

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD M. MACKUSE and DEPARTMENT OF THE AIR FORCE,
McGUIRE AIR FORCE BASE, NJ

*Docket No. 98-809; Submitted on the Record;
Issued December 27, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, 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 benefits based on a lower back injury as of October 6, 1997; (2) whether the Office met its burden to terminate appellant's compensation benefits based on a consequential psychological condition as of October 6, 1997; (3) whether appellant is entitled to a review of the record before an Office's hearing representative under 5 U.S.C. § 8124(b)(1).

On June 18, 1994 appellant, then a 45-year-old carpenter, injured his left leg and left hip while placing a ladder against a window. Appellant filed a Form CA-1 claim for benefits on July 5, 1994, which the Office accepted for low back strain and sciatica. Appellant was placed on light duty on July 5, 1994 in which he remained until March 20, 1995. He received compensation for appropriate periods.

In a report dated March 15, 1996, Dr. David H. Clements, a Board-certified family practitioner and appellant's treating physician, stated that appellant continued to have lower back pain when he tried to exert himself and that he aggravated his back condition whenever he was instructed to perform tasks exceeding light duty. Dr. Clements advised that appellant had a chronic low back strain and he restricted appellant from bending or lifting more than 20 pounds, more than one hour of walking or sitting, stooping or reaching and all forms of pushing or ladder work.

In a report dated April 3, 1996, Dr. Clements noted that appellant appeared to be improving with therapy, although he was still experiencing pain in his light-duty position. Dr. Clements advised that if appellant continued to improve, he could tentatively anticipate returning him to work in approximately three weeks.

In a report dated April 24, 1996, Dr. Clements stated that appellant was currently having psychological problems dealing with his work and noted that appellant was consulting with a

psychiatrist and a psychologist for these problems. Dr. Clements recommended that appellant enter a work hardening program in order to strengthen and test his back under supervised conditions. He opined that appellant could be released to full duty once his work hardening program was completed.¹

By letter to the Office dated May 16, 1996, appellant's attorney indicated that he had attached medical reports dated May 3, 1996 from Dr. David Kalkstein, a psychiatrist, in addition to a Form CA-8 and Form CA-20. Dr. Kalkstein indicated that he had been treating appellant for depression for more than two months on a weekly basis. He stated that, due to appellant's work-related back injury, he had developed a severe depression, resulting in his total disability. Dr. Kalkstein advised that because appellant had continued to experience severe, work-related low back pain and immobility since his work injury, he had developed progressive symptoms of depression, anxiety, agitation and irritability, in addition to sleeplessness, weight loss, loss of energy, diminished home life, low self-esteem and suicidal ideation. Dr. Kalkstein advised that these were symptoms of major depression. In the attached Form CA-8, dated May 15, 1996, appellant requested compensation as of April 16, 1996 and continuing.

By letter dated June 3, 1996, appellant's attorney contended that appellant had been unable to work since early April 1996 due to a consequential psychological injury.

In order to determine whether appellant had developed a psychological condition as a result of his accepted employment-related low back condition the Office scheduled a second opinion examination with Dr. Jon Bjornson, Board-certified in psychiatry and neurology.

In a report dated September 5, 1996, Dr. Bjornson diagnosed an adjustment disorder with depression. He advised that appellant's psychological state had improved, that his mental status seemed to be in fairly good shape at this time and there was no psychological reason why he cannot return to work at this time. Dr. Bjornson acknowledged that his opinion regarding appellant's ability to return to work could be more definitive if he had more information regarding his work records, which he had not reviewed. He opined, however, that, based on his two hours with appellant, his motivation was good, that he would return to employment if guaranteed light duty. Dr. Bjornson concluded that the best therapy for appellant would be a work hardening program and an immediate return to light duty.

By letter dated October 30, 1996, the Office informed appellant that it had accepted his claim for a disability for a consequential depression condition. The Office noted that appellant had stopped work on April 15, 1996 because of this condition.

In order to clarify the nature and extent of appellant's employment-related low back condition the Office scheduled a second opinion examination with Dr. David W. Richardson, Board-certified in psychiatry and neurology.

