

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BILLY J. McMILLIAN and U.S. POSTAL SERVICE,  
POST OFFICE, North Houston, TX

*Docket No. 00-847; Submitted on the Record;  
Issued October 19, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective April 24, 1999; and (2) whether the Office abused its discretion by denying appellant's request for a review of the written record under section 8124(b) of the Federal Employees' Compensation Act.

On July 16, 1980 appellant, then a 41-year-old rural mail carrier, sustained cervical and lumbar strains when he fell off a ramp while in the performance of his federal duties. The Office accepted appellant's claim for cervical and lumbar strains and approved appropriate compensation benefits. By decision dated August 21, 1995, compensation for wage loss and medical benefits were terminated based on the weight of the medical evidence. By decision dated January 25, 1996, an Office hearing representative reversed the August 21, 1995 decision and remanded the case to the Office for further development. The hearing representative found a conflict of medical opinion existed.

By decision dated July 11, 1996, the Office terminated compensation benefits based on the report of Dr. Theodore W. Parsons, III, the impartial medical specialist. By decision dated November 8, 1998, an Office hearing representative reversed the July 11, 1996 decision and remanded the case to the Office for further development concerning the opinion of Dr. Parsons.

By decision dated February 11, 1997, the Office again terminated benefits finding that the weight of the medical evidence, as represented by Dr. Parsons' reports, established that the accepted conditions had resolved. By decision dated November 30, 1998, an Office hearing representative again remanded the case back to the Office with specific instructions that a new impartial medical evaluation be scheduled to resolve the conflict of medical opinion.

By decision dated April 6, 1999, the Office terminated benefits effective April 24, 1999 on the basis that the weight of the medical opinion evidence, as represented by the impartial

medical evaluation of Dr. George E. Medley, a Board-certified orthopedic surgeon, established that the accepted conditions had resolved.

By letter dated May 17, 1999, postmarked on that date, appellant requested a review of the written record before an Office hearing representative.

By decision dated July 13, 1999, the Office denied appellant's request for a review of the written record on the grounds that his request was not made within the 30-day time period and that he could submit additional evidence through the reconsideration process.

In a letter dated August 24, 1999, appellant requested reconsideration and set forth legal arguments.

By decision dated November 24, 1999, the Office denied modification of its previous decisions.

The Board finds that the Office properly terminated appellant's compensation benefits effective April 24, 1999, as the evidence establishes that his employment-related residuals ceased.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.<sup>1</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>2</sup>

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on April 24, 1999 based on the well-rationalized opinion of the impartial specialist, Dr. Medley.<sup>3</sup> In a report dated February 22, 1999, he discussed appellant's history of injury, physical complaints, the results of objective tests and listed findings on physical examination. Dr. Medley diagnosed osteoarthritis and degenerative disc disease, lumbar spine. He stated that appellant did not have any evidence of serious nerve root compression or radiculopathy that would lead to any type of back surgery. Dr. Medley further felt that appellant could return to work in a light-duty position that did not require heavy

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<sup>1</sup> *David W. Green*, 43 ECAB 883 (1992); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *Harold S. McGough*, 36 ECAB 332 (1984); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>2</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>3</sup> Section 8123(a) of the Act provides that, "[i]f 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." 5 U.S.C. § 8123(a).

lifting and a lot of physical activity, but stated that a functional capacity assessment would need to be done to determine appellant's exact capabilities. Regarding appellant's work injury of 1980, he stated:

“I feel that the examinee's injury in 1980 probably resulted in an aggravation of the degenerative processes in his lumbar spine. I feel that the argument is basically whether or not this was a temporary aggravation or a permanent aggravation. It would seem from going through his medical records that there was never any definite structural damage documented by any type of imaging study that occurred at the time of the original injury. I would, therefore, feel that the original injury probably resulted in a temporary aggravation of the degenerative joint disease in his lumbar spine. Over the next 20 years, the examinee's lumbar spine has gone through the normal process of aging and the degenerative changes have progressed accordingly. Every individual develops degenerative joint disease and degenerative disc disease as the skeleton ages, however, some individuals develop these changes earlier in life and at a more rapid rate than other individuals. I basically can go no further than to say that this examinee sustained an aggravation of his osteoarthritis and degenerative joint disease of the lumbar spine at the time of his injury. I basically feel that this was probably a temporary aggravation, but I have no medical proof of this other than the fact that there was never a fracture noted on the x-rays or there was never an actual herniated ruptured disc noted on the MRI [magnetic resonance imaging] studies.”

In a March 11, 1999 addendum report, Dr. Medley stated that appellant was unable to safely undergo the functional capacity assessment on March 1, 1999 because of significant hypertension. In view of this, he stated that appellant was not medically able to work at this time and noted that a functional capacity assessment would be needed before his exact limitations could be assessed. Dr. Medley further stated that as appellant was 60 years old and has not worked in approximately 10 years, appellant was probably not going to return to the work force.

