

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RUSSELL A. GRANT and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Phoenix, AZ

*Docket Nos. 99-1405 and 99-2245; Submitted on the Record;  
Issued May 18, 2001*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 27, 1999; and (2) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124(b).

On February 12, 1979 appellant, then a 26-year-old nursing assistant, filed a traumatic injury claim (No. A13-0569565) alleging that on February 9, 1979 he experienced muscle spasm at the end of his workday due to his daily routine.

The Office accepted appellant's claim for temporary aggravation of his preexisting Scheuermann's disease and spondylolysis. Subsequently, the Office expanded the acceptance of appellant's claim to include adjustment reaction with depression and anxiety as a consequential condition of appellant's employment-related back injury.<sup>1</sup>

By letter dated October 20, 1998, the Office advised appellant to submit a current rationalized medical report from his treating physician. In response, Dr. James B. Gaddy, a Board-certified family practitioner and appellant's treating physician, submitted a December 7, 1998 letter stating that appellant had middle and upper back pain with some secondary low back pain and an apparent history of depression and anxiety. Dr. Gaddy declined to complete a physical capacity evaluation (PCE) form.

By letters dated November 23, 1998, the Office referred appellant, a statement of accepted facts, a list of specific questions and the medical records to Dr. David Bot, a Board-certified psychiatrist, for a psychological examination and to Dr. Scott Linder, a Board-certified orthopedic surgeon, for a physical examination.

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<sup>1</sup> Appellant was unable to return to work because of his accepted employment-related emotional condition. The Office referred appellant to a vocational rehabilitation counselor. As a result, appellant graduated with honors from Whitworth College with a Bachelor of Science degree in health management. Appellant, however, never returned to work.

Dr. Bot submitted a December 17, 1998 report finding that appellant suffered from a pain disorder causally related to his employment injuries and that appellant's emotional condition stabilized by the mid-1980s with no subsequent change. He also found that appellant was capable of working. Dr. Linder submitted a report of the same date finding that appellant no longer had any residuals of his February 9, 1979 employment injury.

In a December 29, 1998 letter, the Office advised Dr. Bot to review Dr. Linder's report and determine whether appellant had any residuals of his emotional condition, which arose from his 1979 back injury.

In response, Dr. Bot submitted a January 7, 1999 report finding that appellant was not suffering from a psychiatric illness due to his February 9, 1979 employment injury.

In a notice dated December 28, 1998, the Office proposed to terminate appellant's compensation on the grounds that the opinions of Drs. Linder and Bot established that he no longer had any physical or emotional residuals of his February 9, 1979 employment injury. The Office also advised appellant to submit medical evidence supportive of his continued disability within 30 days.

By decision dated February 2, 1999, the Office terminated appellant's compensation based on the opinions of Drs. Linder and Bot. In a March 9, 1999 letter, appellant, through his congressional representative's office, requested an oral hearing. In an April 12, 1999 decision, the Office denied appellant's request on the grounds that it was untimely filed.

The Board finds that the Office met its burden of proof in terminating appellant's compensation, effective February 27, 1999, for appellant's accepted physical conditions.

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.<sup>2</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup> If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.<sup>4</sup>

In this case, the Office relied on the December 17, 1998 report of Dr. Linder to terminate compensation. He provided a history of appellant's employment, the February 9, 1979 employment injury, medical treatment and family background. He noted appellant's complaints

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<sup>2</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>3</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>4</sup> *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

and symptoms and his findings on physical, orthopedic and objective examination. Dr. Linder diagnosed diffuse thoracolumbar spinal pain of uncertain etiology and stated, *inter alia*:

“Present examination gives no indication that [appellant] is suffering from any residuals of any work-related condition to the spine.

“There would not appear to be an indication for any further evaluation or treatment of any sort in regards to his claimed injury.”

Dr. Linder added, “[t]here is no evidence today that [appellant] is unable to return to regular employment, either because of his work-related injury claims in the past or for other reasons.” Dr. Linder further opined:

“X-rays performed today confirm, as suspected, degenerative disc disease and arthritis, primarily in the lumbar spine, but also evidence throughout the thoracic spine. However, it is emphasized that present examination does not give any indication that this condition is active and it is producing no objective findings on [appellant’s] present physical examination. Therefore, these findings would not account for the severity of his claimed symptoms and sense of disability.”

