

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAYNE Y. KITaura and U.S. POSTAL SERVICE,
POST OFFICE, Honolulu, HI

*Docket No. 98-518; Submitted on the Record;
Issued March 29, 2000*

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 benefits; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

On October 29, 1985 appellant, then a 36-year-old postal clerk, filed a notice of occupational disease alleging that he suffered bilateral carpal tunnel syndrome as a result of his federal employment. The Office subsequently accepted the claim for bilateral wrist strain and awarded appropriate compensation benefits.

On May 21, 1996 Dr. K.C. Clement Yeung, appellant's treating physician and a family practitioner, diagnosed a hand sprain with bilateral upper extremity pain and weakness. He stated that appellant had not fully recovered and supported his findings with range of motion and grip strength testing of appellant's upper extremities.

On July 25, 1996 the Office referred appellant, along with a statement of accepted facts, to Dr. Ramon Bagby, a Board-certified orthopedic surgeon, for a second opinion examination.

On August 9, 1996 Dr. Yeung indicated that appellant was unable to work from August 7 through August 9, 1996 due to a flare-up of his chronic, bilateral wrist strain.

On September 26, 1996 Dr. Yeung again stated that appellant had not recovered from his hand sprain with bilateral upper extremity pain and weakness. He based his conclusion on range of motion and grip strength testing showing deficits in his upper extremities.

On September 26, 1996 Dr. Cleveland C.F. Wu, a physician Board-certified in physical medicine and rehabilitation, diagnosed probable bilateral carpal tunnel syndrome and a probable bilateral wrist injury, the nature of which could not be ascertained due to the illegibility of the report. He affirmed his assessment on December 24, 1996.

On October 15, 1996 Dr. Bagby provided his second opinion examination. He recorded appellant's complaints and reviewed the history of his injury. Dr. Bagby performed an extensive

review of the medical records and conducted a physical examination. He diagnosed chronic bilateral upper extremity pain and doubted that carpal tunnel syndrome was present. Dr. Bagby noted that appellant's symptoms continued despite his cessation of the activities causing his injury. He stated that nerve conduction studies, x-rays and laboratory studies were negative for carpal tunnel syndrome. Dr. Bagby indicated that appellant's symptomology was not consistent with carpal tunnel because he complained of paresthesias throughout both hands rather than in the median nerve distribution. He noted that his physical examination rendered normal results with no atrophy, deformity, redness, heat or swelling. Dr. Bagby further noted that grip strength, circumferential measurements and the range of motion of all joints of the bilateral upper extremity were normal. He concluded that it was medically probable that appellant's complaints stemmed from factors not related to his accepted injury or continued employment. Dr. Bagby opined that appellant's subjective complaints were not related to his employment.

On November 1, 1996 Dr. Yeung indicated that appellant was totally disabled from October 30 through November 2, 1996 due to a flare-up of his work-related, bilateral hand strain.

Following the Office's November 6, 1996 request for a clarifying report, Dr. Bagby indicated again on November 27, 1996 that there was no evidence that appellant sustained permanent impairment due to his work injury of March 20, 1985.

On November 29, 1996 Dr. Yeung submitted a treatment plan which the Office subsequently approved. He again indicated that appellant had not recovered from his hand sprain with bilateral upper extremity pain and weakness. Dr. Yeung relied on range of motion testing and grip strength testing which showed deficits that continued to limit appellant's ability to work without restriction.

On December 4, 1996 the Office issued a notice of proposed termination of compensation because the medical evidence no longer established that appellant suffered residuals from his employment injury. The Office allowed appellant 30 days to submit an additional argument or evidence. In an accompanying memorandum, the Office indicated that the weight of the medical evidence rested with the well-rationalized opinion of Dr. Bagby. The Office indicated that Dr. Yeung failed to relate appellant's present condition to his employment.

On December 24, 1996 Dr. Yeung stated that he disagreed with Dr. Bagby's conclusions. He stated that, based on a reasonable medical probability, appellant's symptoms were related to his position with the employing establishment.

By decision dated January 6, 1997, the Office rejected appellant's claim because the weight of the medical evidence established that he no longer suffered residuals from his March 20, 1985 work injury. In an accompanying memorandum, the Office stated that the weight of the medical evidence continued to lie with the detailed findings of Dr. Bagby because his report included a complete history, consideration of all prior medical treatment and a well-rationalized opinion regarding appellant's condition.

By a letter postmarked March 14, 1997, appellant requested an oral hearing.

By decision dated September 4, 1997, the Office denied appellant's request for a hearing as untimely. The Branch of Hearings and Review indicated that the request for a hearing was

postmarked March 14, 1997, which was more than 30 days after the January 6, 1997 decision and, therefore, found that appellant was not entitled to a hearing as a matter of right.

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

Section 8124(b) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office representative 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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹

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 or deny 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 the right to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require 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.²

In this case, the Office issued its last decision terminating appellant's compensation on January 6, 1997. Appellant, however, requested a hearing in a letter postmarked March 14, 1997. Because he did not request a hearing within 30 days of the Office's January 6, 1997 decision, he was not entitled to a hearing under section 8124 as a matter of right. The Office also exercised its discretion, but decided not to grant appellant a discretionary hearing on the grounds that he could have his case further considered on reconsideration by submitting additional relevant evidence. Consequently, the Office properly denied appellant's hearing request.

The Board further finds that the Office failed to meet its burden to terminate appellant's compensation due to an unresolved conflict in the medical opinion evidence.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of benefits. After it has determined that an employee has disability causally related to his 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.³

In the present case, the Office relied on the opinion of Dr. Bagby to terminate benefits. He opined that the residuals from appellant's accepted injury, a bilateral wrist strain, had

¹ 5 U.S.C. § 8124(b)(1).

² *Henry Moreno*, 39 ECAB 475 (1988).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

resolved. In reaching this conclusion, Dr. Bagby noted that appellant's symptoms continued despite the cessation of the activities which caused his injury. He also found that nerve conduction studies, x-rays and laboratory studies were negative for carpal tunnel syndrome and that appellant's symptomology of paresthesias throughout both hands was inconsistent with the condition. Finally, Dr. Bagby indicated that appellant's physical examination, including grip strength testing, circumferential measurements and range of motion testing, rendered normal results. His opinion, however, was contradicted by the opinion of Dr. Yeung. He opined that appellant continued to suffer residuals from his accepted employment injury which disabled him from his usual employment. Dr. Yeung based his opinion on his numerous examinations and the fact that appellant demonstrated deficits on his grip strength and range of motion testing. The opinions of Drs. Bagby and Yeung are both well rationalized and supported by their physical findings on examination. As there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an independent medical specialist, pursuant to section 8123(a) of the Act.⁴

The decision of the Office of Workers' Compensation Programs dated September 4, 1997 denying appellant's request for a hearing is affirmed, but the decision of the Office dated January 6, 1997 terminating compensation is reversed.

Dated, Washington, D.C.
March 29, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁴ 5 U.S.C. § 8123(a); *see Martha A. Whitson (Joe D. Whitson)*, 36 ECAB 370 (1984).