In situations when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist of the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>4</sup>

The Board has carefully reviewed the opinion of Dr. Medley and notes that it has the reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. He provided a thorough factual and medical history through his examination of the record and noted that the numerous MRIs and computerized axial tomography scans appellant underwent over the years demonstrated evidence of degenerative disc disease with more or less a progressive osteoarthritis involving the lumbar spine. Moreover, Dr. Medley provided a proper analysis of the factual and medical history and findings on examination and reached conclusions regarding appellant's condition which comported with this

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<sup>4</sup> *Rosie E. Garner*, 48 ECAB 220, 225 (1996).

analysis. He included medical rationale for his opinion that the work injury resulted in only a temporary aggravation of the degenerative joint disease in his lumbar spine by explaining that the objective studies of record failed to show any structural damage, such as a fracture on the x-rays or an actual herniated ruptured disc on the MRI studies, at the time of the original injury. Dr. Medley reasoned that the degenerative changes in appellant's spine over the past 20 years was, therefore, due to the normal process of aging. Although he found that appellant could return to some form of light-duty work, appellant's exact capabilities could not be assessed from a functional capacity study due to appellant's hypertension condition.

In response to the Office's proposed termination of compensation, appellant submitted a letter dated March 20, 1999. He advised that the notice of proposed termination was dated March 1, 1999, the same date Dr. Medley had ordered the functional capacity evaluation. He commented on Dr. Medley's office surroundings and doubted his ability to be impartial. He stated that he was never a rural carrier in Houston and that the Office got some procedural aspects of his claim wrong. He further argued that, although the Office stated that his degenerative disc disease was not accepted as work related, the Office had paid for physicians and tests all based on his degenerative disc disease from 1989 till the present. He further noted that the Office also paid for all the impartial physicians to discredit degenerative disc disease as being related to the work injury.

In a subsequent letter of May 17, 1998, appellant stated that he disagreed with Dr. Medley's usage of the words "feel", "basically" and "probably" in his medical opinion and argued that contrary to Dr. Medley's statement, the record contained references to disc herniation. He included previously submitted copies of medical reports from the years 1983 and 1993. A May 23, 1983 Form CA-20a report from Dr. Jerry L. Hyatt, a Board-certified orthopedic surgeon, noted that a lumbar myelogram showed herniated disc at L4-5, left side and checked a box indicating that appellant's present condition was due to the injury for which compensation was claimed. On page 1 of a June 15, 1983 report, Dr. Raul Sepulveda, a Board-certified neurological surgeon, noted that a December 9, 1982 electromyogram (EMG) was reported as indicating a chronic S1 radiculopathy on both sides with the left side more prominent. A recent myelogram contained evidence of some osteophytes posterior to the L5 vertebrae. A small bulge was present at the L3-4 and at the L4-5 levels as seen on the lateral views. A fair amount of room behind the posterior aspect at the L5, S1 level and the dural sac. There appeared to be some narrowing between the L4-5 and the L5, S1 vertebrae. In a September 28, 1993 report, Dr. Justo S. Avila, Jr., a Board-certified orthopedic surgeon, noted that x-rays of the lumbar spine taken September 28, 1998 showed slight spurring at L1-2 anteriorly; narrowing of L5-S1; and sclerosis of the facet joint at the same level. An October 15, 1990 MRI showed left paracentral disc protrusion at L3-4 and EMG in 1990 showed chronic radiculopathy of L5-S1. Dr. Avila provided an impression of chronic lumbosacral sprain, rule out lumbar disc syndrome with radiculitis to the left leg. A March 30, 1993 report from Dr. Andrew P. Kant, appellant's treating Board-certified orthopedic physician, noted that appellant's current diagnosis was multilevel lumbar disc disease with herniated nucleus pulposus and lumbar radiculopathy.

The Board notes that as the weight of the medical evidence has been afforded the referee specialist, Dr. Medley, appellant's argument's concerning Dr. Medley's opinion will be

addressed first. It is noted that Dr. Medley provided a complete comprehensive report based on a review of the medical records dating back to 1980, a statement of accepted facts and a complete examination. The Board notes that although the medical reports which appellant submitted, which were previously of record, clearly reflected objective studies denoting degenerative changes from 1983, which became more apparent in 1993, only the May 23, 1983 report from Dr. Hyatt discussed causal relationship with the work injury of 1980. The Board has held that a check in a box on a form is not sufficient to establish a causal relationship between an employment injury and the subsequent disability.<sup>5</sup> Since no rationale was provided describing or explaining a causal relationship in the reports appellant submitted or within the case record, these reports along with the other reports within the case record are insufficient to overcome the weight of Dr. Medley's reports. The Board further notes that the reports of record pertaining to the most contemporaneous objective studies to the work injury do not, as Dr. Medley stated, denote any clear structural changes which would be indicative of a permanent aggravation of appellant's degenerative disease process. Although appellant took exception to the language Dr. Medley used in his report, the Board finds that his opinion is well-rationalized and based upon an accurate medical history. No new medical evidence was provided to conflict with Dr. Medley's medical opinion that appellant experienced no permanent aggravation of his degenerative disease process in 1980. Accordingly, Dr. Medley's opinion that only a temporary aggravation of appellant's underlying degenerative joint disease of the lumbar spine had been sustained and that the strains imposed upon the degenerative joint disease involving the back had long ago resolved still constitutes the weight of the medical evidence.