Dr. Linder’s medical opinion was rationalized and based on an accurate factual and medical background. Therefore, the report of Dr. Linder constitutes the weight of the medical evidence and is sufficient to establish that appellant no longer had any physical residuals of his February 9, 1979 employment injury.

The Board, however, finds that the Office did not meet its burden of proof in terminating appellant’s compensation on the grounds that appellant no longer had any residuals of his employment-related emotional condition. In terminating appellant’s compensation, the Office relied on Dr. Bot’s medical reports. In his December 17, 1998 report, Dr. Bot provided a history of appellant’s family background, emotional condition, medical treatment, employment and education. He noted his findings on mental examination and diagnosed pain disorder with psychological factors, associated with physical complaints of back pain.

Dr. Bot opined:

“The pain disorder would be causally related to [appellant’s] industrial injuries. The pain is the predominate complaint and focus for [him]. The pain disorder is associated with significant disability conviction and low motivation despite having been successful working as a security guard after his injury. Also, [appellant] was successful academically and was also successful in pursuing computer and stock market-related interests.

“There is incongruence between his subjective complaints and his objective abilities such that there is probably an element of malingering.

“There is no preexisting disability to be noted. [Appellant] did have a preexisting personality style, specifically narcissistic, but it was not disabling prior to the industrial injury.

“[Appellant’s] psychiatric condition appears to have stabilized by the mid-1980s and there really has not been any subsequent change.”

Dr. Bot further opined:

“[Appellant] would be capable of performing work from a psychiatric standpoint. It is my opinion that motivation is the most significant barrier for him even more than his pain disorder. There are no psychiatric limitations at performing any job that is deemed to be within his physical capacity.”

In a supplemental report dated January 7, 1999, Dr. Bot indicated that he had reviewed Dr. Linder’s report and his own previous report. He stated:

“It is my opinion that the most important aspect of [appellant’s] presentation is partial malingering in that he may have had pain problems originally but at this point the bulk of his complaint is associated with malingering. The pain disorder with psychological factors associated with physical complaints of back pain would be a diagnosis of lesser significance at this point.

“In summary, more probably than not [appellant] is not suffering a psychiatric illness *per se* as a result of his 1979 injury.”

Dr. Bot’s opinion is of limited probative value on the relevant issue of the present case, in that it does not contain adequate medical rationale in support of his opinion that it was “more probably than not [appellant] is not suffering a psychiatric illness *per se* as a result of his 1979 injury.” While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal.<sup>5</sup> Dr. Bot’s opinion is speculative as he opined that appellant “more probably than not” was not suffering from his 1979 employment injury. Thus, the Office did not meet its burden of proof in terminating appellant’s compensation on the grounds that appellant no longer had any psychological residuals of his February 9, 1979 employment injury.

The Board further finds that the Office properly denied appellant’s request for a hearing under 5 U.S.C. § 8124(b).

Section 8124(b)(1) of the Federal Employees’ Compensation Act<sup>6</sup> provides that a “claimant for compensation not satisfied with the 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.”<sup>7</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>8</sup> Even where the hearing

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<sup>5</sup> See *Philip J. Deroo*, 39 ECAB 1294 (1988).

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> 5 U.S.C. § 8124(b)(1).

<sup>8</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

request is not timely filed, the Office may within its discretion, grant a hearing and must exercise this discretion.<sup>9</sup>

In this case, the Office issued its decision terminating appellant's compensation benefits on February 2, 1999. Subsequently, appellant requested an oral hearing, through his congressional representative's office, by letter dated March 9, 1999. The Board finds that the hearing request was made more than 30 days after the Office's decision and thus it was untimely. Consequently, appellant was not entitled to a hearing under section 8124 of the Act as a matter of right.

The Office 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 relevant evidence not previously considered by the Office. Consequently, the Office properly denied appellant's hearing request.

The February 2, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed in part and reversed in part. The Office's April 12, 1999 decision is hereby affirmed.

Dated, Washington, DC  
May 18, 2001

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>9</sup> *Id.*