

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY L. KINDLE and U.S. POSTAL SERVICE,
HICKMAN MILLS STATION, Kansas City, MO

*Docket No. 00-1679; Submitted on the Record;
Issued March 14, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation and medical benefits effective February 28, 1999.

On October 16, 1979 appellant, then a 31-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), wherein he stated that on October 13, 1979 he sustained a fractured bone in his right foot when turning to avoid a dog. By letter dated May 2, 1984, this claim was accepted for avulsion fracture right foot thrombophlebitis and was later accepted for postoperative pulmonary embolism and temporary strain on the right knee. Appropriate compensation benefits were paid, including an 89 percent impairment rating to the right lower extremity as awarded in the Office's decision February 25, 1988. Appellant's schedule award was affirmed by the Board on September 20, 1990.¹

Appellant sought treatment for his injuries from Dr. Steven E. Buie, a Board-certified family practitioner, and Dr. M. Scott Beall, Jr., a Board-certified orthopedic surgeon. In a medical report dated December 8, 1990, Dr. Buie stated that he agreed with Dr. Beall, that there was a causal relationship between appellant's current diagnosis and the injury sustained on October 13, 1979 when he was attacked by a dog. He opined that appellant had a disability of 85 percent in the lower extremity due to ligamentous laxity, postphlebotic syndrome, eroded cartilage, osteoarthritis and neuralgia.

By decision dated November 5, 1992, the Office denied appellant's claim that a left lower extremity condition was causally related to the 1979 accepted work-related injury. This decision was affirmed by the hearing representative on September 21, 1993.

¹ Gary L. Kindle, Docket No. 89-1571 (September 20, 1990).

Drs. Beall and Buie continued to provide narrative reports discussing appellant's continuing disability. In a report dated October 23, 1992, Dr. Buie repeated his observation that there was a causal relationship between appellant's diagnosis and the injuries sustained on October 13, 1979. In a report dated June 10, 1993, Dr. Buie opined that appellant's "cardiovascular and morbid obesity were worsened due to his initial orthopedic injuries." He further opined that he foresaw no meaningful employment opportunity for appellant and, at best, would be able to be cooperative in the care of himself and aided by others. In his report dated July 29, 1996, Dr. Buie noted:

"Diagnosis is that of degenerative osteoarthritis, bilateral knees, ligamentous laxity complete on right and degenerative on left, post-phlebotic syndrome with post-phlebotic edema, chronic lumbar osteoarthritis and intermittent lumbar strain with frequent falls due to instability, hypertension uncontrolled, situational depression controlled, ventral hernia stable, history of intermittent pulmonary emboli stable at present and is on life-time anticoagulant with history of increased degeneration of lower extremities."

He further noted that appellant was permanently and progressively disabled, that he may not return to any occupation and that appellant was not a candidate for rehabilitation or vocational counseling.

On September 23, 1998 the Office proposed terminating appellant's compensation benefits for the accepted conditions of postoperative pulmonary embolism and thrombophlebitis in the lower extremities.

The Office referred appellant to Dr. James Armstrong, an orthopedic surgeon, for a second opinion. In his report dated November 6, 1998, he opined:

"The accepted conditions were avulsion fracture to the right foot, which is resolved, temporary low back strain and temporary right knee sprain, both of which resolved as of May 26, 1982. The [appellant] has ongoing degenerative changes in the knees, which are unrelated to the accepted conditions. In fact I would expect that degenerative changes of the knees clinically and/or by x-ray would have been evident preexisting the right foot injury."

By decision dated December 14, 1998, the Office finalized the proposed action, terminating appellant's medical treatment of the thrombophlebitis and postoperative embolism. By letter dated December 16, 1998, appellant requested an oral hearing.

On January 5, 1999 the Office proposed to terminate appellant's compensation and associated medical treatment due to the right foot avulsion fracture, temporary low back strain and right knee strain.

In response to the proposed termination of benefits, appellant submitted a February 2, 1999 report, wherein Dr. Beall reviewed appellant's condition and opined:

"[Appellant] has not responded to a variety of treatment modalities for all of his problems and, although the original problem is certainly improved that which

involved his foot, the complications are all in my opinion related to the problem and this work-related problem has resulted in a morbidly obese patient and his being totally disabled and I would feel that he would likely not have become disabled if he had not had this problem originally.”

