

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of ALICIA M. CANTU and DEPARTMENT OF DEFENSE,  
DEFENSE FINANCE & ACCOUNTING SERVICES, San Diego, CA

*Docket No. 01-2259 Submitted on the Record;  
Issued April 14, 2003*

---

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
A. PETER KANJORSKI

The issues are: (1) whether appellant was disabled from October 8, 1998 through January 27, 1999; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing; and (3) whether the Office properly terminated appellant's compensation for a work-related back condition on August 16, 2000.

On June 19, 1998 appellant, then a 50-year-old accountant technician, filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that on June 6, 1998 she injured her back when she fell trying to sit down at her desk. Appellant's medical history contains several work-related and nonwork-related injuries including a nonwork-related motor vehicle accident on March 2, 1990 that resulted in whiplash and right shoulder pain corrected by surgery, a nonwork-related left shoulder injury that was surgically repaired on April 22, 1995, work related right and left shoulder claims in 1995 and a nonaccepted claim for carpal tunnel syndrome and myofascial pain.

In a July 20, 1998 report, Dr. Anthony Dawkins, a chiropractor, diagnosed appellant with a lumbar sprain and lumbar muscle spasms. On August 1, 1998 appellant returned to part-time duty. She returned to full-time work on August 17, 1998. In a December 1, 1998 form report, Dr. Dawkins indicated that appellant continued to experience a lumbar sprain and spasms, but indicated that she could continue working part time.

In a September 24, 1998 decision, the Office accepted appellant's claim for lumbosacral strain. The Office relied on the form report and diagnoses of Dr. Glenn D'Arpa, an osteopath. In his July 22, 1998 report, Dr. D'Arpa found that appellant was totally disabled through July 31, 1998.

On December 16, 1998 appellant filed a notice of recurrence of disability and claim for compensation alleging that while sitting in her Office she reinjured her back on October 8, 1998. In a January 15, 1999 letter, the Office requested more information from appellant and reminded

her that a lumbar subluxation diagnosed by x-rays was not an accepted condition and, therefore, her medical bills from the chiropractor, Dr. Dawkins, would not be compensable.

In a February 12, 1999 report, Dr. D'Arpa indicated that he had seen appellant on January 27, 1999 for the first time since July 1, 1998, when she had opted for chiropractic care. He diagnosed continued lumbar sprain from her June 8, 1998 fall and said she could work only part-time and recommended three epidural steroid injections.

In a March 9, 1999 decision, the Office denied the recurrence but authorized the injections. In a March 9, 1999 letter, appellant was referred to Dr. Thomas Dorsey, an orthopedist, for a second opinion. In a March 26, 1999 report, Dr. Dorsey found that appellant had no residuals from her back injury and indicated that she could return to work full time.

In an April 26, 1999 letter, the Office proposed terminating appellant's benefits based on the report of Dr. Dorsey. In a May 23, 1999 letter, appellant objected to the termination and requested a hearing. In a May 27, 1999 decision, the Office terminated appellant's compensation.

In June 2, 1999 letter, Dr. D'Arpa disagreed with Dr. Dorsey's findings and added the diagnosis of fibromyalgia.

In an August 30, 1999 decision, the hearing representative reversed the termination finding a conflict in the medical evidence between Drs. Dorsey and D'Arpa. Appellant was referred for an independent medical examination with Dr. Roman B. Cham, a Board-certified orthopedist. In a November 30, 1999 report, Dr. Cham found no objective evidence of an ongoing condition or pathology involving the lumbosacral spine. He also found that appellant had a positive psychiatric history requiring medical intervention. He said the work injury aggravated her psychiatric condition, making appellant more emotionally labile and led to excessive physical complaints (somatized) and emotional distress. He diagnosed a lumbosacral strain, resolved and dysfunctional psychosomatic pain response secondary to her accepted injury.

In a January 13, 2000 form report, Dr. Henry Kim, indicated that appellant was to remain off work until January 26, 2000, due to a recent neck condition. No further evidence was submitted on this issue.

In an April 28, 2000 letter, the Office referred appellant to Dr. Sanford Shapiro, a psychiatrist, and Dr. Jonathan Licht, a neurologist. In a May 25, 2000 report, Dr. Licht wrote:

“There was no objective findings on my neurologic examination. There was no specific evidence or neurologic damage to the lower back in problems in the extremities. The giveaway weakness pattern is indicative of either poor effort or an upper motor lesion, but there was no evidence on my examination of any upper motor neuron lesion. Therefore, poor effort is the most likely reason for the giveaway weakness. [Appellant] does not have any neurologic conditions that prevent him (sic) from taking or participating in activities of daily life.”

In a July 10, 2000 report, Dr. Licht again found “no electrophysiological evidence of peripheral neuropathy, entrapment neuropathy or radiculopathy in the extremities.” A magnetic

resonance imaging scan done for Dr. Licht revealed mild multilevel degenerative disc disease and uncovertebral spondylosis.

In a June 9, 2000 report, Dr. Shapiro diagnosed appellant with a dysthymic disorder secondary to symptoms that have occurred subsequent to the related injury on June 8, 1998. He indicated that she continues to suffer from difficulty walking, bending and sitting for long periods of time that makes her depressed and discouraged. He added that, from a psychiatric standpoint, there was no reason to change her duties.

In an August 16, 2000 decision, the Office, relying on the reports of Dr. Cham, found that appellant no longer had residuals related to her accepted back condition and terminated compensation for that condition while authorizing medical benefits for her nondisabling psychological condition. In addition, the Office found that appellant was not entitled to compensation for any disability from when she was being treated by Dr. Dawkins, the chiropractor, because there was no diagnosis by x-ray of a subluxation.

