United States Department of Labor
Employees' Compensation Appeals Board

B.O., Appellant	)	
and	)	**Docket No. 07-1639**
	)	**Issued: January 24, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Nashville, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Oral Argument November 13, 2007

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 5, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 15, 2006 and a March 7, 2007 decision denying her request for a hearing before an Office hearing representative. 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 properly terminated compensation for wage loss effective March 30, 1997 for the accepted back and elbow conditions; and (2) whether the Office properly denied appellant's request for a hearing pursuant to 5 U.S.C. § 8124(b)(1).

FACTUAL HISTORY

The case has been before the Board on several prior appeals. In a decision dated March 1, 2001, the Board remanded the case for a merit decision with respect to termination of compensation.[1] The Office issued a merit decision dated May 24, 2001, and by decisions dated

[1] Docket No. 99-708 (issued March 1, 2001).

October 17, 2001 and August 6, 2002, the Office denied appellant's applications for reconsideration without merit review of the claim. The Board affirmed the August 6, 2002 decision on February 20, 2003.[2] Appellant requested an oral hearing, which was denied by Office decision dated June 5, 2003. By decision dated May 26, 2004, the Board affirmed the June 5, 2003 Office decision.[3] Appellant again requested an appeal to the Board, which was dismissed by order dated February 17, 2005 on the grounds that the Board did not have jurisdiction over a final decision of the Office.[4] In a decision dated June 9, 2006, the Board affirmed a May 13, 2005 decision denying appellant's request for a hearing under 5 U.S.C. § 8124(b). The history of the case is provided in the Board's prior decisions and is incorporated herein by reference.

Appellant requested reconsideration of her claim by letter dated May 12, 2006. By decision dated November 15, 2006, the Office reviewed the case on its merits. The Office found that appellant was entitled to medical benefits for the accepted condition of psychogenic pain disorder and that further development was warranted "to determine whether a psychiatric condition is active and disabling." The Office found that the evidence did not establish any error in terminating compensation for wage loss in the March 19, 1997 decision.

With respect to the termination of compensation in the March 19, 1997 decision, the Office noted that appellant had been referred to Dr. Edward Kissel, an orthopedic surgeon, for a second opinion evaluation. In a report dated August 15, 1995, Dr. Kissel stated that there were no objective findings of an S1 radiculopathy. He reported that leg strength was intact, straight leg raising was negative with normal reflexes at the knees and ankles. Dr. Kissel stated that appellant was not totally disabled and could work with a 25-pound lifting restriction. In a supplemental report dated March 25, 1996, he again indicated that there were no objective abnormal clinical findings associated with the complaints of pain. Dr. Kissel stated, "It is my feeling in people who have repeated back injuries with chronic pain that it is prudent to keep them in a light-duty weight category to prevent exacerbations of their pain and prevent recurrent injuries."

Appellant requested an oral hearing by letter dated December 12, 2006. By decision dated March 7, 2007, the Office denied the hearing request, finding that appellant had already requested reconsideration and the Office had issued a November 15, 2006 reconsideration decision. The Office further stated that in its discretion the hearing request was further considered and it was denied on the grounds that the issue could equally well be addressed through the reconsideration process.

[2] Docket No. 03-199 (issued February 20, 2003).

[3] Docket No. 04-831 (issued May 26, 2004).

[4] Docket No. 04-2116 (issued February 17, 2005).

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[5] The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.[6]

ANALYSIS -- ISSUE 1

In this case, the Office reviewed the merits of the March 19, 1997 termination decision. Although the Office stated in its November 15, 2006 decision that the March 19, 1997 terminated both wage-loss and medical benefits, a review of the evidence indicated that the decision was a termination of compensation for wage loss. The initial page of the March 19, 1997 decision does refer to termination of medical benefits and wage loss, without further explanation. The notice of proposed termination dated February 6, 1997, however, discussed only compensation for wage loss. Moreover, the hearing representative clearly stated in his October 5, 1997 decision that appellant continued to be entitled to medical benefits. The Board finds that the March 19, 1997 decision was a decision that terminated compensation for wage loss effective March 30, 1997. Since the Office indicated that disability from the psychogenic pain disorder was under development, the only issue presented is whether the Office met its burden of proof to terminate compensation for wage loss effective March 30, 1997 based on the accepted orthopedic conditions.

