

work on August 9, 2003 and his employment was terminated on September 5, 2003. In an August 12, 2003 report, Dr. Sarah V. Nyland, a family practitioner, noted appellant's history of injury on July 12, 2003 and preexisting sciatica, concluding that he exacerbated his preexisting sciatica during a "twisting injury at work." The Office accepted appellant's claim for lumbar strain and aggravation of left lumbosacral radiculopathy into the left hip. He was placed on the periodic rolls and compensation was paid.

Interpreting an October 22, 2003 computerized tomography (CT) scan of appellant's lumbar spine, Dr. James B. Cefalu, a radiologist, found no definite abnormalities and diagnosed radiating pain down appellant's left leg, rule out disc pathology. He noted, however, that the study was limited due to appellant's extreme obesity.

In a November 20, 2003 report, Dr. Nyland noted that she released appellant to light duty on September 5, 2003 but no light-duty work was available and consequently his employment was terminated. She noted that appellant might be able to return to full duty within a few months but explained that his recovery was complicated by morbid obesity. In a duty status report dated the same day, Dr. Nyland stated that appellant was released to light duty in September 2003. On October 29, 2003 she noted appellant's history of arthritis and degenerative joint disease in the low back and opined that appellant's injury might have been caused by "severe left sciatica secondary to what I believe is likely nerve impingement."

In a January 7, 2004 electromyogram (EMG) study of appellant's lower extremities, Dr. Tom Kushner, an osteopath, opined that appellant had multilevel denervation in the left L5-S1 distribution, suggesting nerve root impingement.

On January 23, 2004 Dr. Pamela A. Girres, an internist and associate of Dr. Nyland, advised that appellant was unlikely to return to his preinjury level of function. She explained that appellant's employment injury was an "aggravating factor" in his condition, but "certainly, co-morbid conditions, including deconditioning and obesity, are factors."

In a February 10, 2004 report, Dr. John F. Howe, a Board-certified neurologist, advised that appellant's EMG scan was consistent with some distribution abnormalities of the L5-S1 nerve roots. However, he also noted that appellant had numerous other conditions including morbid obesity, degenerative joint disease of the knees and a history of back pain.

On January 31, 2005 the Office referred appellant for a second opinion examination to determine the extent, if any, of his continuing work-related disability.

In a March 8, 2005 second opinion report, Dr. Patrick N. Bays, an osteopath, noted appellant's history of lumbar strain and aggravation of left lumbosacral radiculopathy on July 12, 2003 as well as his preexisting morbid obesity, lumbar degenerative disc disease and sciatica. He noted that appellant's lumbar range of motion was somewhat limited with pain at "extremes of motion." Dr. Bays diagnosed morbid obesity, history of preexisting lumbar degenerative disc disease and sciatica that were temporarily aggravated by the work injury, and lumbar strain with aggravation of left lumbosacral radiculopathy. He concluded that appellant's employment injury caused a temporary aggravation of his preexisting back conditions which, based on the doctor's physical examination of appellant and review of the medical evidence, appeared to have resolved

and returned to the baseline preexisting pathology. In a work capacity evaluation prepared the same day, Dr. Bays advised that appellant could work eight hours per day with permanent restrictions.

On April 12, 2005 Dr. Yun-Sun Choe, a rheumatologist, stated that appellant had chronic low back pain from his work injury. In an April 19, 2005 progress note, Dr. Wesley Brown, an occupational medical specialist and an associate of Dr. Girres, noted that appellant's radiculopathy was "not a new condition." He diagnosed chronic lumbar back pain. After the Office asked Dr. Girres to comment on Dr. Bays' opinion, Dr. Brown, on June 13, 2005, advised that he agreed that appellant's work-related conditions had resolved, that further medical treatment of his work-related condition was not indicated, and that appellant's permanent limitations were secondary to his preexisting conditions.

On April 16, 2007 the Office proposed to terminate appellant's compensation benefits on the grounds that the medical evidence, particularly Dr. Bays' second opinion report and Dr. Brown's agreement, established that appellant's work-related conditions had resolved.

By correspondence dated April 18, 2007, appellant disagreed with the Office's proposed termination of his compensation benefits. He noted that he was still experiencing chronic pain, for which he required medication. Appellant also stated that Dr. Brown was not his treating physician and that he only saw him once after the physician took over Dr. Girres' practice.

In an April 20, 2007 report, Dr. Nyland stated that appellant had preexisting degenerative disc disease at the time of his employment injury but there was no evidence that he was experiencing symptoms of pain or loss of function until after his injury. She reported that appellant attributed his decreased strength and mobility in his left leg to his employment injury.

Appellant also provided additional progress notes, including an April 20, 2007 note from Dr. Nyland noting appellant's continued treatment and a May 11, 2007 note from Dr. Laura Rachel Kaufman, a family practitioner and associate of Dr. Nyland. Dr. Kaufman diagnosed preexisting lumbar degenerative disc disease and sciatica, temporarily aggravated by his work injury. She stated: "I believe the progression of [appellant's] symptoms are a natural progression of his preexisting sciatica and not related to the lumbar strain of July, 2003."

By decision dated May 31, 2007, the Office terminated appellant's compensation benefits effective June 10, 2007. The Office noted that he submitted the above-noted reports from Dr. Nyland and Dr. Kaufman, but stated that the reports did not establish that he had continuing work-related disability.

By correspondence postmarked July 10, 2007, appellant requested a review of the written record. On his appeal request form, he stated that the Office's decision was dated June 10, 2007.

