally scheduled examination with Dr. Blaker. Appellant appeared for the second scheduled examination with Dr. Blaker.

² *David W. Green*, 43 ECAB 883 (1992); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *Harold S. McGough*, 36 ECAB 332 (1984); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on March 25, 2001 based on the well-rationalized opinion of the impartial specialist, Dr. Meller, a Board-certified orthopedic surgeon.⁴ In a report dated November 27, 2000, he discussed appellant's history of injury, physical complaints, the results of objective tests and listed findings on physical examination. Dr. Meller stated that the diagnosis which best described the mechanism of injury was a lumbar sprain and strain. Although he expressed doubt about whether the 1991 work-related injury had, in fact, occurred, he advised that if the Office had accepted it, then he would consider this most consistent with a mild self-limiting soft tissue injury consisting of a lumbar sprain and strain. Dr. Meller stated that the examination findings revealed no pertinent positive findings with the exception of self-limiting behavior and marked objective standard tests of symptom embellishment. He noted that the studies which had been obtained, including the computerized tomography (CT) scan revealed facet arthropathy, which was a preexisting condition that preexisted the 1986 injury and had not markedly worsened. The disc bulge noted on the 1999 magnetic resonance imaging (MRI) scan was a normal-for-age finding and related to disc degeneration. Dr. Meller opined that the fact that a bulge had developed in the interim while appellant was not at work, further underscored the fact that it had nothing to do with his work injury. He further opined that the accepted fact of chronic pain syndrome was not valid based on the objective clinical examination. Considering that appellant had no treatment, including the absence of medication, the absence of any braces, the absence of any therapeutic intervention of note, but had subjective complaints of pain somewhere between 7 and 10 out of 10, Dr. Meller opined that this was an entirely mutually exclusive set of events. He stated that it was exclusive to the point where it was impossible from an orthopedic standpoint. Dr. Meller further stated that the findings of symptom embellishment, which he noted within his report, failed to substantiate the need to remain on disability. He opined that appellant could return to his preinjury occupation without physical restrictions. No further medical treatment was required with regard to his accepted work injury. Dr. Meller stated that appellant may require some common sense type of restrictions with regard to his degenerative disc disease and disc bulge, which he would restrict appellant to a medium-duty capacity. He recommended appellant avoid excessive resting and self-limiting. Dr. Meller further commented that as an orthopedist reviewing records, he noted that in numerous psychologic evaluations, appellant was noted to be defensive and used denial extensively. He stated that the records expressed appellant's anger and defensive behavior. Dr. Meller advised that mainstream orthopedic literature did not support resting for appellant's summer of 1999 and 2000, but, in fact, violated the basic principles of the back school. The basic principles of the back school was noted to be modified bed rest for two to three days following an injury, after which stretching and strengthening exercises commence. He further advised that the judicious use of anti-inflammatory medications, endurance exercises to focus on fitness, weight reduction and wellness behavior were to be advocated. Dr. Meller stated that none of those were being carried out and served as evidence of self-limiting behavior. On that basis, he opined that there was no clinical evidence of lumbosacral radiculopathy. The fact that the level had changed indicated that there were soft findings in the studies and that neither studies at the L5 nor S1 correlated with objective clinical testing. Dr. Meller further stated that he found it somewhat disappointing

⁴ Section 8123(a) of the Act provides that, "[i]f 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 U.S.C. § 8123(a).

that Dr. John Bowden noted palpable pain from L4 to the coccygeal area, the sacroiliac articulation as an objective finding of spinal pathology. Dr. Meller stated that pain was a subjective complaint and should not be misconstrued as an objective clinical test by a physician.

