

from a belt. He stopped work on July 10, 2002. By letter dated October 8, 2002, the Office accepted appellant's claim for thoracic sprain, neck sprain and neuritis of the left shoulder. The Office paid appropriate compensation for temporary total disability. The Office received medical reports from Dr. Gabriel L. Dassa, appellant's treating Board-certified orthopedic surgeon, who diagnosed cervical radiculopathy, cervical sprain/strain and thoracic spine strain. He found that appellant continued to be totally disabled.

By letter dated December 6, 2002, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions, to Dr. Kenneth Falvo, a Board-certified orthopedic surgeon, for a second opinion medical examination. He submitted a December 19, 2002 report which provided a history of her July 9, 2002 employment injury and medical and work background. Dr. Falvo reported his findings on physical examination noting that appellant's cervical sprain had resolved and he had rotator cuff tendinitis of the left shoulder. He stated that he was mildly partially disabled and should avoid lifting objects weighing more than 20 pounds overhead on a repetitive basis with the left upper extremity for the next four weeks. Dr. Falvo further stated that otherwise, appellant was not restricted from returning to work as a mail handler. He concluded that Dr. Dassa's recommendation that she undergo surgery on the left shoulder was not necessary. He recommended medication other than anti-inflammatory agents which caused appellant to experience gastric upset. In an accompanying work capacity evaluation (Form OWCP-5), Dr. Falvo indicated that appellant could work eight hours a day with certain pushing, pulling and lifting limitations.

The Office found a conflict in the medical opinion evidence between Dr. Dassa and Dr. Falvo regarding the issue of whether appellant had any continuing residuals or disability causally related to his July 9, 2002 employment injury. To resolve the conflict, by letter dated April 12, 2003, the Office referred him, together with a statement of accepted facts, the case record and a list of questions, to Dr. Lester Lieberman, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an April 23, 2003 report, Dr. Lieberman described the July 9, 2002 employment injury. He noted that appellant was involved in an automobile accident within the last year and complained of pain in the left arm which he experienced prior to the car accident. Appellant experienced problems with lifting and gripping items and numbness in his left fingers only. Dr. Lieberman provided a history of appellant's medical treatment, range of motions concerning the cervical and lumbar spines and left shoulder and a detailed review of his medical records. He stated that there were no objective findings of the accepted employment-related conditions of thoracic sprain, neck sprain or neuritis of the left shoulder based on the physical examination findings. Dr. Lieberman stated that appellant was not currently disabled and that his employment-related conditions had resolved. He opined that he was capable of returning to his date-of-injury position without restriction. Dr. Lieberman did not complete a Form OWCP-5 because he found that appellant could return to work without any restrictions.

By letter dated July 24, 2003, the Office issued a notice of proposed termination of compensation based on Dr. Lieberman's April 23, 2003 medical report. The Office provided 30 days in which appellant could respond to this notice.

Appellant submitted an August 13, 2003 request from Dr. Ranu Boppana, a Board-certified neurologist, for a magnetic resonance imaging (MRI) scan of the cervical spine. In a treatment note of the same date, he indicated that appellant experienced chronic neck pain. On August 13, 2003 he found that appellant had a cervical spine disc herniation.

By decision dated August 25, 2003, the Office terminated appellant's compensation effective that date. It found the evidence submitted by him insufficient to establish that he remained totally disabled for work and accorded special weight to Dr. Lieberman's impartial medical report.

In a letter postmarked October 8, 2003, appellant requested an oral hearing before an Office hearing representative. By decision dated November 10, 2003, the Office's Branch of Hearings and Review denied his request for an oral hearing. It found that appellant did not timely request a hearing. It exercised its discretion and denied his hearing request on the basis that the issue in the case could be resolved by requesting reconsideration and submitting additional medical evidence establishing that he continued to suffer residuals from his July 9, 2002 employment injury.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.² If the Office properly terminates compensation, the burden for reinstating compensation benefits shifts to the claimant.³ To prevail, the claimant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.⁴

Section 8123(a) of the Federal Employees' Compensation Act provides: "[i]f 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 When a case is referred to an impartial medical specialist for the purpose of

¹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

² *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

³ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

⁴ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

⁵ *Richard L. Rhodes*, 50 ECAB 259 (1999); *Noah Ooten*, 50 ECAB 283 (1999); *Rosita Mahana (Wayne Mahana)*, 50 ECAB 331(1999); *Richard Coonradt*, 50 ECAB 360 (1999); *Gwendolyn Merriweather*, 50 ECAB 411 (1999); *Marsha R. Tison*, 50 ECAB 535 (1999).

resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁶

ANALYSIS -- ISSUE 1

The Board finds that a conflict in the medical opinion evidence was created between Dr. Dassa, an attending physician, and Dr. Falvo, an Office referral physician, as to whether appellant had any continuing residuals or disability causally related to the July 9, 2002 employment-related thoracic sprain, neck sprain and neuritis of the left shoulder. Dr. Dassa opined that he was totally disabled. Dr. Falvo opined that appellant's employment-related cervical sprain had resolved and stated that, although he suffered from rotator cuff tendinitis of the left shoulder and was partially disabled, he could work eight hours a day with lifting restrictions.

The Office referred appellant to Dr. Lieberman, selected as the impartial medical specialist, who provided an accurate factual and medical background and conducted a thorough medical examination. He found no objective findings of the accepted employment-related conditions of thoracic sprain, neck sprain or neuritis of the left shoulder. Dr. Lieberman provided a detailed review of appellant's medical records. He opined that appellant was not currently disabled and that his employment-related conditions had resolved. Dr. Lieberman concluded that appellant was capable of returning to his date-of-injury job without any physical restrictions.

The Board finds that Dr. Lieberman's opinion is entitled to special weight in finding that appellant no longer has any residuals or disability due to his July 9, 2002 employment injury as it is sufficiently rationalized and based on a proper factual and medical background.

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.⁷ Section 10.615 of the Office's federal regulation implementing this section of the Act, provides that a claimant can choose between an oral hearing or a review of the written record.⁸ The regulation also provides that in addition to the evidence of record, the employee may submit new evidence to the hearing representative.⁹

Section 10.616(a) of the federal regulations provides that a request for a review of the written record or an oral hearing 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.¹⁰

⁶ *James R. Driscoll*, 50 ECAB 146 (1998).

⁷ 5 U.S.C. § 8124(b)(1).

⁸ 20 C.F.R. § 10.615.

⁹ *Id.*

¹⁰ 20 C.F.R. § 10.616(a).

Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹¹

ANALYSIS -- ISSUE 2

Appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated August 25, 2003 and, thus, he is not entitled to a hearing as a matter of right. He requested a hearing before an Office representative in a letter dated September 29, 2003 and postmarked October 8, 2003. The Office properly found that appellant was not entitled to a hearing as a matter of right because his September 29, 2003 hearing request was not made within 30 days of the Office's August 25, 2003 decision. Further, the Office properly exercised its discretion in further denying the oral hearing finds that the issue could equally well be addressed by appellant requesting reconsideration.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective August 25, 2003 on the grounds that he was no longer disabled due to his July 9, 2002 employment injury. The Board further finds that the Office properly denied appellant's request for a hearing pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the November 10 and August 25, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 24, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹¹ *Daniel J. Perea*, 42 ECAB 214 (1990).