

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT H. MILLARD and U.S. POSTAL SERVICE,
POST OFFICE, Somerville, NJ

*Docket No. 98-1200; Submitted on the Record;
Issued December 27, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective September 12, 1996; (2) whether the Office properly denied appellant's request for an oral hearing as untimely; (3) whether appellant established that he had any disability after September 12, 1996 causally related to the January 22, 1996 employment injury; and (4) whether appellant established that on March 14, 1997 he sustained a recurrence of his January 22, 1996 employment injury.

On January 22, 1996 appellant, then a 46-year-old key punch operator, filed a claim for traumatic injury (Form CA-1), alleging that on that date he slipped and injured his back while in the performance of duty. On March 6, 1996 the Office accepted appellant's claim for lumbosacral contusion and strain. At the time of his injury, appellant was assigned to light duty due to a prior injury sustained on September 14, 1992.¹ Appellant stopped work on the date of injury and returned to his light-duty job on April 8, 1996. Following his return to work, appellant missed intermittent periods and filed recurrence claims on April 11 and May 31, 1996, March 14 and March 28, 1997.² Following further medical development and the issuance of a notice proposing to terminate appellant's compensation benefits, by decision dated September 12, 1996 the Office terminated appellant's wage loss and medical benefits compensation, effective September 12, 1996, on the grounds that he had recovered from all residuals of his January 22, 1996 employment injury. Appellant requested a hearing and by

¹ The Office did not accept the prior injury as employment related.

² Appellant stopped work on April 11, 1996 and returned to work on April 16, 1996. Appellant again stopped work on May 31, 1996 and returned to work on June 3, 1996. Appellant next stopped work on March 14, 1997 and returned to work on March 27, 1997. Immediately following his return to work, on March 28, 1997, appellant stopped work again and returned to work on April 4, 1997. The Office accepted appellant's April 11, 1996 claim for a recurrence but subsequently denied appellant's March 14, 1997 claim for a recurrence of disability by decision dated December 2, 1997. The record does not contain any Office decisions pertaining to appellant's May 31, 1996 or March 28, 1997 claims.

decision dated April 22, 1997, the Office denied appellant's request for a hearing as untimely. Appellant subsequently requested reconsideration and in a decision dated December 2, 1997, the Office denied modification of the prior decision. In a separate decision dated December 2, 1997, the Office denied appellant's March 14, 1997 claim for a recurrence of disability. The instant appeal follows.

Initially, the Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation, effective September 12, 1996.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.³

Appellant's treating physician, Dr. Stephen Schneider, a Board-certified orthopedic surgeon, released appellant to light duty or desk-duty work on April 8, 1996 and in follow-up reports dated May 6, May 16 and May 17, 1996, reaffirmed his prior opinion. Subsequently, appellant came under the care of Dr. Nasser Ani, a Board-certified orthopedic surgeon. In his initial report of record dated July 22, 1996, Dr. Ani noted that appellant had initially injured himself in September 1992 and at that time was diagnosed with a herniated disc. He stated that appellant was treated conservatively and was coping with his symptoms until his January 22, 1996 accepted employment injury. Dr. Ani further stated that while appellant continued to work, he still complained of severe low back pain with bilateral leg radiculopathy. The physician noted that a March 14, 1996 magnetic resonance imaging scan revealed degenerative and spinal stenosis at L4-5 and L5-S1 with a disc herniation at these two levels. Dr. Ani recommended epidural injections and medication and concluded that appellant could continue to work. Appellant was examined by Dr. Robert Dennis, a Board-certified orthopedic surgeon and the Office second opinion physician, on June 14, 1996. In his report of the same date, Dr. Dennis stated:

"The lumbosacral sprain due to the injury of January 22, 1996 has resolved and was directly caused by the injury mechanism of that date. There was temporary aggravation of the preexisting spinal stenosis. This preexisting condition resulted in Mr. Millard's inability to return to full-duty work status as a packer/warehouseman (not the lumbar sprain). However, even with this aggravated condition, he should be able to perform duties as listed for data entry, clerical, with minor restrictions as listed on the work capacity evaluation form...."

As both of appellant's treating physicians, first Dr. Schneider and later Dr. Ani and the Office second opinion physician, Dr. Dennis, agreed that appellant is capable of performing clerical or desk type light duties, the Board finds appellant had no employment-related disability on or after September 12, 1996 and the Office met its burden of proof to terminate appellant's wage-loss benefits on that date.

³ See *Patricia A. Keller*, 45 ECAB 278 (1993).

The Board further finds that the Office properly denied appellant's request for an oral hearing as untimely.

Appellant requested an oral hearing by letter postmarked October 15, 1996. Section 8124(b) of the Federal Employees' Compensation Act,⁴ concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... 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."⁵

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.⁶ Even where the hearing request is not timely filed the Office may within its discretion grant a hearing and must exercise this discretion.⁷

In the instant case, the Office properly determined that appellant's October 15, 1996 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's September 12, 1996 decision, which was finalized on September 13, 1996. The Office, therefore, properly found that appellant was not entitled to a hearing as a matter of right. The Office then proceeded to exercise its discretion in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case was medical and could be resolved through the submission of medical evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.

