

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARTHUR L. AUSTIN and DEPARTMENT OF THE NAVY,
NAVAL AIR SYSTEMS COMMAND, Alameda, CA

*Docket No. 97-2353; Submitted on the Record;
Issued October 26, 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 met its burden of proof to terminate appellant's compensation benefits on July 12, 1996; (2) whether the Office abused its discretion in denying merit review of the claim on March 27, 1997; and (3) whether the Office properly denied appellant's request for review of the written record.

In the present case, the Office has accepted that appellant, then a 34-year-old equipment cleaner, sustained a low back strain while picking up a box on September 19, 1994.¹ On June 6, 1995 the Office terminated appellant's compensation benefits on the grounds that the report of the Office's second opinion physician, Dr. Bala C. Marar, a Board-certified orthopedic surgeon, established that appellant had no continuing disability or impairment causally related to the September 19, 1994 employment injury. On March 5, 1996 an Office hearing representative conducted a written review of the record. The hearing representative found that a conflict existed in the medical evidence between the report of Dr. Marar, the Office second opinion physician, dated March 13, 1995, and the reports of appellant's treating physician, Dr. Lavorgna, dated December 2, 1994 and March 23, 1995. The hearing representative reinstated appellant's compensation benefits and remanded the case to the Office for referral of appellant to an impartial medical specialist. After receipt of the impartial medical specialist, Dr. Richard E. Preininger, a Board-certified orthopedic surgeon's report, the Office terminated appellant's compensation benefits on July 12, 1996 on the grounds that appellant had no continuing disability or impairment causally related to either his October 20, 1993 or September 19, 1994 injuries.

On September 6, 1996 the Office denied reconsideration after merit review. On October 8, 1996 the Office denied appellant's application for review, without merit review. By decision dated December 5, 1996, the Office Branch of Hearings and Review denied appellant's

¹ Appellant had also claimed that he sustained back, neck, right arm and hand, hip and leg injuries on October 20, 1993 while moving a work stand. The Office denied this claim.

request for review of the written record. On January 15, 1997 the Office denied modification of the prior decision, after merit review. On March 27, 1997 the Office denied appellant's application for review, without merit review.

The Board 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 justifying termination or modification of compensation benefits. 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 disabling condition has ceased or that it is no longer related to the employment.²

The Office hearing representative properly found that a conflict existed in the medical opinion evidence as to whether appellant remained disabled due to the accepted employment injury between appellant's treating physician, Dr. Lavorgna, and the Office's second opinion physician, Dr. Marar, which required that appellant be referred for an impartial medical examination.

The Federal Employees' Compensation Act at section 8123(a)³ provides that if 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 referred appellant to Dr. Preininger for an impartial medical evaluation. Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁴

The Board finds that Dr. Preininger's report was based upon a proper factual and medical background. In his report dated May 20, 1996, Dr. Preininger noted appellant's history of injury at work in 1993 and 1994, as well as his past medical history which included lumbar fusion at age 15 for left-sided thoracic scoliosis. Dr. Preininger indicated that appellant had related that his back pain was continuous and was worsening, and that he had cervical pain which began approximately one year post injury. He stated that appellant had attempted to go back to work on several occasions since October 1993, but by and large had been unable to work since then. Dr. Preininger stated that he was unable to explain appellant's inability to return to work.

Dr. Preininger also explained with proper medical rationale why he concluded that appellant no longer had residuals of the accepted employment injury. Regarding appellant's physical examination, he noted that appellant's current objective findings included marked

² *Patricia A. Keller*, 45 ECAB 278 (1993).

³ 5 U.S.C. § 8123(a).

⁴ *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

limitation of motion of his neck and back, with multiple Waddell's signs and nonorganic physical signs. Dr. Preininger explained that appellant's symptoms were not classic for any type of injury or condition. Finally, regarding the issue of whether appellant had residuals of the accepted conditions, he explained that appellant's objective findings, such as limitation of motion, particularly of his back, were secondary to his preexisting condition and fusion. He noted that he had trouble relating any of his findings to the specific injuries in question, as they were lumbosacral strains. Dr. Preininger stated that appellant did not have residuals from either his October 20, 1993 injury or his accepted September 19, 1994 injury and that he had no objective findings which would preclude him from performing his employment. The Office properly concluded that Dr. Preininger's report was based upon a proper factual and medical background, was well rationalized, and was entitled to special weight.

