

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT W. BOND and DEFENSE LOGISTICS AGENCY,
Camp Lejeune, NC

*Docket No. 01-1265; Submitted on the Record;
Issued August 6, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation and medical benefits effective November 29, 2000 on the grounds that he had no continuing disability causally related to the July 1, 1999 employment injury; and (2) whether the Office properly denied appellant's request for an oral hearing before an Office hearing representative as untimely.

On July 1, 1999 appellant, a 33-year-old crane operator, sustained an injury to his right shoulder while in the performance of duty. He began receiving treatment, medically managed by Dr. Gary T. Whitlock, a Board-certified emergency medicine specialist, at the employing establishment's health facility on July 2, 1999. Dr. Whitlock diagnosed right shoulder sprain and placed appellant on limited duty.

Appellant worked in a limited-duty capacity until July 26, 1999 when he stopped work and came under the care of Dr. Noel B. Rogers, a Board-certified orthopedic surgeon.¹ Dr. Rogers diagnosed acute traumatic subacromial bursitis of the right shoulder with a possible torn rotator cuff.

The Office accepted appellant's claim for right shoulder sprain/strain and right shoulder rotator cuff tear and paid appropriate compensation benefits, including coverage for an acromioplasty of the right shoulder.

Appellant submitted a progress report dated March 1, 2000, in which Dr. Rogers reported that, based on his examination of appellant following surgery, appellant retained full abduction, full forward flexion and full internal rotation and external rotation of the right shoulder. He noted that appellant related that he was a little weak, "which the therapist has also noticed." The

¹ The record reveals that appellant was a temporary employee, whose appointment expired on September 28, 1999. The record further reveals that, upon the expiration of his appointment, no light duty was offered to him.

doctor concluded that appellant was “doing a lot better”; that he should continue with his exercises; and that he is capable of returning “to work full-time March 6th regular duty.” In a follow-up report dated March 3, 2000, Dr. Rogers reiterated his findings regarding the range of motion attributable to appellant’s right shoulder and indicated that appellant was to return to his office within six to eight weeks.

On May 5, 2000 Dr. Rogers reported that appellant was experiencing clicking in his right shoulder and tingling when gripping. The doctor pointed out that, “I have again reminded the pt. [patient] that it can take up to a year to fully recover [from the acromioplasty].” He noted that appellant “is not working because no one will give him a job, so he starts school next week for training in early childhood development.” In a follow-up report dated July 7, 2000, Dr. Rogers reported that appellant complained of discomfort in his shoulder; that he was experiencing less pain; and that the neurovascular status of both upper extremities was intact with a full range of motion of the left unaffected shoulder. The doctor’s prognosis was that appellant would continue to improve with the assistance of exercises. He added that he would follow up with appellant in four months.

The Office issued a proposed notice of termination on April 18, 2000, finding that, based on the March 1, 2000 medical note of Dr. Rogers, appellant had no continuing disability causally related to the July 1, 1999 employment injury. The Office allotted appellant 30 days in which to submit additional evidence. The Office added that, in the event appellant did not respond within the time allotted, it would terminate his wage-loss compensation and medical benefits. Appellant did not respond within the time allotted.

By decision dated November 29, 2000, the Office terminated appellant’s compensation and medical benefits effective that same date on the grounds that the weight of the medical evidence established that he had no continuing employment-related disability.

By an undated letter, postmarked January 6, 2001 and received by the Office’s Branch of Hearings and Review on January 9, 2001, appellant requested an oral hearing before an Office hearing representative.

By decision dated February 15, 2001, the Office denied appellant’s hearing request as untimely. The Branch of Hearings and Review explained that appellant did not file the request within 30 days of the November 29, 2000 decision. The Branch of Hearings and Review further denied the request on the grounds that the issue could equally well be addressed by the submission of new evidence pursuant to the reconsideration process.

The Board finds that the weight of the medical evidence establishes that appellant had no disability on and after November 29, 2000, causally related to his July 1, 1999 employment injury.

