

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

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**JAMES CONSENTINO, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Pittsburgh, PA, Employer**

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**Docket No. 04-1774  
Issued: October 21, 2004**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*  
*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  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On July 7, 2004 appellant filed a timely appeal from the March 23, 2004 merit decision of the Office of Workers' Compensation Programs, which denied modification of an earlier decision to terminate his compensation benefits. The Board has jurisdiction to review the March 23, 2004 decision and the issue of termination.<sup>1</sup>

**ISSUE**

The issue is whether the Office met its burden of proof to justify the termination of appellant's compensation benefits.

**FACTUAL HISTORY**

On June 20, 2000 appellant, then a 57-year-old small bundle sorter operator, filed a claim alleging that the arthritis in his left thumb joint was a result of the repetitive motion of sorting

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<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3.

mail. The Office accepted his claim for left thumb tenosynovitis and paid compensation for temporary total disability on the periodic rolls.

In a decision dated September 17, 2001, the Office terminated compensation benefits effective that date on the grounds that the weight of the medical evidence, as represented by the July 16, 2001 report of Dr. Gregory S. Maslow, an orthopedic surgeon and Office referral physician, established that appellant's injury-related disability had ceased, but in a decision dated February 21, 2002, an Office hearing representative set aside the termination because of an unresolved conflict in opinion between Dr. Maslow and appellant's treating orthopedic surgeon, Dr. Stuart L. Trager.

To settle the matter, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Robert Bachman, a Board-certified orthopedic surgeon. On May 22, 2002 Dr. Bachman reported that appellant had fully recovered from his employment-related tenosynovitis.

On June 18, 2002 the Office notified appellant and his authorized representative that it proposed to terminate compensation. The Office found that the opinion of the impartial medical specialist, Dr. Bachman, was entitled to special weight and established that appellant's current disability was due to a preexisting condition, not to factors of employment.

In a decision dated July 22, 2002, the Office terminated appellant's compensation benefits effective that date on the grounds that the weight of the medical evidence established that his injury-related disability had ceased. The Office sent a copy of this decision to appellant but not to his representative.

On February 26, 2003 appellant's representative requested a schedule award. In support thereof he submitted the November 7, 2002 report of Dr. David Weiss, Board-certified in orthopedic medicine. On March 2, 2003 appellant filed a claim for a schedule award.

On May 2, 2003 the Office acknowledged appellant's claim for a schedule award "received after the final decision dated July 22, 2002." The Office advised that, if appellant wished to dispute that decision, he should exercise the appeal rights that accompanied it. Appellant's representative replied on May 28, 2003 that he had received no copy of a July 22, 2002 decision. He requested a copy at the Office's earliest convenience "so a proper appeal can be initiated."

On July 2, 2003 appellant's representative requested reconsideration of the July 22, 2002 decision, but indicated that the Office had still not provided him a copy of that decision.

In a decision dated March 23, 2004, the Office reviewed the merits of appellant's claim and denied modification of its July 22, 2002 decision to terminate compensation benefits. The Office noted that Dr. Bachman's report represented the weight of the medical evidence and that the evidence and argument submitted by appellant was insufficient to warrant modification of the prior decision. The Office added that it was not required to reissue its July 22, 2002 decision because appellant was duly notified of the termination and, according to regulations, notification to either the employee or the representative "will be considered notification to both." Appeal

rights attached to the Office's March 23, 2004 decision notified appellant of his right to request reconsideration and his right to appeal to the Board.

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act states that the Office shall determine and make a finding of facts and make an award for or against payment of compensation after considering the claim presented by the beneficiary and the report furnished by the immediate superior and after completing such investigation as it considers necessary.<sup>2</sup> Section 10.127 of the regulations directs the Office to mail a copy of this award to certain parties:

“A copy of the decision shall be mailed to the employee's last known address. If the employee has a designated representative before the Office, a copy of the decision will also be mailed to the representative. Notification to either the employee or the representative will be considered notification to both. A copy of the decision will also be sent to the employer.”<sup>3</sup>