The accepted orthopedic conditions in this case were back strain, hairline fracture of the right elbow radial head and chronic L5-S1 nerve root radiculopathy. Appellant was referred for a second opinion examination with Dr. Kissel. In an August 16, 1995 report, he indicated that there was no objective findings of an S1 radiculopathy and appellant could work with a 25-pound lifting restriction. In the supplemental report dated March 25, 1996, Dr. Kissel stated that there were no objective clinical findings associated with appellant's complaints of pain. He stated that he felt that patients with a history of repeated back injuries and chronic pain should be kept in a light-duty capacity "to prevent exacerbations of their pain and prevent recurrent injuries." It is evident that Dr. Kissel felt that any orthopedic work restrictions were necessary to prevent further exacerbations. It is well established that, under the Federal Employees' Compensation Act, a medical restriction that is based on a fear of future aggravation due to employment exposure is not employment related.[7] Dr. Kissel clearly indicated that his work restrictions were prophylactic in nature, to prevent recurrent injuries and there were no current objective findings.

Appellant did not submit any probative medical evidence supporting continuing disability causally related to her accepted back or elbow conditions. In a brief report dated June 23, 1997, Dr. S.L. Lampkin stated that appellant was having severe low back pain that would not allow her

[5] *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

[6] *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

[7] *Gaetan F. Valenza*, 39 ECAB 1349 (1988).

to continue her regular employment. He did not provide any further explanation or discuss causal relationship with employment.

The Board finds that the weight of the evidence of record establishes that appellant had no continuing employment-related disability due to the accepted orthopedic conditions as of March 30, 1997. The Office met its burden of proof in terminating wage-loss compensation for these conditions. It is well established that, after termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability which continued after termination of compensation benefits.[8] In this case appellant did not submit any probative medical evidence establishing a continuing employment-related disability causally related to the accepted back or elbow injuries after March 30, 1997. Appellant did not meet her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act 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 under subsection (a) of this title 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."[9]

The Office's regulations provide, with respect to a request for a hearing, "The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."[10] The Board has held that the Office, in its broad discretionary authority to administer the Act, has power to hold hearings in circumstances where no legal provision is made for such hearings and the Office must exercise its discretion in such circumstances.[11] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[12]

ANALYSIS -- ISSUE 2

Appellant requested a hearing pursuant to 5 U.S.C. § 8124(b)(1). As noted, this section provides for a hearing "before review under section 8128(a)." The Office's regulations indicate that a claimant who has requested reconsideration of a decision pursuant to 5 U.S.C. § 8128(a) is not entitled to a hearing pursuant to 5 U.S.C. § 8124(b)(1). The Office issued a March 1997

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

[9] 5 U.S.C. § 8124(b)(1).

[10] 20 C.F.R. § 10.616(a).

[11] *Mary B. Moss*, 40 ECAB 640 (1989); *Rudolph Bermann*, 26 ECAB 354 (1975).

[12] *Teresa M. Valle*, 57 ECAB ___ (Docket No. 06-438, issued April 19, 2006).

decision and appellant submitted numerous requests for reconsideration pursuant to 5 U.S.C. § 8128(a), eventually resulting in a November 15, 2006 merit decision that affirmed the March 19, 1997 decision, in part. Since appellant requested reconsideration of the March 19, 1997 decision prior to requesting a hearing, she is not entitled to a hearing as a matter of right.

The Office must still exercise its discretionary authority with regard to the hearing request. In the March 7, 2007 decision the Office indicated that appellant could equally well pursue her claim through the reconsideration process. This is considered a proper exercise of the Office's discretionary authority.[13] There is no evidence that the Office abused its discretion in denying the request for an oral hearing.

CONCLUSION

The Office met its burden of proof to terminate compensation for wage-loss effective March 30, 1997 for the accepted orthopedic conditions. With respect to the request for a hearing before an Office hearing representative, the Office properly denied the request as appellant had previously requested reconsideration of her claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 7, 2007 and November 15, 2006 are affirmed.

Issued: January 24, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[13] *See Mary E. Hite*, 42 ECAB 641, 647 (1991).