U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY COLBERT and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

Docket No. 97-1225; Submitted on the Record;
Issued January 22, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM, A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective March 20, 1996; and (2) whether the Office abused its discretion in denying appellant's request for an oral hearing.

On August 13, 1990 appellant, then a rigger, filed a traumatic injury claim (Form CA-1) alleging that on August 11, 1990 he experienced pain in the small of his back, shooting pains in the right side and a pulled abdominal muscle while lifting material. Appellant stopped work on August 13, 1990.[1]

The Office accepted appellant's claim for lumbar strain and herniated nucleus pulposus of the lumbar spine.

By letter dated April 14, 1995, the Office referred appellant together with a statement of accepted facts, a list of specific questions and medical records to Dr. Stephen Horowitz, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Horowitz of the referral.[2]

Dr. Horowitz submitted a June 15, 1995 medical report, revealing that appellant was no longer disabled due to the August 11, 1990 employment injury and that appellant could return to work with restrictions.

[1] The record reveals that appellant underwent vocational rehabilitation and that he returned to part-time work on September 13, 1993 for a telemarketing company as a telemarketer. The record further reveals that appellant stopped work after two days of work alleging that he was totally disabled from work.

[2] The record reveals that appellant missed his scheduled appointment with Dr. Horowitz. The Office rescheduled appellant for an appointment with Dr. Horowitz by letter dated May 22, 1995.

In a notice of proposed termination of compensation dated March 26, 1996, the Office advised appellant that it proposed to terminate his compensation because the medical evidence of record established that the residuals of his employment-related injury had ceased. The Office found the weight of the medical evidence of record represented by Dr. Horowitz' June 15, 1995 medical report. The Office advised appellant to submit additional medical evidence supportive of his continued disability within 30 days.

In a May 1996 letter to the Office, appellant stated that he and his physician attempted to follow the Office's advice that he return to the employing establishment, but that the employing establishment would not accept him. Appellant described his continuing symptoms and requested advice from the Office about what he should do about his situation.

By decision dated May 31, 1996, the Office terminated appellant's compensation benefits effective March 20, 1996 finding that appellant had failed to submit any medical evidence to establish continued disability due to the August 11, 1990 employment injury.

In an undated letter, which was postmarked August 13, 1996, appellant requested an oral hearing before an Office representative. By letter decision dated September 4, 1996, the Office denied appellant's request for a hearing as untimely filed pursuant to section 8124 of the Federal Employee's Compensation Act.

In an October 15, 1996 letter, appellant requested reconsideration of the Office's decision. By decision dated November 4, 1996, the Office denied appellant's request for reconsideration without a review of the merits of the claim.

The Board finds that the Office has met its burden of proof in terminating appellant's compensation benefits effective March 20, 1996.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.[3] 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.[4]

In the present case, the Office accepted that appellant sustained a lumbar strain and a herniated nucleus pulposus of the lumbar spine due to factors of his federal employment. The Office terminated appellant's compensation benefits based on the medical opinion of Dr. Horowitz, an Office medical consultant specializing in orthopedic surgery.

In a June 15, 1995 medical report, Dr. Horowitz indicated a history of the August 11, 1990 employment injury and appellant's employment. He also indicated appellant's description

[3] *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

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

of his position as a rigger, a review of medical records and his findings on physical examination. Dr. Horowitz stated that:

> "The finding of decreased sensation in [appellant's] entire left lower extremity is consistent with symptom magnification and this is a nonanatomic finding. He did have a negative straight leg raise test and specifically denied any extremity complaints and this maneuver was performed in the sitting position. Knee and ankle reflexes were normal.
>
> Prior diagnostic studies have had minimal findings such a[s] bulging disc or small herniated disc. Changes such as these can be found in the general population, even those who have not experienced back pain or back injury.
>
> Therefore, it is my opinion that [appellant] is not suffering from a clinically significant radiculopathy or herniated disc.
>
> At the present time, I feel [appellant] has recovered from his injury of August 11, 1990. I feel he should be able to return to work in his prior duty capacity. Since he has been out of work for so long, however, it would be reasonable for him to have some restrictions, at least on a temporary basis until he can become accustomed to the demands of this job. Therefore, I have filled out a functional capacities form and enclose[d] it with this letter."