The Board further finds that appellant failed to establish that he had any continuing disability causally related to his accepted employment injury.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to him to establish that he had disability causally related to his accepted injury.⁸ To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background supporting such a causal relationship.⁹

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8124(b)(1).

⁶ *Tammy J. Kenow*, 44 ECAB 619 (1993).

⁷ *Id.*

⁸ *See George Servetas*, 43 ECAB 424 (1992).

⁹ *See* 20 C.F.R. § 10.110(a); *Kathryn Haggerty*, 45 ECAB 383 (1994).

The only new evidence submitted by appellant subsequent to the September 13, 1996 decision of the Office consists of reports from Dr. Ani dated September 6, 1996, February 28, July 16 and August 15, 1997. In his September 6, 1996 report, Dr. Ani confirms his earlier opinion that appellant is able to continue his restricted duty and in his February 28, 1997 report, Dr. Ani notes that appellant is feeling much improved following his most recent epidural injections but does not discuss appellant's ability to work. Dr. Ani's July 16 and August 15, 1997 report, pertain exclusively to an intervening back injury sustained by appellant on July 2, 1997, which was handled by the Office in a separate claim. Therefore, with the exception of periods of recurrence of disability already accepted by the Office, appellant failed to present any medical evidence to establish that he was disabled for work after September 13, 1996 causally related to his January 22, 1996 employment injury.

The Board, however, finds that the Office erred in terminating appellant's authorization to receive medical treatment under the Act. The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.¹⁰ To terminate authorization for medical treatment the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.¹¹

In this case, the Office accepted that appellant sustained an employment-related lumbar contusion and strain and approved the payment of compensation benefits for the claimed period and for medical treatment. By its September 13, 1996 letter, which accompanied its September 12, 1996 decision, the Office terminated appellant's authorization for medical treatment. The Office, however, did not establish that appellant no longer had residuals of any employment-related condition would require further medical treatment. In his June 14, 1996 report, Dr. Robert Dennis, the Office second opinion physician, stated that further treatment for the lumbosacral sprain is not medically necessary. However, Dr. Ani, appellant's treating physician, stated in more contemporaneous reports dated July 22 and September 6, 1996, which were received by the Office prior to its September 12, 1996 decision, that appellant continued to experience back pain and prescribed a series of epidural injections and oral medication. As the record does not contain any probative contemporaneous evidence establishing that appellant's work-related condition had totally resolved, the Office did not meet its burden in terminating appellant's medical benefits for residuals of his employment injury.

Lastly, the Board finds that appellant failed to establish that he sustained a recurrence of disability on March 14, 1997 causally related to his accepted January 22, 1996 employment injury.

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the substantial, reliable and probative evidence that the subsequent disability for which he claims compensation is causally related to the accepted injury.¹² This burden includes the necessity of furnishing evidence from a qualified

¹⁰ See *Marlene G. Owens*, 39 ECAB 1320 (1988).

¹¹ *Jose Hernandez*, 47 ECAB 288 (1996); *Carolyn F. Allen*, 47 ECAB 240 (1995).

¹² *Alfredo Rodriguez*, 47 ECAB 437 (1996).

physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.¹³

In the instant case, the Office accepted that on January 22, 1996 appellant sustained a lumbar sprain while in the performance of duty. In a claim filed on March 29, 1997 appellant alleged that he sustained a recurrence of disability on March 14, 1997, causally related to his January 22, 1996 employment injury. Appellant stopped work following the alleged recurrence of disability on March 14, 1997 and returned to work on March 27, 1997.

By decision dated December 2, 1997, the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence did not establish a causal relationship between his accepted injury and the claimed condition or disability.

The only medical reports of record dated on or after March 14, 1997 the date of the alleged recurrence of disability, are the July 16 and August 15, 1997 reports from Dr. Ani, appellant's treating physician. In these reports, however, Dr. Ani discusses appellant's condition solely as it relates to an injury sustained by him in July 1997 for which appellant has filed a separate claim. As these reports do not discuss the relationship, if any, between the diagnosed conditions and appellant's January 22, 1996 accepted employment injury, they are, therefore, of little probative value. An award of compensation may not be based on surmise, conjecture, speculation or upon appellant's own belief that there is causal relationship between the claimed condition and the employment.¹⁴ To establish causal relationship, appellant must submit a physician's report in which the physician reviews the employment factors identified by appellant as causing his condition and, taking these factors into consideration together with the findings upon physical examination and appellant's medical history, states whether the employment injury caused or aggravated appellant's diagnosed conditions and presents medical rationale in support of his or her opinion. By letter dated June 20, 1997 the Office advised appellant of the type of evidence necessary to establish his claim for a recurrence of disability. Appellant failed to submit such evidence in this case and, therefore, has failed to discharge his burden of proof with respect to his claimed March 14, 1997 recurrence of disability.

¹³ *Id.*

¹⁴ *Donald W. Long*, 41 ECAB 142 (1989).

The decision of the Office of Workers' Compensation Programs dated December 2, 1997 denying modification of the Office's prior decision terminating appellant's right to wage-loss compensation and medical benefits is affirmed in part and reversed in part. The decision of the Office dated December 2, 1997 denying appellant's claim for a recurrence of disability is affirmed and the April 22, 1997 decision of the Office denying appellant's request for an oral hearing is affirmed in accordance with this decision of the Board.

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

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member