A claimant may authorize an individual to represent him in any proceeding before the Office.<sup>4</sup> A properly appointed representative who is recognized by the Office may make a request or give direction to the Office regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments of facts or the law and obtaining information from the case file, to the same extent as the claimant. Any notice requirement contained in the regulations or the Act is fully satisfied if served on the representative and has the same force and effect as if sent to the claimant.<sup>5</sup>

### **ANALYSIS**

The record establishes that appellant had a representative. The representative first wrote to the Office on January 30, 2001 when he advised: “Please make certain that all future correspondence is directed to my attention as the claimant's representative.” The Office thereafter mailed the representative a copy of the August 10, 2001 proposal to terminate compensation and the September 17, 2001 decision terminating compensation. On September 20, 2001 the representative requested an oral hearing before an Office hearing representative. To establish his authority to act on appellant's behalf, he filed an appointment of representation, signed by appellant, authorizing him to represent appellant before the Office. The Office duly mailed the representative a copy of the February 21, 2002 decision setting aside the termination of compensation. The Office also mailed the representative a copy of the June 18, 2002 proposal to terminate compensation based on the report of the impartial medical specialist, Dr. Bachman.

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<sup>2</sup> 5 U.S.C. § 8124(a).

<sup>3</sup> 20 C.F.R. § 10.127 (1999).

<sup>4</sup> 5 U.S.C. § 8127(a)

<sup>5</sup> 20 C.F.R. § 10.700(c) (1999).

When it issued its July 22, 2002 decision terminating appellant's compensation, the Office did not mail a copy to the representative. The question that arises is whether section 10.127 of the regulation, quoted above, required the Office to mail a copy of the July 22, 2002 decision to appellant's representative.

The Board settled this question in the case of *Travis L. Chambers*,<sup>6</sup> where it found that an Office decision was not properly issued because the Office did not send a copy of that decision to the claimant's authorized representative. The Director of the Office argued that regulations permitted notice to either the claimant or the authorized representative. The Board disagreed. Explaining that the language of section 10.127 must be read with due regard for the remedial nature of the Act, the unambiguous language requiring that copies of decisions be sent to both the employee and the authorized representative and the previously recognized importance of the right of the employee to have the authorized representative notified of any Office decision, the Board held that section 10.107 of the regulations required that a copy of an Office decision be sent to the authorized representative.

In this case, the Office improperly issued its July 22, 2002 decision terminating compensation because it did not mail a copy of that decision to appellant's representative. The decision is null and void. The Office later conducted a merit review of appellant's case and denied modification of the July 22, 2002 termination, again finding that Dr. Bachman's opinion represented the weight of the medical evidence, but this merit review did not resuscitate the termination of compensation: by not mailing a copy of the July 22, 2002 decision to appellant's representative, the Office prejudiced appellant by effectively denying his representative the opportunity to assist in pursuing post-deprivation remedies, including a timely hearing under section 8124 of the Act.<sup>7</sup> The Office first informed the representative of a "final decision dated July 22, 2002," on May 2, 2003 and advised that, if appellant disputed that decision, he should exercise the appeal rights that accompanied it. The representative received this information more than eight months after the time limitation had expired for requesting a hearing as a matter of right. Without a valid, properly issued decision terminating compensation and to avoid a denial of administrative due process, the Board must set aside the Office's March 23, 2004 decision denying modification.

### CONCLUSION

The Board finds that this case is not in posture for a decision on whether the Office met its burden of proof to justify the termination of appellant's compensation benefits. The Office's September 17, 2001 decision terminating compensation was set aside and its July 22, 2002 decision terminating compensation was not properly issued. So currently there is no final

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<sup>6</sup> *Travis L. Chambers*, (Docket No. 02-1650, issued April 17, 2003), *reaff'd* 55 ECAB \_\_\_\_ (Docket No. 02-1650, issued April 17, 2003).

<sup>7</sup> Section 8124 of the Act provides that a claimant not satisfied with a decision of the Office is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before an Office representative, provided there has been no review under section 8128(a), relating to reconsideration. 5 U.S.C. § 8124(b)(1).

decision by the Office terminating compensation for appellant's employment-related left thumb tenosynovitis.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 23, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: October 21, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member