Appellant submitted medical reports from Dr. Beall, dated October 4, 1999 and July 1, 1993, who indicated that appellant’s problems started with an injury to his foot as a result of a dog bite which led to complications and that he was completely disabled because of these complications. Appellant also submitted Dr. Buie’s reports of September 29 and January 20, 1999. In his January 20, 1999 report, Dr. Buie reiterated his opinion that appellant was permanently disabled from causal effects from the previous injury. In Dr. Buie’s September 29, 1999 report, he objected to Dr. Armstrong’s assessment that appellant’s condition was not a direct consequence of his injury and reiterated his opinion that appellant’s current advancing medical disability has a causal relationship with his work injury.

By decision dated February 16, 1999, the Office finalized its termination finding that the weight of the medical evidence was represented by the opinion of Dr. Armstrong and established that the accepted conditions had resolved. Compensation and medical benefits were terminated effective February 28, 1999. On March 16, 1999 appellant requested an oral hearing. On the same date he requested subpoenas for witnesses and documents. The hearing was held on September 21, 1999.

At the hearing and by letter dated September 28, 1999, the hearing representative denied appellant’s request for subpoenas as he found that appellant had not explained why such testimony was directly relevant or why a subpoena is the best method to obtain such evidence. Further, the hearing representative denied the subpoena for “any and all documents concerning the evaluation of medical evidence and review of claims for other long term recipients.”

In a decision dated January 4, 2000, the hearing representative found that the Office had not met its burden of proof to terminate appellant’s entitlement to medical treatment as outlined in its December 14, 1998 decision. Accordingly, the decision dated December 14, 1998 was set aside and the case remanded for further development of the medical evidence. The hearing representative noted that appellant was entitled to reinstatement of compensation benefits and medical treatment for such conditions as outlined.² However, the hearing representative found that the Office had met its burden of proof to terminate appellant’s entitlement to medical treatment of the orthopedic conditions as outlined in its February 16, 1999 decision. In making this determination, the hearing representative found that the weight of the evidence was with Dr. Armstrong’s second opinion evaluation.

The Board finds that the Office did not meet its burden of proof in terminating appellant’s compensation and medical benefits effective February 28, 1999.

Once the Office accepts a claim, it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability

² Although appellant’s attorney requested that the hearing representative’s language as to the reinstatement of benefits be revised, the Board notes no error in the language of the hearing representative.

causally related to his 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 Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. 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.⁴

In the instant case, the Board finds a conflict in the medical evidence between appellant's treating physicians, Drs. Beall and Buie and that of the second opinion referral physician, Dr. Armstrong. The reports of the physicians are in conflict as to whether appellant has any continuing disability relating to his accepted work injury. Appellant's treating physicians Drs. Beall and Buie, found to assert that appellant remained disabled as a result of his work injury on October 13, 1979. Dr. Armstrong explained that appellant's accepted conditions had resolved and noted that there was no objective evidence to support work-related disability.

Where there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.⁵ Based on the above-referenced conflict in the medical evidence between Drs. Beall and Buie and Dr. Armstrong, the Board finds that the Office should have referred appellant's case for an impartial medical examination.⁶ Accordingly, the decision dated February 12, 1999 is set aside and the case remanded for further consideration.

On appeal appellant contends that the Office hearing representative erred in not issuing subpoenas. Section 8126⁷ of the Federal Employees' Compensation Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method to obtain such evidence because there is no other means by which the testimony could have been obtained.⁸ The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or action taken which is clearly contrary to logic and probable deductions from established facts.⁹

³ *Martin T. Schwartz*, 48 ECAB 521, 522 (1997).

⁴ *Id.*

⁵ 5 U.S.C. § 8123(a); *see also Lawrence C. Parr*, 48 ECAB 445, 453 (1997).

⁶ *See Craig M. Crenshaw, Jr.*, 40 ECAB 919 (1989).

⁷ 5 U.S.C. § 8126.

⁸ 20 C.F.R. § 10.619.

⁹ *Dorothy Bernard*, 37 ECAB 124 (1985).

Appellant's general contentions with regard to the need for subpoenas was not sufficient to require that subpoenas be issued.¹⁰ The Office hearing representative did not abuse her discretion in denying subpoenas as requested by appellant.

The decision of the Office of Workers' Compensation Programs dated January 4, 2000 is reversed.

Dated, Washington, DC
March 14, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ See *Darlene Menke*, 43 ECAB 173, 180 (1991).