In a report dated May 22, 1996, Dr. Richardson reviewed appellant's medical records and a statement of accepted facts and indicated findings on examination. Dr. Richardson diagnosed

¹ Dr. Clements essentially reiterated these findings in an updated report dated May 17, 1996.

left S1 radiculopathy with intermittent sensory complaints, but stated that he was unable to causally relate any of appellant's neurologic diagnoses to the June 18, 1994 employment injury.² He stated that, although there were radiographic findings of disc herniation at the L5-S1 level, he was unable to causally relate these findings to his symptoms or to his work-related low back condition. Dr. Richardson noted that there was no evidence of nerve root impingement and that electrodiagnostic tests, including an electromyogram (EMG) and nerve conduction studies were normal. He stated that "it is my opinion that appellant is not disabled, but rather intermittently impaired by his predilection to develop symptoms of sciatica on the left side. I believe that he could be employed if attention is given to appropriate restriction of lifting, carrying, pushing and pulling, in view of his predilection to neurologic symptoms with provocative movements about the back.

By letter dated April 25, 1997, the Office advised appellant that it had determined a conflict existed in the medical evidence between the opinion of Dr. Clements, appellant's treating physician and the opinion of Dr. Richardson as to whether appellant had any continuing residual disability in his low back causally related to his June 18, 1994 employment injury and referred him for a referee medical examination with Dr. Steven J. Valentino, pursuant to section 8123(a).³

In a report dated May 5, 1997, Dr. Valentino opined that, based on the statement of accepted facts, appellant's medical records and his examination, appellant had fully recovered from his work-related injury of June 18, 1994. He found no need for ongoing supervised medical care and indicated that appellant had no positive objective findings to substantiate any ongoing injury or residual of the noted injuries. Dr. Valentino concluded, "his physical examination is ... consistent with complete recovery. He does not require further ongoing supervised medical care, treatment or further diagnostic evaluation. From an orthopedic, neurologic and spine standpoint he is completely recovered and capable of resuming gainful employment as well as normal function without cause for restriction."

In a notice of proposed termination dated June 25, 1997, the Office, based on the opinion of Dr. Valentino, found that the weight of the medical evidence demonstrated appellant no longer had any residuals from the June 18, 1994 employment-related low back injury. The Office stated that it had accepted a claim for a psychological condition resulting from the low back condition; however, noting Dr. Bjornson's opinion that there was no psychological reason why appellant could not return to work at the time of his examination, the Office found that appellant's psychological condition had also resolved. The Office allowed appellant 30 days to

² Dr. Richardson noted that appellant complained of an acute reinjury to his lower back on September 12, 1995, which occurred while he was standing on a ladder to paint a ceiling overhead. Appellant related that this injury resulted in increased pain to his left leg and left buttocks in addition to weakness about the left foot and knee. Dr. Richardson related that appellant returned to work several days later in a light-duty capacity involving clerical desk work and worked in this regard until late February 1996 at which time he was sent back to do shop maintenance work. According to appellant, several of the maneuvers which he was asked to perform exacerbated his back and leg complaints. Because of his persistent complaints, appellant left work on April 16, 1996 and has not returned.

³ 5 U.S.C. § 8123(a).

submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not submit any additional evidence in response to the notice of termination.

By decision dated October 6, 1997, the Office terminated appellant's compensation, finding that the weight of the medical evidence established that appellant no longer suffered from residuals of his June 18, 1994 employment injury.

By letter dated November 7, 1997, appellant's attorney requested a review of the record before an Office hearing representative.

By decision dated December 4, 1997, the Office denied appellant's request for a review of the record because it was not made within 30 days and he was not entitled as a matter of right to such a review. The Office stated that appellant's request was further denied on the grounds that the issue in the case could be equally well addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which could establish that he had a continuing disability causally related to the June 18, 1994 employment injury.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits based on his accepted low back strain and sciatica effective October 6, 1997.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ 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.⁵

In the present case, the Office based its decision to terminate appellant's compensation for his low back injury on Dr. Valentino's referee medical opinion. Where there exists a conflict of medical opinion 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 is entitled to special weight.⁶ Dr. Valentino indicated that, from an orthopedic, neurologic and spine standpoint, appellant was completely recovered from his June 18, 1994 low back injury. He concluded, based on his examination that appellant was capable of resuming gainful employment and normal function without restriction.