Prior to the Office's July 12, 1996 decision terminating appellant's benefits, the Office also received April 18 and May 7, 1996 reports from appellant's physician, Dr. Robert S. Blum, a Board-certified neurosurgeon, which were substantially identical in narrative discussion. His reports were of limited probative value in establishing that appellant remained disabled due to his accepted employment injury. Dr. Blum explained that appellant had a significant scoliosis of the thoroacolumbar spine, for which appellant had undergone fusion at age 15. He noted that patients with scoliosis typically develop pain on either side of their fusion and that appellant did have pain which was aggravated by heavy bending and lifting. Dr. Blum also stated that appellant had a back strain/sprain which was superimposed on his scoliosis, but that appellant had no specific neurological deficits on examination, except for those related to his scoliosis and fusion with loss of spinal range of motion. He opined that appellant's complaints of pain were credible, considering his degree of scoliosis. Dr. Blum noted that Dr. Light had recommended surgery for removal of a herniated cervical disc, but he stated no opinion regarding the cause of this condition. Finally, he noted that "[appellant's] position is that he was fit for duty until the strain of October 1993 and the aggravation or additional incident of September 1994." Dr. Blum's report is of limited probative value because it did not offer a medical opinion as to whether appellant's accepted back strain in fact continued to disable him. While Dr. Blum noted appellant's "position" that he had been disabled since September 1994, he offered no medical rationale in support of continuing disability. Dr. Blum indicated that appellant had no neurological deficits except for his preexisting conditions of scoliosis and fusion, but he did not indicate that appellant had residuals of the accepted lumbar strain injury.

On July 1 and 9, 1996 the Office received additional reports from Dr. Blum. In these reports Dr. Blum stated that appellant's scoliosis was asymptomatic until appellant's 1993 and 1994 injuries. He also opined that, "what precludes him from work is his pain superimposed upon his underlying condition, a condition which would not have worsened to the degree that it did, absent his injuries." These were the first reports in which Dr. Blum actually opined that appellant's scoliosis was aggravated by his 1993 and 1994 injuries. The Board notes that the Office has not accepted that appellant's scoliosis was aggravated by employment. The Board has long held that "the fact that work activities may produce symptoms revelatory of an underlying condition does not raise an inference of causal relationship between the condition and the employment. Causal relationship may not be inferred but must be established by rationalized

medical evidence.⁵ Dr. Blum stated that appellant had pain superimposed upon his underlying condition, but he did not provide any medical explanation as to how appellant's scoliosis was aggravated by his employment and how such aggravation continued to disable appellant. His opinion in this regard is therefore of limited probative value. The Office met its burden of proof to terminate appellant's compensation benefits on July 12, 1996 as Dr. Preininger's report was entitled to special weight and as the reports from Dr. Blum were of limited probative medical value as they did not provide a medical opinion with supporting medical rationale as to whether appellant remained disabled due to the accepted employment injury.

Following the termination of appellant's compensation benefits, appellant requested reconsideration on several occasions. On August 19, 1996 appellant requested that the Office reconsider his claim. In support of this request for reconsideration appellant submitted a report from Dr. Jonathan Francis, a Board certified orthopedic surgeon, dated August 13, 1996. In this report Dr. Francis stated that he disagreed with Dr. Preininger's opinion. Dr. Francis noted that appellant's condition was more neurologic than orthopedic because appellant had pain resulting from irritation of the spinal column from pressure from disc protrusion, which was definitely a neurologic process. Dr. Francis thus concluded that Dr. Blum's opinion was of greater weight than that of Dr. Preininger. The Board notes, however, that Dr. Francis did not explain the basis for his findings that appellant had a spinal disc protrusion and how this condition would be related to his accepted work injury. The Board also notes that Dr. Blum in fact noted that appellant had no neurologic deficits caused by the employment injury. Therefore neither Dr. Blum's reports nor Dr. Francis' reports in fact substantiates that appellant has any neurological condition which was caused by his employment injury and which continued to disable him. Furthermore, Dr. Francis noted that a magnetic resonance imaging (MRI) examination showed disc at C5-6 and opined that it was highly likely that this condition arose from repetitive type heavy lifting appellant performed at work over a 15-year period. The record does not reflect, however, that appellant has filed an occupational disease claim alleging that he sustained cervical injury over such 15-year period.

