

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEVIN GROCE and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, Pa.

*Docket No. 97-598; Submitted on the Record;
Issued May 10, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant had no ongoing disability causally related to his April 20, 1990 work injury; and (2) whether the Office abused its discretion in denying appellant's request for a second oral hearing.

On April 20, 1990 appellant, then a 28-year-old mail handler filed a notice of traumatic injury alleging that he injured his left knee, back and shoulder on that same date in the course of his federal employment. The Office accepted the claim for multiple contusions and a lumbar strain, and paid appropriate compensation benefits.

On April 23, 1990 Dr. Pekka Mooar, appellant's treating physician and a Board-certified orthopedic surgeon, reviewed the history of appellant's April 20, 1990 injury and conducted a physical examination. Dr. Mooar opined that appellant's neck, shoulder, back and knee prevented him from returning to work.

On April 24, 1990 Dr. M. Barry Lipson, a Board-certified orthopedic surgeon, examined appellant and diagnosed a contusion of the right shoulder by history, a lumbosacral sprain by history, and status post patellar stabilization procedure on the left with injury to the left knee by history. Dr. Lipson indicated that the objective findings did not match the level of appellant's complaints. He indicated that appellant should recover in two weeks.

On July 27, 1990 Dr. Mooar stated that he did not expect appellant to have any permanent injuries.

Appellant returned to limited duty, working four hours per day, on October 22, 1990.

On December 21, 1990 Dr. Mooar indicated that appellant was slowly getting better. He reported that appellant continued to have problems with his back and that he had occasional pain in his knees with clicking. Appellant subsequently returned to work, eight hours per day.

A May 17, 1991 magnetic resonance imaging (MRI) scan performed by Dr. Eric L. Hume, a Board-certified orthopedic surgeon, revealed disc bulging, but no disc herniation. An MRI scan taken by Dr. Hume on June 14, 1991 revealed the same results.

A December 9, 1991 MRI scan showed no evidence of meniscal tear or loose bodies.

A January 11, 1992 electromyography revealed mild findings of L5 and S1 radiculopathy.

On January 24, 1992 Dr. Robert Koenigsberg, a doctor of osteopathy, interpreted an MRI scan as showing minimal bulges of the L3-4 and L4-5 intervertebral discs.

On March 24, 1992 Dr. Mooar reported that appellant remained partially disabled.

On May 1, 1992 Dr. Henry S. Wieder, a Board-certified orthopedic surgeon, examined appellant and found that his radiographic study suggested a loose body in the left knee joint or an exotosis of the interior surface of the patellar which could account for appellant's persistent pain and clicking in the knee joint. Dr. Wieder also indicated that appellant continued to show evidence of chronic low back strain/sprain manifested by muscle spasm and restricted motion. He indicated appellant was capable of working in a restricted capacity.

On June 2, 1992 Dr. Mooar noted multiple back, shoulder, neck and knee complaints since appellant's injury. He noted that appellant developed chronic low back pain.

On September 14, 1992 Dr. Eric I. Mitchell, an orthopedic surgeon, diagnosed chronic component of lumbar strain/sprain and degenerative arthritis of the left knee, post traumatic. He indicated appellant could work light duty. Dr. Mitchell recommended light duty again on October 16, 1992 and on November 6, 1992.

On October 15, 1992 Dr. Mooar indicated that appellant continued to suffer disability from his knee and back.

On January 13, 1993 Dr. Pete Margate, a diagnostic radiologist, interpreted an MRI scan of appellant's lumbar spine as normal.

The Office indicated in a letter dated January 20, 1993 that appellant underwent a "patellar realignment procedure" in his left knee prior to his April 20, 1990 work injury.

On January 27, 1993 Dr. Max Karpin, a neurosurgeon, began treating appellant for his headaches. Dr. Karpin's objective tests were reported as normal.