Appellant's argument that a functional capacity evaluation was done on the same day as the notice of proposed termination is irrelevant to the issue in this case, which is whether the Office met its burden of proof in terminating appellant's compensation for the effects of the 1980 injury. A functional capacity study pertains to appellant's ability to work and has no indication whether or not appellant has any residuals causally related to the original injury. As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that he had disability causally related to his accepted employment injury.<sup>6</sup> As noted, no new medical evidence has been provided.

Appellant questioned Dr. Medley's credentials and questioned errors in the factual background of his case, as he never carried mail in Houston. He stated that the Office got some procedural aspects of his claim wrong. A termination decision is rendered on the basis of medical evidence. Dr. Medley is a Board-certified orthopedic surgeon, selected to resolve the conflict of medical opinion in this case. As Dr. Medley's opinion is sufficiently well rationalized and based upon a proper factual background, it is given the special weight accorded to an impartial medical specialist.<sup>7</sup> Regarding the alleged factual errors, the Office never implied that appellant carried mail in Houston, but that the Houston Post Office is the employer charged with the costs of his injury. Furthermore, as the statement of accepted facts provided to

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<sup>5</sup> *Richard N. Johns*, 31 ECAB 29 (1979).

<sup>6</sup> *George Servetas*, 43 ECAB 424, 430 (1992).

<sup>7</sup> *Rosie E. Garner*, *supra* note 4.

Dr. Medley is consistent with the facts of this case, he had a proper factual background upon which to render his opinion.

Although appellant argues that the Office paid for testing and treatment of his degenerative disc disease, the Board notes that the Office never accepted the condition of degenerative disc disease as being causally related to his July 16, 1980 work injury. It is, therefore, appellant's burden to establish a causal relationship between his degenerative disc disease and his prior employment injury through the submission of rationalized medical opinion evidence.<sup>8</sup>

Accordingly, the Board finds that Dr. Medley's opinion is sufficient to meet the Office's burden of proof in terminating appellant's compensation.

The Board finds further that the Office did not abuse its discretion in denying appellant's request for a review of the written record.

Section 8124(b)(1) of the Act provides in pertinent part as follows:

“Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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>9</sup>

The Office's procedures implementing this section are found in the Code of Federal Regulations at 20 C.F.R. § 10.616(a). The regulations state that a claimant is not entitled to an oral hearing or a review of the written record if the request is not made within 30 days of the date of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made prior to requesting a hearing, or if a written review of the record by an Office hearing representative has already taken place.<sup>10</sup>

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

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<sup>8</sup> See *Gary L. Whitmore*, 43 ECAB 441 (1992).

<sup>9</sup> 5 U.S.C. § 8124(b)(1).

<sup>10</sup> 20 C.F.R. § 10.616(a)(1999); see *Robert Lombardo*, 40 ECAB 1038 (1989); *Shirley A. Jackson*, 39 ECAB 540 (1988).

provision was made for such hearings and has held that the Office must exercise its discretion in such cases.<sup>11</sup> The Office shall determine whether a discretionary hearing should be granted and, if

not, shall so advise the claimant with reasons.<sup>12</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when no legal provision is made for such hearings, are a proper interpretation of the Act and of Board precedent.<sup>13</sup>

In the instant case, following an April 6, 1999 Office decision, appellant requested a review of the written record by letter dated May 17, 1999, which was postmarked on that date. The 30-day period expired prior to May 17, 1999. Accordingly, appellant's request for a review of the written record was not within the 30-day time limitation. The Office, nonetheless, had discretionary authority to grant appellant's request and in its July 13, 1999 decision it exercised this discretion, by stating that the issue could be resolved through the reconsideration process. The Board has often held that the denial of a hearing on this ground represents a proper exercise of the Office's discretionary authority.<sup>14</sup> Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's request for a review of the written record and that it properly advised appellant with reasons for its denial. The Board further finds that appellant subsequently requested reconsideration and the Office properly reviewed all the materials appellant had submitted before the Branch of Hearing and Reviews in its November 24, 1999 decision denying modification.

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<sup>11</sup> See, e.g., *Mary B. Moss*, 40 ECAB 640 (1989) (untimely request); *Johnny S. Henderson*, 34 ECAB 216 (1982) (request for a second hearing); *Rudolph Bermann*, 26 ECAB 354 (1975) (injury occurring prior to effective date of the statutory amendments providing right to hearing).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

<sup>13</sup> See *Jeff Micono*, 39 ECAB 617 (1988); *Henry Moreno*, 39 ECAB 475 (1988).

<sup>14</sup> See *Robert Lombardo*, *supra* note 10.

The November 24, July 13 and April 6, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC  
October 19, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member