The accompanying estimated functional capacities form revealed appellant's physical restrictions.

Subsequent to the Office's March 26, 1996 notice of proposed termination, appellant filed a claim for compensation on account of continuing disability (Form CA-8) on April 16, 1996 covering the period March 28 through April 26, 1996. An accompanying attending physician's supplemental report (Form CA-20a) dated April 16, 1996 from Dr. Joseph L. Azorsky, a general practitioner and appellant's treating physician, revealed the date of the employment injury and that appellant had an unstable lumbar spine secondary to a lumbar sprain. Dr. Azorsky indicated that appellant's condition was caused by the injury, for which compensation was claimed by placing a checkmark in the box marked "yes." Appellant also filed a Form CA-8 on May 9, 1996 covering the period April 17 through April 30, 1996. Dr. Azorsky's accompanying May 8, 1996 Form CA-20a contained the same information as he provided in his Form CA-20a dated April 16, 1996. Appellant submitted Dr. Azorsky's June 18, 1996 attending physician's report (Form CA-20) revealing a history of the August 11, 1990 employment injury and a diagnosis of chronic unstable lumbar spine secondary to a sprain. Dr. Azorsky again indicated that appellant's condition was caused or aggravated by an employment activity by placing a checkmark in the box marked "yes." The Board has held that an opinion on causal relationship, which consists only of a physician checking "yes" to a medical form report question on whether the claimant's disability was related to the history is of diminished probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.[5] Inasmuch as Dr. Azorsky failed to

[5] *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

provide any medical rationale for his conclusion that appellant's current condition was caused by the August 11, 1990 employment injury, his reports are insufficient to establish that appellant continued to be disabled due to his August 11, 1990 employment injury.

Therefore, the Board finds that Dr. Horowitz' opinion constitutes the weight of the evidence and that the Office properly terminated appellant's compensation benefits effective March 20, 1996.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states: "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 issuance of the decision, to a hearing on his claim before a representative of the Secretary.''[6]

The Office's procedures implementing this section of the Act are found in section 10.131(a) of the federal regulations. This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing, states in pertinent part as follows:

> "A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of this section has been obtained."[7]

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. 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 for the right to a hearing, when the request is made after the 30-day period for requesting a hearing and when the request is for a second hearing on the same issue. The Office's procedures, which required 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.[8]

---

[6] 5 U.S.C. § 8124(b)(1).

[7] 20 C.F.R. § 10.131(a).

[8] *Sandra F. Powell*, 45 ECAB 877, 890 (1994); *Joseph K. Johnson*, 41 ECAB 328, 333 (1989); *Henry Moreno*, 39 ECAB 475, 482 (1988).

In the present case, the Office issued its decision terminating appellant's compensation on May 31, 1996. In an undated letter, which was postmarked August 13, 1996, appellant requested a hearing. Since appellant did not request a hearing within 30 days of the Office's May 31, 1996 decision, he was not entitled to a hearing under section 8124 as a matter of right.

There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's request for a hearing. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken, which are contrary to both logic and probable deductions from established facts.[9] The Office exercised its discretion in considering appellant's hearing request in its September 4, 1996 decision. The Office determined that the issue in the case could be equally resolved through the reconsideration process by submitting additional medical evidence to establish that appellant's disability resulting from the August 11, 1990 employment injury had not ceased. Therefore, the Office properly exercised its discretionary powers in denying appellant's request for a hearing.[10]

With regard to the November 4, 1996 decision, the Board finds that the Office properly denied reconsideration as appellant failed to submit new or relevant evidence.

The November 4, August 13 and May 31, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
January 22, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] *See Marilyn D. Polk*, 44 ECAB 673 (1993); *James A. Sellers,* 43 ECAB 924 (1992).

[10] *See Marilyn D. Polk, supra* note 9 at 678; *Charles J. Prudencio*, 41 ECAB 499, 501 (1990); *Delphine L. Scott*, 41 ECAB 799, 803-04 (1990).