On February 8, 1993 Dr. Wilhelmina C. Korevaar, a Board-certified anesthesiologist, diagnosed mechanical back pain and facet arthropathy of the left knee due to a long-standing reflex sympathetic dystrophy following reinjury after his patellar stabilization procedure.

On February 9, 1993 Dr. Mooar again indicated that employment-related back pain and patella instability partially disabled appellant.

On February 9, 1993 appellant filed a notice of recurrence of disability alleging that he suffered a recurrence on December 5, 1992. In this regard, appellant indicated that his back pain had worsened.

On February 13, 1993 Dr. Stephen Lande, a psychologist, indicated that appellant had a high level of anxiety and depression related to stress at work, his supervisor, and his physical condition.

On February 22, 1993 Dr. Korevaar again treated appellant for left knee and low back problems.

On February 25 and April 19, 1993 Dr. Karpin treated appellant for post-traumatic mixed cephalgia.

By decision dated May 9, 1993, the Office approved appellant's claim for recurrence of disability on December 16, 1992. On May 21, 1993 the Office clarified its decision and indicated that the claim was accepted for partial disability.

On May 15, 1993 Dr. Lande continued his treatment of appellant's headaches.

Dr. Karpin treated appellant's headaches on May 26, July 1, August 3 and August 26, 1993.

On July 6, 1993 the Office requested a second opinion examination from Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon. On August 9, 1993 Dr. Klinghoffer reviewed the history of appellant's injury and his course of treatment. He also noted appellant's past history of left knee operations. Dr. Klinghoffer performed a physical examination and reviewed x-rays. He stated that his examination did not reveal any abnormality other than in the left knee. He opined that the physical effects of appellant's 1990 injury had resolved.

On September 23, 1993 Dr. Karpin diagnosed persistent headaches, left knee pain and low back pain. He indicated that the low back pain stemmed from appellant's injury and that appellant remained partially disabled.

On October 5, 1993 Dr. Mooar indicated that appellant's employment-related knee condition and back pain rendered him totally disabled.

On October 15, 1993 Dr. Karpin indicated that appellant's post-traumatic cephalgia remained a problem, but that it was diminishing. He noted that appellant's cervical and lumbar pain continued. On December 9, 1993 Dr. Karpin continued to note cervical and lumbar pain.

Appellant returned to work eight hours per day on November 1, 1993.

On November 17, 1993 the Office found that a conflict of medical opinion existed concerning whether appellant had residuals from his work-related injury. Consequently, the Office referred appellant to Dr. Paul L. Liebert, a Board-certified orthopedic surgeon, for a referee opinion.

On November 22, 1993 Dr. Max Karpin, a neurosurgeon and neurologist, indicated that appellant had permanent effects in his low back and left knee. Dr. Karpin checked “yes” to indicate that appellant’s present condition was due to the injury for which compensation was claimed.

On January 10, 1994 Dr. Karpin indicated that he continued to treat appellant for his April 20, 1990 injuries and that appellant could not work longer than four hours per day.

On February 18, 1994 Dr. Korevaar performed a series of facet nerve blocks to treat appellant’s back pain.

On February 24, 1994 Dr. Karpin noted that appellant’s lower back remained a severe problem.

On March 11, 1994 Dr. Mooar noted that appellant’s treatment had been ineffective. He recommended a permanent duty restriction at appellant’s current level of disability.

On March 19, 1994 appellant filed a notice of recurrence of disability indicating that he suffered a recurrence on January 18, 1994. He stated that he experienced loss of feeling in both legs, low back pain, left knee pain (swelling in the knee) and muscle spasms in his back.

On March 24, 1994 Dr. Karpin indicated that appellant could work no longer than four hours per day due to his April 20, 1990 injury.

By decision dated April 1, 1994, appellant’s claim for a recurrence of disability on January 10, 1994 was approved.

On April 28, 1994 Dr. Karpin indicated that appellant continued to suffer from severe lower back pain.

