U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT LEE AUGUSTINO and TENNESSEE VALLEY AUTHORITY, PARADISE FOSSIL PLANT, Drakesboro, Ky.

Docket No. 97-253; Submitted on the Record;
Issued February 4, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits, effective September 23, 1990, on the grounds that appellant's injury-related disability had ceased; (2) whether appellant has met his burden of proof in establishing that he is entitled to continuing compensation benefits on or after September 23, 1990; and (3) whether the Office abused its discretion in denying appellant's request for an oral hearing.

The Board has duly reviewed the case record and finds that the Office met its burden of proof to terminate appellant's compensation benefits.

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.[1] 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.[2] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[3] To terminate authorization of medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[4]

The Office accepted that on December 12, 1981 appellant sustained a low back strain, that developed into lumbar disc syndrome, and paid appellant appropriate compensation benefits. On December 7, 1982 appellant's treating physician, Dr. P.R. Dominguez, released appellant to limited light duty within certain physical restrictions. On April 5, 1983, March 11, 1985 and

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Id.*

[3] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[4] *Id.*

March 14, 1987 the Office forwarded appellant's claim to an Office medical adviser, who opined in each instance that appellant was capable of performing light sedentary work, within restrictions, for eight hours a day. Appellant's treating physician, however, continued to support appellant's ability to perform only limited light duty through March 1987, specifying that appellant could work no more than four hours a day at light work within his physical limitations.

Section 8123(a)[5] of the Federal Employees' Compensation 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." The Office properly found a conflict of medical opinion evidence between the Office medical adviser, who opined that appellant could perform light duty for eight hours a day, and Dr. Dominguez, appellant's treating physician, who reported appellant could only work four hours a day. The Office referred appellant, a statement of accepted facts, medical records and a list of specific questions to Dr. A.J. Dzenitis, a Board-certified neurological surgeon, for an impartial medical evaluation to resolve the conflict in the medical opinion evidence pursuant to section 8123(a) of the Act.

Dr. Dzenitis completed a report on September 12, 1988 and stated that while appellant had subjective complaints, there were no objective findings to support these complaints, and concluded that there was "no reason" why appellant could not "return to some type of light work or activity," but did not comment as to the degree of appellant's disability.

Dr. Dzenitis saw appellant again on April 30, 1990, in response to the Office's request that he provide a more detailed discussion of whether appellant continued to suffer from any residuals of his accepted employment injury. After examining appellant a second time, he noted that appellant did not seem to show any discernible neurological signs or deterioration, but that he did display some stiffness and an inequality of calf size measurement. In a follow-up report dated June 15, 1990, submitted in response to the Office's second request for clarification, Dr. Dzenitis unequivocally stated that appellant did not have any disability due to his 1981 employment injury.

In a decision dated September 18, 1990, the Office terminated appellant's compensation benefits effective September 23, 1990.[6]

The Board finds that Dr. Dzenitis' medical opinion, expressed in his April 30 and June 15, 1990 reports, and supported in part by his earlier physical examination findings of September 12, 1988, is sufficiently rationalized and based upon a proper factual background. Where opposing medical reports of virtually equal weight and rationale exist, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently rationalized and based upon a proper factual background, must be given special weight.[7] Thus, Dr. Dzenitis' reports represent the weight of the medical evidence

[5] 5 U.S.C. § 8123(a).

[6] The Office properly followed its procedures in issuing a notice of proposed termination of compensation on August 3, 1990.

[7] *Brady L. Fowler*, 44 ECAB 343, 352 (1992).

and establish that appellant's injury-related disability had ceased as of September 23, 1990, the effective date of the Office's termination of benefits.

On November 28, 1990 and August 2, 1991 appellant requested reconsideration of the Office's September 18, 1990 decision and submitted new medical evidence from Dr. R. Anthony Marrese in support of his request. In a report dated November 21, 1990, Dr. Marrese reviewed appellant's medical history as well as his own physical findings of back spasm and concluded that appellant was not capable of working at that time. In his report dated July 23, 1991, Dr. Marrese again reviewed appellant's history and progress and listed his current findings on examination of back spasm and weakness, and concluded that within a reasonable degree of medical certainty, appellant's current condition was causally related to his 1981 employment injury.