By decision dated August 3, 2007, the Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. The Office also noted that appellant could have the matter further addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective June 10, 2007. The Office relied upon Dr. Bays' March 8, 2005 second opinion report. He examined appellant and reviewed the medical evidence and diagnostic testing reports of record and concluded that his employment injury had temporarily aggravated his preexisting conditions. Dr. Bays explained that appellant had a history of lumbar degenerative disc disease, sciatica and morbid obesity and that appellant's work-related lumbar strain had temporarily aggravated these conditions. However, after reviewing the record he determined that appellant's conditions had returned to their baseline level. Dr. Bays concluded that appellant's injury and aggravation of the preexisting condition was temporary and had resolved. The Board finds that he detailed his physical examination findings and review of the medical evidence and presented explanation in support of his conclusion that appellant's temporary work-related aggravation had resolved. Dr. Bays explained that appellant's preexisting conditions were longstanding and that based on his physical examination the aggravated preexisting conditions seemed to have returned to the baseline pathology. The Board finds that Dr. Bays provided a rationalized medical opinion on which the Office properly relied.

Following Dr. Bays' examination, appellant provided several additional medical reports. In an April 20, 2007 report, Dr. Nyland stated that, although appellant had numerous preexisting conditions, there was no indication that he experienced pain or loss of function from those conditions until after his injury. The Board notes that the mere fact that a disease or condition manifests itself or worsens during a period of employment⁴ or that work activities produce symptoms revelatory of an underlying condition⁵ does not raise an inference of causal relationship between the condition and the employment factors. The mere fact that appellant's preexisting conditions began producing symptoms after his work injury does not establish that his current symptoms are due to the work injury and not to other factors. Dr. Nyland also stated that appellant attributed his continuing weakness and decreased mobility of the left leg to his employment injury. Generally, however, findings on examination are needed to support a physician's opinion that an employee is disabled for work. When a physician's statements

¹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

² *Id.*

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁵ *Richard B. Cissel*, 32 ECAB 1910, 1917 (1981).

regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁶ The Board finds that Dr. Nyland's statement that appellant attributed his current symptoms to his work injury is insufficient to establish that he had continuing work-related residuals.

In an April 12, 2005 report, Dr. Choe stated that appellant had chronic low back pain from his work injury, but did not present rationale or explanation in support of this statement. The Board has previously held that mere conclusory statements, not fortified by explanation, are insufficient to establish causal relationship between an employment incident and a diagnosed condition.⁷ The Board finds that Dr. Choe's report did not establish that appellant had continuing work-related residuals, and in fact, Dr. Brown's reports indicate the contrary.

Appellant also submitted April 19 and June 13, 2005 notes from Dr. Brown. On April 19, 2005 Dr. Brown stated that appellant's radiculopathy was a preexisting condition. On June 13, 2005 he agreed with Dr. Bays that appellant's temporary work-related aggravation had resolved and his conditions had returned to their baseline pathology. Thus, Dr. Brown does not support any continuing employment-related condition. Likewise, Dr. Kaufman's May 11, 2007 progress report presented findings and concluded that appellant's current symptoms were related to his preexisting sciatica, not to the work-related lumbar strain. She noted that appellant's employment injury temporarily aggravated his preexisting sciatica and lumbar degenerative disc disease but stressed that the aggravation was temporary and that appellant's current symptoms were a natural progression of his sciatica. Dr. Kaufman's report supports that appellant's temporary work-related aggravation had resolved and any continuing symptoms he experienced were the result of a preexisting condition rather than his work injury.

Accordingly, the Board finds that the Office properly terminated appellant's compensation benefits because the medical evidence supports that appellant's present symptoms were related to his preexisting conditions and that his accepted conditions had resolved.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary 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.⁸ Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.⁹ The Office's

⁶ *William A. Archer*, 55 ECAB 674 (2004); *see also Dennis M. Mascarenas*, 49 ECAB 215 (1997).

⁷ *See Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

⁸ 5 U.S.C. § 8124(b)(1).

⁹ 20 C.F.R. § 10.615.

regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹⁰

Additionally, the Board has held that the Office, in its broad discretionary authority in the administration of the Act,¹¹ 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.¹² 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 Board precedent.¹³

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's request for a review of the written record as untimely filed. The Office's decision was issued on May 31, 2007. Appellant's request for a review of the written record was postmarked July 10, 2007, more than 30 days after the date of issuance of the decision appealed.

On his appeal request form, appellant noted the date of the decision as June 10, 2007. The Board notes, however, that the Office's decision was in fact dated and issued on May 31, 2007. Although the relevant decision terminated appellant's compensation benefits effective June 10, 2007, the date of effective termination is not the date of issuance of the decision. Accordingly, the Board finds that his request for a review of the written record, which was postmarked on June 10, 2007 and in response to a decision issued by the Office on May 31, 2007, was untimely filed.

Although the Office determined that appellant's request was untimely, it nevertheless exercised its discretion by examining his request for an appeal. The Office determined that the appellant's case would be best served by his submission of a request for reconsideration along with new supporting evidence. Accordingly, the Board finds that the Office acted within its discretion in denying appellant's hearing request as untimely, because appellant failed to file the request within the statutory time frame.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits and that the Office properly denied appellant's request for a review of the written record as untimely filed.

¹⁰ 20 C.F.R. § 10.616(a).

¹¹ 5 U.S.C. §§ 8101-8193.

¹² *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹³ *Teresa M. Valle*, 57 ECAB __ (Docket No. 06-438, issued April 19, 2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

ORDER

IT IS HEREBY ORDERED THAT the August 3 and May 31, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 3, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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