On June 9, 1994 Dr. Karpin diagnosed intractable headaches, muscular contraction type and vascular type, and bilateral myofascial syndrome.

On July 15, 1994 the Office found that a conflict in the medical opinions existed and referred appellant to Dr. Paul L. Liebert, a Board-certified orthopedic surgeon, for a referee examination.

On September 1 and October 6, 1994 Dr. Karpin indicated that appellant still experienced pain in the cervical and lumbar region.

On October 24, 1994 Dr. Liebert provided his referee examination. He reviewed the history of appellant’s injury and his course of treatment. Dr. Liebert noted that appellant’s MRIs of the lumbar spine were essentially negative. He performed a physical examination of appellant’s back and left knee. Dr. Liebert indicated that appellant sustained a soft tissue injury to his neck and back as a result of the April 20, 1990 injury. He noted that his examination revealed no signs of impingement or radicular components. Consequently, Dr. Liebert concluded that appellant was no longer disabled from his back injury. He further stated that any symptoms appellant experienced now in his left knee were due to his preexisting condition.

On November 3, 1994 Dr. Karpin reported exacerbated pain in the cervical and lumbar region. He diagnosed closed head trauma, post-traumatic cephalgia, lumbosacral sprain and strain, and myofascitis. Dr. Karpin indicated that appellant could not return to his job without restriction.

On December 20, 1994 the Office issued a “[n]otice of [p]roposed [t]ermination of [c]ompensation” based upon the opinion of Dr. Liebert, the referee examiner. Appellant was given 30 days to respond.

On February 2, 1995 Dr. Karpin reported that appellant’s pain discomfort in the cervical and lumbar sprain remained a problem.

On February 20, 1995 Dr. Mooar indicated that appellant had not recovered from his injuries.

On March 8, 1995 Dr. Karpin recommended permanent limited-duty status for appellant.

On March 9, 1995 Dr. Karpin indicated that appellant’s post-traumatic cephalgia was improving. He stated that pain discomfort in the cervical and lumbar area remained a problem.

On April 6, 1995 Dr. Karpin again noted intense cervical and lumbar pain on his examination of appellant. He repeated this assessment on May 3, June 1, July 6, August 9 and November 21, 1995. On April 7, 1995 Dr. Karpin recommended that appellant be placed on permanent limited-duty restriction due to his work injury.

By decision dated May 1, 1995, the Office terminated appellant’s compensation effective May 1, 1995 because the weight of the evidence failed to support continued disability.

On May 9, 1995 appellant requested an oral hearing.

On July 17, 1995 Dr. Anthony J. Palmaccio diagnosed left knee and back pain related to appellant’s April 20, 1990 injury.

On November 21, 1995, February 29 and March 27, 1996 Dr. Karpin again noted that pain discomfort in the cervical and lumbar area remained a problem for appellant.

On January 4, 1996 Dr. Palmaccio diagnosed patellofemoral dysfunction and chondromalacia.

On April 23, 1996 Dr. Karpin opined that appellant’s symptoms were a direct result of his April 20, 1990 injury. He stated that due to the longevity of the symptoms and the reaggravation of December 5, 1992, these injuries created a permanent partial impairment and significant loss of function. Dr. Karpin noted appellant’s back problems again on June 6, 1996. On June 10, 1996 determined that appellant suffered a 29 percent impairment of the whole person due to his work-related injuries.

Appellant’s hearing was held on June 18, 1996.

On June 20, 1996 Dr. Ofelie M. Balagtas-Balmaseda conducted electrodiagnostic studies and diagnosed right acute C6 radiculopathy.

On July 17, 1996 Dr. Karpin again indicated that appellant's symptomology resulted from his April 20, 1990 injury and created a permanent partial impairment. He indicated that appellant's left knee problems contributed to his back pain.

