

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

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NAYDEAN ARRINGTON, Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
VETERANS ADMINISTRATION MEDICAL )  
CENTER, Baltimore, MD, Employer )

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**Docket No. 04-807  
Issued: July 19, 2004**

*Appearances:*  
*Naydean Arrington, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On February 6, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated May 12 and November 11, 2003 which terminated her compensation. She also filed a timely appeal of an Office decision dated August 1, 2003 which denied her request for a review of the written record under section 8124. The Board has jurisdiction to review the merits of appellant's claim under 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective May 18, 2003; and (2) whether the Office properly denied appellant's request for review of the written record.

## **FACTUAL HISTORY**

In May 1983, the Office accepted that appellant, then a 29-year-old nurses' assistant, sustained thoracic and lumbosacral sprains and left thigh and left arm contusions at work on April 23, 1983. Appellant has not worked since the date of her injury.

The Office referred appellant for a second opinion examination by Dr. Richard S. Goodman, a Board-certified orthopedic surgeon. In a report dated March 1, 2003, Dr. Goodman indicated that appellant had some restriction of back motion but suggested that she self-limited her motion. He reviewed appellant's history of injury, performed a physical examination, and found that the accepted condition of lumbar and thoracic strains and left thigh and left arm contusions had resolved in 1984. Dr. Goodman stated that he could not find any evidence of organic disease causally related to the April 1983 work injury. He stated that there were no objective findings or work-related disabilities. He stated that appellant's symptoms required a vascular consultation but were not related to the work injury. Dr. Goodman noted that appellant had the condition of coolness of the left foot but it was not work related. He stated that appellant could not lift more than 50 pounds or stand over 6 hours.

On April 2, 2003 the Office issued a notice of proposed termination of compensation and medical benefits. The Office found that the weight of the medical evidence, as represented by the opinion of Dr. Goodman, established that the accepted conditions had resolved and were not the source of appellant's current disability. The Office gave appellant 30 days to respond.

Appellant submitted reports from Charles Friedlander, a certified physician's assistant, dated May 1, 2002, and February 10 and April 15, 2003. He performed physical examinations and reviewed electromyograms (EMGs) performed in 2000. Mr. Friedlander diagnosed chronic low back pain with degenerative disease, spinal stenosis and neuropathy. In an April 15, 2003 report, he stated that appellant's condition "does seem to all relate back to an old back injury." Appellant also submitted physical therapy notes dated from April 1 to 14, 2003 documenting ongoing back pain.

In a decision dated May 12, 2003, the Office terminated appellant's compensation benefits effective May 18, 2003.

In a letter dated June 17, 2003, appellant requested a review of the written record by the Branch of Hearings and Review.<sup>1</sup>

In a decision dated August 1, 2003, the Office's Branch of Hearings and Review denied appellant's request for review of the written record, noting that the request was postmarked June 17, 2003, more than 30 days after the Office issued the May 12, 2003 decision and, therefore, it was untimely. The Branch of Hearings and Review informed appellant that she could request reconsideration by the Office and submit additional evidence.

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<sup>1</sup> Appellant did not actually request written review of the record but the Office treated her June 17, 2003 correspondence as such a request.

In an undated letter, received by the Office on October 7, 2003, appellant requested reconsideration and submitted a June 11, 2003 medical report from Dr. Gerald J. Hausler, an osteopath and Board-certified family practitioner, a medical report dated November 24, 2000 from Dr. Joseph J. Fay, a Board-certified orthopedic surgeon, a medical report dated December 8, 2000 from Dr. Frederick J. Fletcher, a Board-certified orthopedic surgeon, and medical reports from other physicians dated August 4, November 17 and December 9, 1983, March 9, 1984 and December 11, 1987. Appellant also submitted an electrodiagnostic study dated November 21, 2000, a magnetic resonance imaging (MRI) scan dated December 4, 2000 and an undated medical report from Dr. Richard B. O'Brien, a general practitioner and an internist.

On June 11, 2003 Dr. Hausler stated that "the basis" of appellant's back problem was related to the April 23, 1983 employment injury. Referring to the reports by Mr. Friedlander, Dr. Hausler stated that previous correspondence had been sent by his office with a diagnosis of chronic low back pain with degenerative disc disease and history of spinal stenosis with L5 radiculopathy. He indicated that appellant had a preexisting diagnosis of spinal stenosis of L2-3 and L3-4 with posterior protrusion of L2-3 and L3-4 suggesting some degree of fosal herniation. Dr. Hausler stated that hypertrophic and degenerative changes were also present at L5-S1. He noted that the diagnoses were not only present on physical examination but were documented by the November 21, 2000 EMG. Dr. Hausler stated that, because of appellant's progressive pain, she saw Dr. Fletcher who referred her to Dr. Whalen who thought she should undergo back surgery.

In a November 24, 2000 report, Dr. Fay stated that appellant's electrodiagnostic studies showed left L5-S1 radiculopathy with EMG evidence of axonal damage. He stated that appellant seemed to have some weakness of the extensors of her left foot and he was going to obtain an MRI scan to determine if she had a herniated disc.