In situations when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist of the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁵

The Board has carefully reviewed the opinion of Dr. Meller and finds that it has the reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. He provided a thorough factual and medical history through his examination of the record and noted that the MRI and CT scans appellant underwent over the years demonstrated evidence of a preexisting condition of degenerative disc disease which was advancing in a normal fashion given appellant's age. This included the disc bulge found on appellant's 1999 MRI scan which had developed during the time appellant was not working. Moreover, Dr. Meller provided a proper analysis of the factual and medical history and findings on examination and reached conclusions regarding appellant's condition which comported with this analysis. He included medical rationale for his opinion that appellant did not have evidence of chronic pain syndrome as no treatment in terms of medication, braces or therapeutic intervention was given. Dr. Meller noted that appellant presented with findings of symptom embellishment and the record supported anger and defensive behavior by appellant. He related that appellant's "resting" in the summers of 1999 and 2000 violated the basic principles of the back school and supported the evidence of self-limiting behaviors. Dr. Meller further included medical rationale for his opinion that there was no clinical evidence of a lumbosacral radiculopathy by pointing out that the fact that the level has changed was indicative of soft findings in the studies which also failed to correlate with objective clinical testing. Pain, Dr. Meller, was clear to point out, was a subjective complaint and was not an objective clinical test by a physician. Although he found that appellant could return to work in a medium-duty capacity, he emphasized that the restrictions were due to appellant's preexisting degenerative disc disease and disc bulge which were due to the normal process of aging.

The Board further notes that appellant failed to respond to the Office's proposed termination of compensation dated February 22, 2001.

Accordingly, the Board finds that Dr. Meller's opinion is sufficient to meet the Office's burden of proof in terminating appellant's compensation.

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

Section 8124(b)(1) of the Act provides in pertinent part as follows:

⁵ *Rosie E. Garner*, 48 ECAB 220, 225 (1996).

“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.”⁶

The Office’s procedures implementing this section are found in the Code of Federal Regulations at 20 C.F.R. § 10.616(a). The regulations state that a claimant is not entitled to an oral hearing or a review of the written record if the request is not made within 30 days of the date of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made prior to requesting a hearing, or if a written review of the record by an Office hearing representative has already taken place.⁷

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 and has held that the Office must exercise its discretion in such cases.⁸ The Office shall determine whether a discretionary hearing should be granted and, if not, shall so advise the claimant with reasons.⁹ The Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing when no legal provision is made for such hearings, are a proper interpretation of the Act and of Board precedent.¹⁰

In the instant case, following the March 23, 2001 Office decision terminating compensation, appellant requested an oral hearing by letter dated March 24, 2001, which contained an envelope postmarked May 24, 2001 and a copy of a postal return receipt postmarked April 25, 2001 with appellant’s annotation “proof of letter sent to [the Office].” The record contains a letter dated April 20, 2001 wherein appellant wrote to the claims examiner “the following medical reports speak on my behalf.” This is presumably where the April 25, 2001 postmark came from. In this case, the 30-day period expired April 22, 2001 and, as that date fell on a Sunday, appellant had until April 23, 2001 in which to timely file his request. Appellant’s postmarks of April 25 and May 24, 2001 are outside the 30-day period. Accordingly, appellant’s request for an oral hearing was not within the 30-day time limitation. The Office, nonetheless, had discretionary authority to grant appellant’s request and in its July 13, 2001 decision it exercised this discretion, by stating that the issue could be resolved through the reconsideration process. The Board has often held that the denial of a hearing on this ground represents a proper

⁶ 5 U.S.C. § 8124(b)(1).

⁷ 20 C.F.R. § 10.616(a)(1999); *see Robert Lombardo*, 40 ECAB 1038 (1989); *Shirley A. Jackson*, 39 ECAB 540 (1988).

⁸ *See, e.g., Mary B. Moss*, 40 ECAB 640 (1989) (untimely request); *Johnny S. Henderson*, 34 ECAB 216 (1982) (request for a second hearing); *Rudolph Bermann*, 26 ECAB 354 (1975) (injury occurring prior to effective date of the statutory amendments providing right to hearing).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

¹⁰ *See Jeff Micono*, 39 ECAB 617 (1988); *Henry Moreno*, 39 ECAB 475 (1988).

exercise of the Office's discretionary authority.¹¹ Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's request for an oral hearing and that it properly advised appellant with reasons for its denial. The Office properly exercised its discretion and advised that the issue could be resolved through the reconsideration process.

The July 13 and March 23, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
September 17, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ See *Robert Lombardo*, *supra* note 7.