During the period of June 18, 1999 and January 11, 2000, appellant worked full time while taking time off for medical appointments. The Office allowed coverage for the time lost for medical appointments. The Office further found no coverage for the time missed between January 12 and 26, 2000, finding the medical evidence insufficient to support disability.

In an October 10, 2001 letter, appellant requested a hearing, which the Office denied as untimely.

The Board finds that the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "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."<sup>1</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>2</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 provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>3</sup> 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

---

<sup>1</sup> 5 U.S.C. § 8124(b)(1).

<sup>2</sup> *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

<sup>3</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

hearing,<sup>4</sup> when the request is made after the 30-day period for requesting a hearing<sup>5</sup> and when the request is for a second hearing on the same issue.<sup>6</sup>

In the present case, appellant's hearing request was made more than 30 days after August 16, 2000 the date of issuance of the Office's prior decision dated and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing before an Office representative in a letter dated October 1, 2000. Hence, the Office was correct in stating in its decision, that appellant was not entitled to a hearing as a matter of right because her hearing request was not made within 30 days of the Office's decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its decision denying the hearing properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the issue in the case was medical and could be resolved by submitting additional medical evidence to establish that her injury was causally related to factors of employment. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken, which are contrary to both logic and probable deduction from established facts.<sup>7</sup> In the present case, appellant presented no new evidence to meet that high standard. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The Board further finds that the Office properly denied appellant wage-loss compensation for her emotional condition. To establish that an emotional condition was sustained in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to the condition; and (3) rationalized medical evidence establishing that the identified compensable employment factors are causally related to the emotional condition.<sup>8</sup>

In its August 16, 2000 decision, the Office relying on the report of Dr. Cham, accepted that appellant developed an emotional condition causally related to her accepted condition and referred appellant to Dr. Shapiro, a psychiatrist. In his June 9, 2000 report, Dr. Shapiro diagnosed appellant with a dysthymic disorder secondary to symptoms that have occurred subsequent to the related injury on June 8, 1998 and indicated that walking, bending and sitting for long periods of time makes her depressed and discouraged. But he added that appellant was a good candidate for further psychiatric treatment, there was no reason she could not work. The

---

<sup>4</sup> *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

<sup>5</sup> *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

<sup>6</sup> *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

<sup>7</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

<sup>8</sup> *Bonnie Goodman*, 50 ECAB 139 (1998); *Samuel Senkow*, 50 ECAB 370 (1999).

Board finds that appellant has not submitted sufficient medical evidence to establish entitlement to wage-loss compensation for her accepted emotional condition.

The Board also finds that the Office properly terminated appellant's orthopedic benefits.

Under the Act,<sup>9</sup> once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>10</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>11</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>12</sup>

The Office properly determined that there was a conflict in the medical opinion between Dr. D'Arpa appellant's treating physician and Dr. Dorsey acting as an Office referral physician, regarding whether appellant continued to have residuals of the June 8, 1998 employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Cham for an impartial medical examination and an opinion on the matter.<sup>13</sup>

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for 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>14</sup>

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Cham, the impartial medical specialist selected to resolve the conflict in the medical opinion. The November 30, 1999 report, of Dr. Cham establishes that appellant had no disability due to her June 8, 1998 employment injury.

The Board has carefully reviewed the opinion of Dr. Cham and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Cham's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Cham provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions

---

<sup>9</sup> 5 U.S.C. §§ 8101-8193.

<sup>10</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>11</sup> *Id.*

<sup>12</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>13</sup> Section 8123(a) of the Act provides in pertinent part: "If 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).

<sup>14</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

regarding appellant's condition, which comported with this analysis.<sup>15</sup> He provided medical rationale for his opinion by explaining that no objective evidence to suggest appellant's lumbosacral strain continued.

Appellant returned to work on August 18, 1998 and worked full time until October 7, 1998, when she stopped work due to back pain. Appellant did not work from October 8 to November 18, 1998, when she returned part time until June 18, 1999.

The Board finds that the Office properly refused to compensate appellant for her disability for the period between October 8, 1998 and January 27, 1999, because the only medical evidence submitted was from Dr. Dawkins, a chiropractor. The opinion of his has no probative value on the issue of whether appellant sustained an employment-related injury because his reports do not constitute medical evidence within the meaning of the Act.

Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.<sup>16</sup> However, Dr. Dawkins did not indicate in any of his reports that appellant sustained a subluxation as demonstrated by x-rays.

On January 27, 1999 Dr. D'Arpa found appellant partially disabled until June 17, 1999, when appellant returned to full-time work. The Office properly compensated appellant for this time missed based on the report of Dr. D'Arpa.

For the period January 12 through 26, 2000, appellant stopped work due to neck pain.

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim, including the fact that an injury was sustained in the performance of duty as alleged and that any disability for which compensation is claimed is causally related to the employment injury.<sup>17</sup>

The evidence required to establish causal relationship is rationalized medical evidence, based on complete factual and medical background, showing a causal relationship between the claimed medical condition and the identified factors.<sup>18</sup>

The Board finds that the Office properly denied disability for this period as appellant submitted no rationalized medical evidence establishing either a new injury or a recurrence.

---

<sup>15</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>16</sup> 5 U.S.C. § 8107(a). See *Jack B. Wood*, 40 ECAB 95, 109 (1988).

<sup>17</sup> *Duane B. Harris*, 49 ECAB 170 (1997).

<sup>18</sup> *Id.*, *Dennis Mascarenas*, 49 ECAB 215 (1997).

The August 16, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
April 14, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

A. Peter Kanjorski  
Alternate Member