U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA R. PINKHAM and U.S. POSTAL SERVICE,
POST OFFICE, Marysville, CA

Docket No. 99-67; Submitted on the Record;
Issued July 26, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has any continuing disability or condition after June 25, 1995 causally related to her accepted employment injuries; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely.

The Board has duly reviewed the case on appeal and finds that appellant has no continuing disability or condition after June 25, 1995 causally related to her accepted employment injuries.

Appellant, a clerk, filed claims alleging that she developed cervical disc disease due to her federal employment. The Office accepted appellant's claims for cervical and lumbar subluxations, temporary aggravation of preexisting degenerative disc disease in the cervical spine and aggravation of thoracic outlet syndrome. The Office proposed to terminate appellant's compensation benefits effective June 25, 1995. By decision dated June 16, 1995, the Office terminated appellant's compensation and medical benefits. Appellant requested a review of the written record and by decision dated November 13, 1995, the hearing representative found that the Office had met its burden of proof to terminate appellant's compensation benefits effective June 25, 1995. The hearing representative further found that, following the Office's June 16, 1995 decision, appellant had submitted additional medical evidence creating a conflict of medical opinion regarding her continuing work-related condition and remanded the case for resolution of this conflict. By decision dated May 19, 1998, the Office found that appellant had no medical residuals on or after June 25, 1995. Appellant requested an oral hearing on

June 26, 1998. By decision dated August 6, 1998, the Branch of Hearings and Review denied appellant's request as untimely.[1]

The Office referred appellant for a second opinion evaluation with Dr. Robert L. England, a Board-certified orthopedic surgeon. In his September 24, 1993 report, Dr. England found that appellant's current condition was not related to her federal employment but to the ongoing pathology of her underlying degenerative disc disease. Appellant's attending physician, Dr. Kenneth B. Wiesner, a Board-certified internist, completed a report on June 26, 1995 and stated that appellant's work-related aggravation was permanent. Section 8123(a) of the Federal Employees' Compensation Act,[2] provides, "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 properly referred appellant for an impartial medical evaluation with Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon.[3] In a report dated April 24, 1998, Dr. Swartz noted appellant's history of injury and performed a physical evaluation. He found that appellant did not have any current or active aggravation of her cervical condition. Dr. Swartz found that, although appellant's work injuries caused a permanent aggravation of her cervical condition, the natural progression of her degenerative disease eventually equaled the degree of progression that there was as a result of the work exposure. He stated, "whereas the aggravation that occurred had reached a permanent plateau, but the natural progression of the disease surpassed that plateaued level and continued, and what we are dealing with at this time is natural progression of the disease."

In situations were there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[4] In this case, Dr. Swartz's report is based on a proper factual background and provides his medical reasoning for concluding that appellant no longer has residuals of her accepted work injuries. Therefore, this report is entitled to the weight of the medical opinion evidence.

Appellant submitted additional medical evidence from Dr. Wiesner including treatment notes and a report dated June 26, 1996. Dr. Wiesner provided physical findings and stated that appellant remained symptomatic due to her work-related injuries. Dr. Wiesner did not provide

[1] Following the Office's May 19, 1998 decision, appellant submitted additional evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. §§ 8101-8193, 8123(a).

[3] The Office initially referred appellant to Dr. Walter F. Drysdale. However, the Office requested a supplemental report from Dr. Drysdale and he declined to respond. The Board has held that, when the Office requests clarification and none is forthcoming, the Office must select a second impartial specialist to resolve the conflict. *Margaret Ann Connor*, 40 ECAB 214, 221 (1988).

[4] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

medical reasoning in support of his opinion. As Dr. Wiesner was on one side of the conflict that Dr. Swartz resolved, the additional report from Dr. Wiesner is insufficient to overcome the weight accorded Dr. Swartz's report as the impartial medical specialist or to create a new conflict with it.[5]

The medical evidence does not establish that appellant has any continuing disability causally related to her accepted work injuries and the Office properly denied her claim.

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

Section 8124(b) of the Federal Employees' Compensation Act,[6] 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."[7]

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.[8] Even where the hearing request is not timely filed, the Office may within its discretion, grant a hearing, and must exercise this discretion.[9]

In the instant case, the Office properly determined appellant's June 26, 1998 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's May 19, 1998 decision. The Office, therefore, properly denied appellant's 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.

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[5] *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8124(b)(1).

[8] *Tammy J. Kenow*, 44 ECAB 619 (1993).

[9] *Id.*

The August 6 and May 19, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
July 26, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member