In separate merit decisions dated March 22 and August 26, 1991, the Office found the reports of Dr. Marrese insufficient to warrant modification of the prior decision. The Office properly found that Dr. Marrese failed to provide any medical rationale supporting his opinion that appellant's current medical condition and related disability were causally related to appellant's accepted employment injury and, therefore, his reports are insufficient to outweigh that of Dr. Dzenitis.[8]

Appellant continued to submit additional medical evidence in support of his claim and on August 9, 1993 requested an oral hearing before an Office hearing representative. In a decision dated February 15, 1994, the Office denied appellant's request on the grounds that he had previously requested reconsideration, and, therefore, as a matter of right, was not entitled to a hearing on the same issue.

On August 24, 1994 appellant filed a notice of appeal with the Board. By order dated February 2, 1995, however, in order to protect appellant's appeal rights, the Board remanded the case to the Office on the grounds that it had not received the case record from the Office within the allotted time. The Board instructed the Office to reconstruct and properly assemble the record and to issue an appropriate decision.

In response to the Board's order, on September 28, 1995, the Office reissued its August 26, 1991, decision verbatim, but with a current date. The Board finds, however, that the Office did not consider, prior to issuing its decision, any of the new medical evidence submitted by appellant subsequent to the August 26, 1991 decision. As the Board's jurisdiction of a case is limited to reviewing that evidence which was before the Office at the time of its final decision,[9] it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its final decision.[10] As the Board's decisions are final as to the subject matter appealed,[11] it is crucial that all evidence relevant to the subject matter of the claim

[8] *Ern Reynolds*, 45 ECAB 690 (1994).

[9] *See* 20 C.F.R. § 501.2(c).

[10] *See William A. Couch*, 41 ECAB 548 (1990).

[11] *See* 20 C.F.R. § 501.6(c).

which was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office.

In the present case, the Office did not review a July 30, 1992 report of Dr. W. Cooper Beazley, an October 30, 1992 report by Dr. Robert H. Meyers and a September 26, 1994 deposition by Dr. Meyers, prior to the issuance of its September 28, 1995 decision. For this reason, the Board will reverse the Office's September 28, 1995 decision as the Office did not fully consider evidence which was properly submitted by appellant.

Finally, the Board finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under 5 U.S.C. § 8124.

Subsequent to the issuance of the Office's September 28, 1995 decision, by letter dated October 3, 1995, appellant requested a hearing before an Office representative. In a decision dated June 24, 1996, the Office denied appellant's hearing request. The Office stated that appellant was not entitled to a hearing as a matter of right since he had previously requested reconsideration on the same issue, *i.e.*, whether his injury-related disability had ceased. The Office exercised its discretion to conduct a limited review of the case and indicated that appellant's request was also denied on the basis that the issue in his case could be addressed through a reconsideration application.

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."[12]

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.[13] 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,[14] when the request is made after the 30-day period for requesting a hearing,[15] and when the request is for a second hearing on the same issue.[16] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[17]

[12] 5 U.S.C. § 8124(b)(1).

[13] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[14] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[15] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[16] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[17] *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

In the present case, appellant's October 3, 1995 hearing request was made after he had requested reconsideration in connection with his claim and, thus, appellant was not entitled to a hearing as a matter of right. On November 28, 1990 and August 2, 1991 appellant had requested reconsideration of the Office's September 18, 1990 decision. Hence the Office was correct in stating in its June 24, 1996 decision that appellant was not entitled to a hearing as a matter of right because he made his hearing request after he had requested reconsideration.

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 June 24, 1996 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case was medical and could be resolved by submitting additional medical evidence to establish that his current condition was causally related to his accepted employment 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.[18] 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 5 U.S.C. § 8124.

The June 24, 1996 decision of the Office of Workers' Compensation Programs is affirmed. The September 28, 1995 decision of the Office is reversed and the case remanded to the Office for further consideration consistent with this decision.

Dated, Washington, D.C.
February 4, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

[18] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).