Appellant again requested reconsideration on December 28, 1996. Appellant submitted several medical reports previously unreviewed by the Office. In a July 23, 1996 report, Dr. Blum reiterated his previous opinions and then disagreed with the Office's July 12, 1996 decision. Dr. Blum stated that he believed his report did create a conflict with that of Dr. Preininger because appellant did suffer residuals of his 1993 and 1994 injuries in the form of a strain, which was superimposed upon his preexisting spinal condition and which made appellant symptomatic to the point that he was unable to work. Dr. Blum explained that there "may be" old x-rays of appellant's spine which when compared with the post 1993 films would show an objective change in his curvature, and which then when added to his complaints might be considered sufficient to establish appellant's claim. Dr. Blum, himself, pointed out the deficiencies in his own reports. Dr. Blum's opinion was based upon mere speculation and he was unable to support with any medical evidence or rationale his conclusion that appellant in fact had residuals of the accepted injury, in addition to the preexisting condition, which continued to disable appellant. Appellant also submitted September 15 and 17, and October 29, 1996 reports from Dr. Francis. In his September 15 and 17, 1996 reports, Dr. Francis expressed

⁵ *Norman E. Underwood*, 43 ECAB 719 (1992).

his disagreement with the Office's previous evaluation of his reports. Dr. Francis reported that there was a definite relationship between appellant's injuries in 1993 and 1994 and his previous 15 years of employment and that appellant still "suffered" from a combination of the injuries he sustained in 1993 and 1994. These reports merely reiterated Dr. Francis' inaccurate or incomplete understanding of the workers' compensation claims process. These reports did not provide any new and relevant medical information which would substantiate that appellant continued to be disabled after July 20, 1996 due to his accepted employment injury. In his October 29, 1996 report, Dr. Francis noted that he had reviewed a 1993 cervical x-ray and a 1995 MRI and had concluded that appellant had "some less severe injury in 1993" and that appellant had sustained reinjury in 1994. Dr. Francis did not provide the necessary medical rationale to explain how a diagnosed cervical condition was in fact caused or aggravated by the accepted employment injury.

The Board finds that the Office did not abuse its discretion by denying merit review on March 27, 1997.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁶

In support of his March 3, 1997 application for review, appellant submitted an additional medical report from Dr. Francis dated February 18, 1997. In his February 18, 1997 report, Dr. Francis stated that appellant's 15 years of employment contributed to his lumbar degenerative disc disease and his cervical disc pathology. He also opined that if appellant returned to his previous employment, he would run an extremely high risk of injuring himself. As previously noted, this appeal does not involve a cervical injury. The Office has only accepted appellant's 1994 lumbar sprain injury. Dr. Francis' report does not address the accepted condition, and does not provide the necessary rationalized medical evidence necessary to establish that appellant had any other lumbar or cervical condition which was caused by appellant's employment injury. This report is therefore not relevant to the issue of whether appellant's disability causally related to his lumbar sprain continued. The Office therefore did not abuse its discretion in denying merit review of the claim based upon this report.

The Board also finds that the Office properly denied appellant's request for review of the written record.

By decision dated December 5, 1996, the Office denied appellant's request for written review of the record on the grounds that appellant had previously requested reconsideration before the Office. In its December 5, 1996 decision, appellant was advised by the Office that his request was denied as appellant was not entitled to a written review of the record as a matter of

⁶ 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

right and that the Office, under its discretionary authority, denied the request as appellant could pursue his claim further by requesting reconsideration and submitting rationalized medical evidence in support of his claim.

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁷ The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing.⁸ The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.⁹

In the instant case, appellant had previously requested reconsideration by the Office on numerous occasions, hence, the Office was correct in stating in its December 5, 1996 decision that appellant was not entitled to a review of the written record as a matter of right. In its December 5, 1996 decision, the Office acknowledged that although there was no entitlement to a written review before an Office representative, it could allow such a review within its discretion. The Office refused to allow a review of the written record on the grounds that additional medical evidence could be submitted to the Office, with a request for reconsideration. The Office therefore properly exercised its discretion to deny appellant's request for review of the written record.

⁷ See *Johnny S. Henderson*, 34 ECAB 216 (1982).

⁸ *Michael J. Welsh*, 40 ECAB 994 (1989).

⁹ *Id.*

The decisions of the Office of Workers' Compensation Programs dated March 27 and January 15, 1997, October 8, September 6 and July 12, 1996 are hereby affirmed.

Dated, Washington, D.C.
October 26, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member