The Board finds that Dr. Valentino's opinion is sufficiently probative and well rationalized to merit the special weight accorded a referee medical examiner. Therefore, the Office properly relied on Dr. Valentino's opinion in finding that appellant no longer suffered from any residual disability resulting from the June 18, 1994 low back injury and therefore was no longer entitled to compensation based on this injury.

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Id.*

⁶ *Aubrey Belnavis*, 37 ECAB 206 (1985); 5 U.S.C. § 8123(a).

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits based on the accepted emotional condition.

With regard to appellant's psychological condition, which resulted as a consequence of the low back injury, the Office based its October 6, 1997 decision to terminate benefits on this condition on the September 5, 1996 medical report of Dr. Bjornson, the second opinion psychologist, who diagnosed an adjustment disorder with depression. He opined that appellant's psychological state had improved, that his mental status seemed to be in fairly good shape and that there was no psychological reason why he cannot return to work at this time. Dr. Bjornson stated, however, that he did not possess complete information regarding appellant's work history, which he did not review. He, therefore, indicated that his opinion regarding appellant's ability to return to work would have been more definitive if he possessed more information regarding his work record. Notwithstanding this reservation, Dr. Bjornson concluded that appellant's motivation was good and that he could return to work immediately if guaranteed light duty. Based on Dr. Bjornson's September 5, 1996 report, the Office accepted appellant's claim for a psychological condition, *i.e.*, an adjustment disorder with depression. Subsequently, however, in its June 25, 1997 notice of proposed termination, the Office found that appellant's psychological condition had resolved based on the same report, relying on Dr. Bjornson's statement that there was no psychological reason why appellant could not return to work at the time of his examination.

The Board finds that given its acceptance of a psychological condition based on Dr. Bjornson's September 5, 1996 report, the medical report of the physician does not support the Office's determination that all residuals of the accepted emotional condition had ceased. While, Dr. Bjornson indicated that appellant was not disabled for work due to the accepted condition, it does not establish that the condition had resolved or no longer required medical treatment. The Board, therefore, will reverse the Office's finding that appellant's consequential psychological condition had resolved as of October 6, 1997, to find appellant remains entitled to medical treatment for his accepted condition.

The Board finds that the Office did not abuse its discretion in denying appellant's November 7, 1997 request for a hearing before an Office hearing representative, pursuant to 5 U.S.C. § 8124.

Section 8124(b)(1) of the Federal Employees' Compensation Act,⁷ 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." The Board has held that 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.⁸ The Board has held that

⁷ 5 U.S.C. § 8124(b)(1).

⁸ *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

section 8124 provides the opportunity for a “review of the written record” before an Office hearing representative in lieu of an “oral hearing” and that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office’s final decision.⁹

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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁰

In the present case, the Office, on October 6, 1997, issued its decision, terminating compensation on the grounds that appellant had no continuing disability resulting from the effects of his June 18, 1994 employment injury. On November 7, 1997 appellant’s attorney requested a review of the record by an Office hearing representative. By decision dated December 4, 1997, the Office denied appellant’s request for a review of the record because it was not timely made within 30 days. The Office then exercised its discretion in considering appellant’s request, noting that it had considered the matter and determined that the issue in the case could be resolved through the reconsideration process by submitting evidence not previously considered, which he had a continuing disability resulting from the June 18, 1994 employment injury.

An abuse of discretion can be shown only through proof of manifest error, a manifestly unreasonable exercise of judgment, prejudice, partiality, intentional wrong or action against logic.¹¹ The Office properly exercised its discretionary powers in denying appellant’s request for a review of the record.¹²

The Board affirms the Office’s December 4, 1997 decision denying appellant a review of the written record by an Office hearing representative.

⁹ See *Michael J. Welsh*, 40 ECAB 994; 20 C.F.R. § 10.131(b).

¹⁰ *Johnny S. Henderson*, 34 ECAB 216 (1982).

¹¹ See *Sherwood Brown*, 32 ECAB 1847 (1981).

¹² *Stephen C. Belcher*, 42 ECAB 696 (1991); *Ella M. Garner*, *supra* note 8.

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 6, 1997 is affirmed, in part, and reversed, in part, in accordance with this decision. The Office's December 4, 1997 decision is hereby affirmed.

Dated, Washington, D.C.
December 27, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member