

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK W. LEE and INTERNAL REVENUE SERVICE,
SERVICE CENTER, Fresno, Calif.

*Docket No. 96-2532; Submitted on the Record;
Issued August 19, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden to terminate appellant's compensation effective January 7, 1996; and (2) whether the Office properly denied appellant's request for a hearing made more than 30 days after the Office's decision.

On May 27, 1993 appellant, then a 32-year-old data transcriber, filed a notice of occupational disease alleging that he suffered from tendinitis in his right hand due to federal employment. On August 9, 1993 the Office accepted the claim for right hand and wrist de Quervain's disease, right carpal tunnel syndrome, and right medial and lateral epicondylitis. Appellant subsequently accepted a limited-duty job offer on December 13, 1993. The Office later accepted appellant's claim for rotator cuff surgery. The employing establishment, however, indicated that it could no longer find work for appellant on January 12, 1995. Appellant subsequently received compensation for total temporary disability.

On January 20, 1995 Dr. Troy H. Smith, appellant's treating physician and a Board-certified orthopedic surgeon, provided the following limitations on appellant's activities. He stated that appellant was able to bend and stoop occasionally, that appellant should not reach above shoulder level, that appellant could carry 10 to 24 pounds occasionally, that appellant could not carry more than 50 pounds, that appellant could lift 10 to 24 pounds occasionally, that appellant could not lift more than 25 pounds, that he could not lift above his shoulders, that he could use his wrists occasionally for twisting and turning, that he could sit for 7 hours per day; that he could stand for 6 hours per day, walk for 6 hours per day, and sit in a typing position for 4 hours per day; that he should sit only 30 to 45 minutes at one time, that he could use his hands for repetitive action such as simple grasping for only 30 minutes, that he could not push or pull with the right hand, that he should limited finger manipulation of each hand to 30 minutes at a time, and that he could write 30 to 45 minutes at one time with a 15-minute break only 4 hours per day. Dr. Smith stated that appellant could work 8 hours per day within these limitations. He further indicated that appellant could not do repetitive movement with the right hand or arm over

30 minutes at a time and only intermittently. He checked “no” to indicate that appellant could not perform repetitive movements of both the wrist and elbow. He further stated that repetitive movement was limited to 30 minutes and that the restrictions applied to the right arm. Dr. Smith attributed all of the limitations to appellant’s employment injury.

On February 21, 1995 Dr. Smith indicated that appellant continued to have pain in the right shoulder and arm and that appellant’s right thumb was bothering him. He noted muscle spasms in the upper back area which occurred when appellant tried to use his arm and stated that appellant still wore a thumb splint which allowed him to use the hand without increasing pain. Dr. Smith’s physical examination revealed moderate tenderness of the right brachial plexus and right trapezius muscle with palpable spasms. He found tenderness in the parascapular muscles of the right side and tenderness over the lateral aspect of the right elbow without swelling. He noted a full range of motion in the elbow. He noted generalized tenderness involving the thumb without any swelling, restriction of movement, or atrophy. He stated that appellant’s present condition was probably coming from his shoulder girdle area which may stem from the neck. He further noted generalized right arm pain indicative of nerve root irritation.

On February 22, 1995 Dr. Smith diagnosed right arm pain. He related the pain to appellant’s right shoulder, arm, and thumb. He noted back spasm upon appellant’s use of the arm. He checked “yes” to indicate that appellant was disabled from his usual work and to indicate that the present condition was due to the injury for which compensation was claimed.

On April 24, 1995 Dr. Smith indicated that appellant basically had the same problems of neck pain, shoulder pain, and right arm pain. He reported that appellant’s thumb remained the same and that he continued to have pain in the right elbow. He stated that appellant remained the same on physical examination and that appellant’s condition was permanent and stationary. He stated that appellant needed to avoid prolonged writing, pushing, pulling, significant computer work with the hands, lifting, or use of the right arm above shoulder level. He stated that appellant was unable to use the arm for pushing, pulling, or writing over 30 minutes at one time without rest. He stated that appellant should not lift over ten pounds on occasion and that he should do work below shoulder level. Finally, Dr. Smith indicated that appellant could not return to his former employment.

On April 18, 1995 Dr. Smith restated appellant’s work restrictions.

On June 21, 1995 Dr. Smith stated that there was no modification in appellant’s job activities and that appellant was at a standstill. He indicated that his symptomology remained the same.

On July 5, 1995 the Office referred the case record and a statement of accepted facts to Dr. O.R. Walker, a Board-certified orthopedic surgeon, for a second opinion examination.

On July 21, 1995 Dr. Smith indicated that appellant continued to have problems involving his right arm, shoulder, and neck. He also noted problems in the lower back on bending or lifting.

On August 8, 1995 Dr. Walker conducted an examination, and reviewed appellant's history and the objective evidence of record. Dr. Walker diagnosed supraspinatus tendinitis and capsular laxity right shoulder, treated, healed with minimal residuals; extensive soft tissue injuries, right elbow, unrelated to occupational injury; severe folliculitis generalized; pes planus moderately severe, bilateral; and de Quervain's disease, right wrist, healed with minimal residuals. He found that the only objective evidence of impairment was the measurements of the musculature of the right upper extremity, specifically at the biceps and triceps level, where a mild atrophy was noted. Dr. Walker related this finding to an unrelated laceration injury of 1982 and thus found appellant's condition unrelated to his accepted employment injury. He found that appellant was not significantly disabled because his hand showed evidence of calluses on the palmar surfaces of both hands which reflected strenuous and frequent use of both hands in grasping and was entirely inconsistent with appellant's subjective complaints. Dr. Walker concluded that appellant was capable of resuming his preinjury employment duties and that he lacked any restrictions.