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the

employment.² Thus, the burden of proof is on the Office rather than the employee with respect to the period subsequent to the date when compensation is terminated or modified.³

The Office's determination to terminate appellant's compensation benefits was based on the March 1, 2000 report of his attending physician, Dr. Rogers, who began treating appellant on July 26, 1999, approximately three weeks following the July 1, 1999 employment injury. Following the surgical intervention, consisting of an acromioplasty of the right shoulder, Dr. Rogers reported that appellant had retained a full range of motion in his right shoulder, that his condition had improved and that appellant was capable of returning to regular duty effective March 6, 2000. As appellant's attending physician concluded that appellant could resume the duties of his date-of-injury position, crane operator, the Office properly concluded that appellant was no longer disabled as a result of the employment-related injury.⁴ Therefore, the Office properly terminated appellant's wage-loss compensation benefits.

The Board further finds, however, that the Office improperly terminated medical benefits.

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁵ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.⁶

In this case, Dr. Rogers noted in his March 1, 2000 progress report that, although appellant's condition was improving, he continued to experience weakness following the acromioplasty and also continued to undergo therapy. The doctor reported on May 5, 2000 that appellant complained of clicking in his right shoulder and tingling when gripping. He pointed out that he advised appellant that it would take up to a year for him to recover from the surgery. In a July 7, 2000 follow-up report, the doctor noted that appellant complained of discomfort in his right shoulder, but that the sensation of pain had decreased. Dr. Rogers concluded that appellant's condition would improve with exercises. The Board finds that the progress reports establish that appellant continues to suffer from residuals of the July 1, 1999 employment injury. Although appellant is not disabled from his date-of-injury position, he does require further medical treatment for the effects of his employment-related injury. Consequently, the Board finds that the Office improperly terminated appellant's medical benefits.

² *Michael Hughes*, 52 ECAB _____ (Docket No. 00-1890, issued May 29, 2001); *Edwin L. Lester*, 34 ECAB 1807 (1983).

³ *Edwin L. Lester*, *supra* note 2.

⁴ Under the Federal Employees' Compensation Act, "the general test of disability is whether an injury-related impairment prevents the employee from engaging in the kind of work he was doing when injured." *See David H. Goss*, 32 ECAB 24, 28 (1980). In other words, disability under the Act means "incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury." *See Cathy Jo Fossen*, 49 ECAB 654, 655 (1998).

⁵ *Manuel Gill*, 52 ECAB _____ (Docket No. 99-915, issued March 2, 2001); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁶ *Id.*

The Board further finds that the Office properly denied appellant's request for an oral hearing before an Office hearing representative as untimely.

Section 8124(b)(1) of the Act provides that "a claimant ... 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."⁷ Section 10.616(a) of the Office's regulations provides in pertinent part that "the hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."⁸ If the request is not made within 30 days, a claimant is not entitled to a hearing or a review of the written record as a matter of right.⁹ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁰ In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.¹¹

As appellant's undated request for an oral hearing was postmarked on January 6, 2001, more than 30 days following the issuance of the Office's November 29, 2000 decision, the Board finds that the Office properly determined said request was untimely. Thus, appellant was not entitled to a hearing as a matter of right.¹² The Office exercised its discretionary authority and further denied appellant's hearing request by apprising appellant that the termination issue could be addressed through the reconsideration process. The Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

⁷ 5 U.S.C. § 8124(b)(1).

⁸ 20 C.F.R. § 10.616(a) (2000).

⁹ *Marilyn F. Wilson*, 52 ECAB _____ (Docket No. 00-1939, issued April 19, 2001); *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁰ *Id.*

¹¹ *Marilyn F. Wilson*, *supra* note 9; *Rudolph Bermann*, 26 ECAB 354 (1975).

¹² 20 C.F.R. § 10.616(a) (2000).

The decision of the Office of Workers' Compensation Programs dated November 29, 2000 is hereby affirmed regarding the termination of appellant's wage-loss compensation benefits and reversed regarding the termination of medical benefits. The decision dated February 15, 2001 is affirmed.

Dated, Washington, DC
August 6, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member