

**United States Department of Labor
Employees' Compensation Appeals Board**

WALTER L. BURKS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hayward, CA, Employer**

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**Docket No. 03-2230
Issued: February 17, 2004**

Appearances:
Walter L. Burks, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 10, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated August 20, 2003, in which an Office hearing representative denied appellant's request for an oral hearing, and January 6, 2003, in which the Office terminated appellant's compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective December 29, 2002; and (2) whether the Branch of Hearings and Review properly denied appellant's request for an oral hearing as untimely filed.

FACTUAL HISTORY

On July 16, 1992 appellant then a 27-year-old casual carrier, filed a notice of traumatic injury alleging that he injured his right foot and ankle in the performance of duty. The employing establishment terminated appellant for cause on July 24, 1992. The Office accepted

appellant's claim for plantar fasciitis on August 19, 1992 and entered appellant on the periodic rolls.

The Office granted appellant a schedule award for an 18 percent permanent impairment of his right lower extremity on November 18, 1993 for a period of 51.84 weeks, to run from July 1, 1993 to June 28, 1994. By decision dated March 1, 1995, the Branch of Hearings and Review affirmed the Office's decision. Appellant requested review by the Board and, in a decision dated May 21, 1997, the Board affirmed the Office's decisions.¹ The Office reinstated appellant on the periodic rolls effective June 29, 1994.

On October 18, 2001 the Office referred appellant for a second opinion evaluation with Dr. William Fox, a Board-certified orthopedic surgeon. In a report dated January 15, 2002, Dr. Fox found that appellant continued to experience residuals of his employment-related condition, but that he could return to sedentary work. Appellant's attending physician, Dr. R. Brian Bulloch, an orthopedic surgeon, found that appellant was totally disabled due to plantar fasciitis. Due to the disagreement regarding the extent of appellant's disability for work, on September 13, 2002 the Office referred appellant to Dr. George Medley, a Board-certified orthopedic surgeon, to resolve the conflict. By report dated October 23, 2002, Dr. Medley found that appellant was not disabled, had no medical residuals of his accepted condition and that he could return to his date-of-injury position.

In a letter dated November 20, 2002, the Office proposed to terminate appellant's compensation benefits on the grounds that he had no continuing employment-related disability or medical residuals. The Office allowed appellant 30 days for a response. Appellant responded in November 2002 and submitted additional medical evidence from Dr. Bulloch. By decision dated January 6, 2003, the Office terminated appellant's compensation benefits, effective December 29, 2002, on the grounds that Dr. Medley's report represented the weight of the medical evidence and established that appellant had no continuing disability or employment-related disability.

Appellant requested an oral hearing in a letter postmarked July 10, 2003. By decision dated August 20, 2003, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely and found that appellant could pursue his claim through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal 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

¹ Docket No. 95-1731.

² *Gloria J. Godfrey*, 52 ECAB 486 (2001).

³ *Barbara J. Warren*, 51 ECAB 413 (2000).

benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁵

Section 8123(a) of the Federal Employees' Compensation Act⁶ provides, "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."⁷ In situations where there are 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 on a proper factual background, must be given special weight.⁸

ANALYSIS -- ISSUE 1

In this case, the Office accepted appellant's claim for employment-related plantar fasciitis and authorized medical and compensation benefits. The Office referred appellant for a second opinion evaluation with Dr. Fox, a Board-certified orthopedic surgeon. In his December 17, 2001 and January 15, 2002 reports, Dr. Fox found that appellant was tender over the plantar fascia and that he required additional treatment due to his employment-related injury. Dr. Fox concluded that appellant could return to work in a sedentary capacity with restrictions on walking and standing.

Appellant's attending physician, Dr. Bulloch, an orthopedic surgeon, noted appellant's history of injury and diagnosed plantar fasciitis. He stated: "I think he probably is not capable of working." Dr. Bulloch recommended a functional capacity evaluation to determine appellant's work abilities and restrictions.

Due to the difference of opinion between appellant's physician, Dr. Bulloch, an orthopedic surgeon, who opined that appellant was not capable of returning to work and Dr. Fox, the Office referral physician and a Board-certified orthopedic surgeon, who determined that appellant had employment-related residuals but was capable of sedentary work, the Office properly referred appellant to Dr. Medley, a Board-certified orthopedic surgeon, to resolve the existing conflict of medical opinion evidence.

