U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY A. TABER and DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Richmond, Va.

Docket No. 96-2450; Submitted on the Record;
Issued October 14, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective November 12, 1995; and (2) whether the Office properly denied appellant's request for a hearing before an Office hearing representative.

On June 8, 1993 appellant, then a 49-year-old supply clerk, filed a claim for pain in her neck and tingling and numbness in her hands which she related to heavy lifting at work for approximately two weeks. She indicated that she first became aware of her condition on April 23, 1993. The Office accepted appellant's claim for cervical sprain and aggravation of degenerative disc disease. The Office authorized buy back of leave for the period May 13 through December 17, 1993 and began payment of temporary total disability effective December 20, 1993.

In an October 18, 1995 decision, the Office terminated appellant's compensation effective November 12, 1995 on the grounds that appellant had no continuing disability or work-related residuals as a result of the April 23, 1993 work injury. In an April 17, 1996 decision, the Office denied appellant's request for a hearing before an Office hearing representative. In a May 24, 1996 decision, the Office denied appellant's request for modification of the prior decision.

The Board finds that the Office has met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.[1]

In a May 13, 1993 report, Dr. Thomas R. Butterworth, Jr., a Board-certified orthopedic surgeon, diagnosed early carpal tunnel syndrome and cervical disc disease. He noted that appellant had narrowing of the C4-5 disc space. In a June 3, 1993 report, Dr. Butterworth indicated that the carpal tunnel syndrome was not related to appellant's employment. He commented that appellant's cervical disc narrowing was not caused by her lifting at work but was aggravated by it.

In a March 9, 1994 report, Dr. Kenneth Kiluk, a Board-certified internist, related that appellant gave a history of two weeks of heavy lifting of boxes of files, after which she had severe spasms in her neck and shoulders and pain in the cervical region. He commented that appellant's pain was currently in the paraspinal region on the left with numerous trigger points in the region. Dr. Kiluk stated that appellant was still disabled for work due to pain because her duties involved the upper cervical region and any kind of activity, including typing or the use of computers, would aggravate her symptoms.

In an October 26, 1994 report, Dr. Charles H. Bonner, a Board-certified physiatrist, stated that appellant had pain in the posterior cervical region in the high lower occipital area with some pain in the trapezius region. He reported that appellant's cervical range of motion was limited with pain to the side of the stretch. He diagnosed post-traumatic myofascial pain syndrome.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Herman M. Nachman, a Board-certified orthopedic surgeon, for a second opinion. In an August 22, 1994 report, Dr. Nachman stated that appellant had normal lateral and rotary motions of the head and neck when motions of the trunk were performed. He indicated that while seated at the examining table appellant's motion of the head and neck were slightly limited at the extremes of motion but attributed the limitation to muscle guarding by appellant. Dr. Nachman noted that x-rays showed slight degenerative changes at the C4-5 level. He concluded that appellant had not suffered an aggravation of an already preexisting condition and did not have any objective signs of any residuals of the employment injury. Dr. Nachman stated that the medical evidence did not indicate that appellant was incapable of working in any capacity. He concluded that appellant could return to work at her original job.

The Office found a conflict in the medical opinion evidence on appellant's ability to return to work. The Office therefore referred appellant, together with the statement of accepted facts and the case record, to Dr. William M. Deyerle, a Board-certified orthopedic surgeon, to examine appellant and resolve the conflict in the medical evidence. In a May 9, 1993 report, Dr. Deyerle stated that appellant had a normal range of motion of the neck with some complaint of pain on the extremes. He noted x-rays showed some degenerative changes at the C4 and C5 interspaces. He stated that there was no evidence in the x-rays to suggest that spurs or degenerative changes of the discs were aggravated by the two-week history of handling heavy

[1] *Jason C. Armstrong*, 40 ECAB 907 (1989).

boxes. Dr. Deyerle noted Dr. Bonner's diagnosis of myofascial pain syndrome but indicated that there was no objective evidence to support that diagnosis. He found that appellant had no objective findings related to the two-week history of lifting boxes. He stated that the medical evidence at the time of his examination revealed any aggravation that may have occurred to the preexisting condition had long since subsided. Dr. Deyerle indicated that any problem that occurred as a result of the two weeks of lifting or manipulating boxes would have resolved within two to three months. He commented that medical records did not indicate that appellant was incapable of working in any capacity. He concluded that there were no limitations on appellant's ability to carry out the type of work she performed prior to the time of the onset of symptoms. In situations when there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial specialist for 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.[2] In this case, Dr. Deyerle gave an accurate history of appellant's condition and provide reasoning, based on his examination, in support of the conclusion that appellant's condition had resolved. His report, therefore, is entitled to special weight and, in the circumstances of this case, constitutes the weight of the medical evidence. The Office therefore has met its burden of proof in establishing that any disability causally related to appellant's employment injury has ceased.

The Board also finds that the Office properly denied appellant's request for a hearing.

Section 8124(b)(1) of the Federal Employees' Compensation Act[3] dealing with a claimant's entitlement to a hearing before an Office hearing representative states that "[b]efore review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary." The Board has noted that section 8124(b)(1) "is unequivocal in setting forth the limitation in requests for hearings…."[4] In this case, appellant's request for a hearing was received more than 30 days after the Office's October 18, 1995 decision and therefore was untimely. 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.[5]

[2] *James P. Roberts*, 31 ECAB 1010 (1980).

[3] 5 U.S.C. § 8124(b)(1).

[4] *Ella M. Garner*, 36 ECAB 238 (1984); *Charles E. Varrick*, 33 ECAB 1746 (1982).

[5] *Henry Moreno*, 39 ECAB 475 (1988).

The Office exercised its discretion in this case by stating that appellant could seek further review of the case by submitting additional evidence and seeking reconsideration. The Office did not abuse its discretion in denying appellant's request for a hearing.

The decisions of the Office of Workers' Compensation Programs, dated May 24 and April 17, 1996 and October 18, 1995, are hereby affirmed.

Dated, Washington, D.C.
October 14, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member