On September 29, 1995 Dr. Smith indicated that there remained no change in appellant's subjective complaints.

On October 2, 1995, the Office requested that Dr. Smith respond to Dr. Walker's opinion. On October 17, 1995 Dr. Smith disagreed with Dr. Walker's conclusion that appellant could return to his former employment. He stated that evidence of calluses or coarse skin did negate the fact that appellant experienced pain and problems in his arm which precluded activity. Dr. Smith indicated that appellant should limit reaching, pulling and lifting with his right arm. He stated that appellant was unable to use his right arm above shoulder level and that he was unable to lift over 10 to 15 pounds with his right arm at one time. He further stated that appellant was unable to do repetitive use of the arm for over 30 minutes at a time without resting. He indicated that appellant could work 4 hours per day with frequent rest periods and 8 hours per day within the limitations stated. He further stated that appellant was precluded from extended writing of fine motor finger movement for over 30 minutes without a break. He stated appellant could not accomplish repetitive movements with the right wrist or elbow. He described all these impairments as permanent and related them to appellant's employment injury.

On November 22, 1995 the Office issued a "Notice of Proposed Termination of Compensation." The Office found that the weight of the medical evidence rested with the opinion of Dr. Walker. Appellant was given 30 days to respond with additional evidence and argument.

By decision dated January 4, 1996, the Office terminated appellant's benefits finding that the medical evidence established that appellant no longer suffered residuals from his accepted injuries. The Office relied on the opinion of Dr. Walker in reaching its determination. The Office also informed appellant that he had 30 days from the date of its decision in which to request a hearing. The Office's decision was sent with a cover letter dated January 4, 1996.

In a letter postmarked March 27, 1996, appellant requested a hearing. Appellant indicated that he did not receive notice of the decision until March 11, 1996. To substantiate his argument, appellant submitted a copy of an unaddressed envelope dated March 8, 1996 in which appellant asserts that he was first notified of the Office's decision terminating benefits.

By decision dated May 23, 1996, the Office denied appellant's request for a hearing because it was not made within 30 days of the January 4, 1996 decision terminating benefits. The Office exercised its discretion to find appellant could submit additional evidence with a request for reconsideration.

The Board initially finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.²

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 that the Office must exercise this discretionary authority in deciding whether to grant a hearing.³ 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,⁴ when the request is made after the 30 day period for requesting a hearing,⁵ and when the request is for a second hearing on the same issue.⁶

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated January 4, 1996 and, therefore, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter postmarked March 27, 1996. Hence, the Office correctly stated that appellant was not entitled to a hearing as a matter of right because the request was not made within 30 days of the Office's February 10, 1994 decision. Appellant's submission of the Office's unaddressed letter postmarked March 8, 1996 failed to affirmatively establish that appellant did not receive the Office's January 4, 1996 until March 11, 1996 as urged by appellant. Moreover, the Office January 4, 1996 cover letter indicated that the decision was sent on that same date.

¹ 5 U.S.C. § 8124(b)(1).

² *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

³ *Henry Moreno*, 39 ECAB 475, 482 (1988).

⁴ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

⁵ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

⁶ *John S. Henderson*, 34 ECAB 216, 219 (1982).

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office in its May 23, 1996 decision, properly exercised its discretion by stating that it considered 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 submitting additional evidence to establish that appellant continued to suffer residuals from his employment-related injury. 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.⁷ 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.

The Board, however, finds that this case is not in posture for a decision.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of benefits. 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.⁸

In the present case, the Office relied on the opinion of its referral physician, Dr. Walker, a Board-certified orthopedic surgeon, to find that it met its burden of terminating benefits. Dr. Walker opined that, based on the lack of objective evidence on physical examination and upon the fact that appellant had calluses on his hands demonstrating strenuous activity, appellant did not have any residual disability related to his accepted employment injuries and could return to his regular work. Dr. Walker's opinion, however, was contradicted by appellant's treating physician, Dr. Smith, a Board-certified orthopedic surgeon, who opined that appellant remained partially disabled partially from his accepted employment injuries. Dr. Smith based his opinion of his numerous examinations of appellant, which demonstrated his physical impairments, on appellant's subjective complaints, and on his treatment of appellant. Smith explained that calluses or coarse skin did not negate the fact that appellant experienced pain and problems in his arms causing disability. The opinions of Drs. Smith and Walker are both well rationalized and supported by their physical findings. When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Federal Employees' Compensation Act,⁹ to resolve the conflict in the medical opinion.

As an unresolved conflict exists in the medical opinion evidence, this case must be remanded to the Office for referral to an impartial medical specialist. After such further development as necessary, the Office shall issue a *de novo* decision.

⁷ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁸ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁹ 5 U.S.C. § 8123(a); see *Martha A. Whitson (Joe D. Whitson)*, 36 ECAB 370 (1984).

The decision of the Office of Workers' Compensation Programs dated May 23, 1996 is affirmed, but the decision dated January 4, 1996 is hereby set aside and the case is remanded to the Office for further development consisted with this opinion.

Dated, Washington, D.C.
August 19, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member