By decision dated August 8, 1996, the Office hearing representative indicated that Dr. Liebert, the referee examiner, provided a thorough and well-rationalized medical opinion establishing that claimant had no residuals from his April 20, 1990 work injury. Because the opinion of an impartial specialist is entitled to special weight, the Office hearing representative found that the evidence failed to establish ongoing disability from appellant's April 20, 1990 work injury.

On August 30, 1996 appellant requested a second oral hearing.

By decision dated October 10, 1996, the Office denied appellant's request for a hearing because appellant already had an oral hearing and he could submit additional evidence on reconsideration.

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

Once the Office accepts a claim, it has the burden of proving that the disability 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 federal employment, the Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to employment.² Furthermore, the right to medical benefits for the accepted condition is not limited to the period of entitlement to disability.³ To terminate authorization or medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which no longer requires medical treatment.⁴

In the present case, the Office referred appellant to Dr. Klinghoffer, a Board-certified orthopedic surgeon, for a second opinion examination conducted on August 9, 1993. He conducted a thorough examination of appellant's back and knee, and opined that the physical effects of appellant's April 20, 1990 work injury had resolved. Dr. Klinghoffer's opinion, however, was contradicted by the opinions of appellant's treating physicians, Drs. Karpin and Mooar. Dr. Karpin opined that appellant remained partially disabled from his April 20, 1990 work injury and Dr. Mooar indicated that appellant's employment-related knee condition and back pain rendered him totally disabled. Because of the conflict between the report of

¹ *Frederick Justiniano*, 45 ECAB 491 (1994).

² *Id.*

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

⁴ *Id.*

Dr. Klinghoffer and the reports of appellant's treating physicians, the Office referred appellant to Dr. Liebert, a Board-certified orthopedic surgeon, for an impartial medical examination pursuant to section 8123 of the Federal Employees' Compensation Act.⁵

In situations where there are opposing medical reports of virtually equal weight and the case is referred to an impartial specialist, the opinion of such a specialist will be given special weight if the opinion is based on proper factual background and well rationalized.⁶ In this case, Dr. Liebert thoroughly reviewed appellant's medical history, performed an orthopedic examination, and reviewed appellant's MRI scans. He concluded that based on the MRI scans and his examination appellant's accepted conditions had resolved. He further stated that any symptoms appellant currently experienced were due to a preexisting condition. Because Dr. Liebert's opinion was based on a proper factual background and supported by medical rationale his opinion, as that of the impartial specialist, constitutes the weight of the evidence.⁷

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

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."⁸

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.⁹ 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,¹⁰ when the request is made after the 30-day period for requesting a hearing,¹¹ and when the request is for a second hearing on the same issue.¹² The Office's procedures, which require

⁵ 5 U.S.C. § 8128 *et seq.*

⁶ *See Jack R. Smith*, 41 ECAB 691 (1990).

⁷ Following the opinion of the referee examiner, appellant continued to submit additional reports from Drs. Karpin and Mooar which merely repeated their previous conclusions. These opinions are insufficient to outweigh the opinion of the referee examiner. In addition, Dr. Palmaccio's opinion that appellant continued to suffer residuals from his work injury is entitled to little weight because he failed to explain his conclusion. *See Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ 5 U.S.C. § 8124(b)(1).

⁹ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹⁰ *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

¹¹ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

¹² *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

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.¹³

In the present case, appellant's August 30, 1996 hearing request was made after he had already had a hearing before an Office hearing representative, and, thus, appellant was not entitled to a hearing as a matter of right. Hence, the Office was correct in stating in its October 10, 1996 decision that appellant was not entitled to a hearing as a matter of right. 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 October 10, 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 could be resolved by the submission of additional evidence. 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.¹⁴ 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.

¹³ *Stephen C. Belcher*, 42 ECAB 696, 701-02 (1991).

¹⁴ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated October 10 and August 8, 1996 are affirmed.

Dated, Washington, D.C.
May 10, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member