In a December 8, 2000 report, Dr. Fletcher stated that appellant's MRI scan showed spinal stenosis and herniated disc at multiple levels. He performed a physical examination showing she had dropped her left Achilles reflex. Dr. Fletcher reviewed the EMG which was positive and stated that appellant had facet joint arthropathy. He stated that appellant was in severe pain and required surgery.

In a November 7, 2003 decision, the Office denied modification of its prior decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. 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.<sup>2</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.<sup>3</sup>

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<sup>2</sup> *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

<sup>3</sup> *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

## **ANALYSIS -- ISSUE 1**

In a March 1, 2003 opinion, Dr. Goodman, the referral physician, opined that the accepted conditions of lumbar and thoracic strains and left thigh and left arm contusions had resolved and indicated that all these conditions had resolved as of 1984. He concluded that there were no objective findings or work-related disabilities. Although Dr. Goodman indicated that appellant had some restriction of back motion, he suggested that she self-limited her motion. He explained appellant's continuing problems by noting that she had a vascular condition of the lower extremities which was not work related. Dr. Goodman recommended work restrictions but clearly indicated that they were not necessitated by a work-related condition. His opinion is complete and well rationalized.

None of the evidence appellant submitted establishes that she continued to experience symptoms from the accepted conditions after May 18, 2003. The reports from Mr. Friedlander dated May 1, 2002, and February 10 and April 1, 2003 and the physical therapy notes dated from April 1 to 14, 2003 are not probative because Mr. Friedlander is a physician's assistant and is therefore not a physician within the meaning of the Federal Employees' Compensation Act.<sup>4</sup> In a June 11, 2003 report, Dr. Hausler diagnosed chronic low back pain with degenerative disc disease with history of spinal stenosis with L5 radiculopathy. He stated that the spinal stenosis was a preexisting condition. Dr. Hausler stated that appellant's back problem related to the April 23, 1983 employment injury. He did not provide any rationalized medical opinion, however, explaining how appellant's current condition arose from the April 23, 1983 employment injury or was causally related to the accepted conditions of thoracic and lumbosacral sprains and left thigh and left arm contusions. The Board has held that a medical report not fortified by medical rationale is of diminished probative value.<sup>5</sup>

In a November 24, 2000 report, Dr. Fay described the results of the electrodiagnostic studies and noted weakness in the extensors of appellant's left foot. He provided no opinion on causation. In a December 8, 2000 opinion, Dr. Fletcher described the results of the MRI scan, EMG and his findings on physical examination but also did not provide an opinion on causation. Dr. Fay's and Dr. Fletcher's reports are of diminished probative value. The November 21, 2000 electrodiagnostic study and December 4, 2000 MRI scan are not probative because they provide no opinion from a physician on causation. Further, the medical reports appellant submitted dated from August 4 through December 11, 1987 and the undated report from Dr. O'Brien are not probative on a determination of appellant's ability to work in 2003. Dr. Goodman's opinion that the accepted conditions had resolved therefore constitutes the weight of the evidence.

## **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of the Act provides that "a claimant ... 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>6</sup> Section 10.615 of the Office's federal regulations

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<sup>4</sup> See 5 U.S.C. § 8101(2); *Ricky S. Storms*, 52 ECAB 349, 353 (2001).

<sup>5</sup> *Jimmie H. Duckett*, 52 ECAB 332, 336 (2001).

<sup>6</sup> 5 U.S.C. § 8124(b)(1).

implementing this section of the Act, provides that a claimant can choose between an oral hearing or a review of the written record.<sup>7</sup> The regulation also provides that, in addition to the evidence of record, the employee may submit new evidence to the hearing representative.<sup>8</sup>

Section 10.616(a) of the Office's regulations<sup>9</sup> provides in pertinent part:

"A claimant, injured on or after July 4, 1966, who has received a final adverse decision by the district Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."

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>10</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 hearing,<sup>11</sup> when the request is made after the 30-day period for requesting a hearing,<sup>12</sup> and when the request is for a second hearing on the same issue.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

In this case, appellant's request for review of the written record was postmarked June 17, 2003, more than 30 days after the date of issuance of the Office's May 12, 2003 decision and therefore, the Branch of Hearings and Review was correct in stating in its decision that appellant was not entitled to review of the written record. The Branch of Hearings and Review properly exercised its discretionary powers by indicating that it had denied appellant's hearing request on the basis the case could be resolved requesting reconsideration and submitting additional medical evidence to show that there was continuing work-related disability.

### **CONCLUSION**

The Board finds that the opinion of the referral physician, Dr. Goodman, constitutes the weight of the evidence, and supports the Office's termination of benefits effective May 18, 2003.

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<sup>7</sup> 20 C.F.R. § 10.615.

<sup>8</sup> *Id.*

<sup>9</sup> 20 C.F.R. § 10.616(a).

<sup>10</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

<sup>11</sup> *Rudolph Bremen*, 26 ECAB 354, 360 (1975).

<sup>12</sup> *Herbert C. Holly*, 33 ECAB 140, 142 (1981).

<sup>13</sup> *Frederick Richardson*, 45 ECAB 454, 466 (1994); *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

The Board also finds that the Office properly denied appellant's request for review of the written record.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 7, August 1 and May 12, 2003 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Issued: July 19, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member