In this October 23, 2002 report, Dr. Medley noted appellant's history of injury and provided findings on physical evaluation. He stated that appellant had no swelling in his lower extremities, that his leg circumferences were equal with no calf or thigh atrophy. Dr. Medley noted that appellant demonstrated cogwheel-like give away on his right side. He further stated,

⁴ *Leonard M. Burger*, 51 ECAB 369 (2000).

⁵ *Id.*

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8123(a).

⁸ *Barbara J. Warren*, *supra* note 3.

“There is no evidence of atrophy of the skin on the bottom of the foot. There is a normal callus formation over the bottom of both feet, even though he says he does not walk on his foot.” Dr. Medley reviewed appellant’s x-rays and found no evidence of significant bony abnormality other than a mild calcaneal spur and mild osteoarthritis around the toes. He stated that he could not offer a diagnosis that would explain appellant’s subjective symptoms. Dr. Medley stated that appellant had no objective findings of plantar fasciitis and that he did not find evidence of any work-related condition that would prevent appellant from returning to his date-of-injury job. He stated that appellant had fully recovered from his accepted employment injury.

Dr. Medley’s report provided a history of injury, detailed findings on physical examination and concluded that appellant had no work-related disability nor residuals. He stated that the physical examination revealed that both appellant’s feet were calloused and that there was no muscle atrophy in his right leg, despite appellant’s claims that he did not walk on his right foot. Dr. Medley concluded that there were no objective findings to support appellant’s subjective symptoms and that his current condition was not related to his accepted employment injury. He opined that appellant could return to work without restriction and that appellant did not require further medical treatment. The Board finds that, as Dr. Medley offered medical reasoning in support of his conclusion that appellant was no longer disabled and had no medical residuals of his accepted condition, his report is sufficient to meet the Office’s burden of proof to terminate appellant’s compensation and medical benefits.⁹

Appellant submitted an additional report from Dr. Bulloch, in support of his claim for continuing disability and medical residuals. On December 3, 2002 Dr. Bulloch stated that appellant had multiple complaints, which reflected his rheumatologic concerns. He also noted that appellant had a “foot concern” which was consistent with a chronic plantar fasciitis and that appellant should undergo additional treatment for this condition. The Board, however, finds that this report is not sufficient to establish continuing disability or medical residuals of the employment-related condition of plantar fasciitis. Although Dr. Bulloch provided a diagnosis of plantar fasciitis, he did not provide detailed physical findings in support of his diagnosis. Dr. Bulloch also failed to offer any explanation of why he believed that appellant continued to experience plantar fasciitis 10 years after his accepted employment injury. Finally, as Dr. Bulloch was on one side of the conflict that Dr. Medley resolved, the additional report from Dr. Bulloch is insufficient to overcome the weight accorded Dr. Medley’s report as the impartial medical specialist or to create a new conflict with it.¹⁰

The Board finds that the weight of the medical evidence, as represented by the well-rationalized report of Dr. Medley, establishes that appellant has no continuing disability or medical residuals and the Office properly terminated appellant’s compensation and medical benefits based on this report.

⁹ *Id.*

¹⁰ *Michael Hughes*, 52 ECAB 387 (2001).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, states: "Before review under section 8128(a) of this title, a claimant ... not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹¹

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.¹² Even where the hearing request is not timely filed, the Office may, within its discretion, grant a hearing and must exercise this discretion.¹³

LEGAL ANALYSIS -- ISSUE 2

In the instant case, the Office properly determined appellant's July 10, 2003 request for a hearing was not timely filed as it was made more than 30 days after the issuance of the Office's January 6, 2003 decision. The Office, therefore, properly denied appellant's hearing as a matter of right.¹⁴

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could be resolved through the submission of evidence in the reconsideration process. Therefore, the Office properly denied appellant's request for a hearing as untimely and properly exercised its discretion in determining to deny appellant's request for a hearing as he had other review options available.¹⁵

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits, effective December 29, 2002, on the grounds that the weight of the medical evidence as represented by the October 23, 2002 report of Dr. Medley, a Board-certified orthopedic surgeon and impartial medical specialist, established that appellant had no continuing disability or medical residuals due to his accepted employment-related condition of plantar fasciitis. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing.

¹¹ 5 U.S.C. § 8124(b)(1).

¹² See *Claudio Vazquez*, 52 ECAB 496 (2001).

¹³ *Id.*

¹⁴ *Claudio Vazquez*, *supra* note 12.

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the August 20 and January 6, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 17, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member