United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 08-2262**
	)	**Issued: September 14, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Ann Arbor, MI, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 8, 2008 appellant filed a timely appeal from a January 24, 2008 decision of the Office of Workers' Compensation Programs that terminated his compensation and a June 5, 2008 decision which denied his request for an oral hearing. 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 appellant's wage-loss compensation and medical benefits effective September 11, 2007; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On January 27, 2006 appellant, then a 43-year-old licensed practical nurse, filed a traumatic injury claim alleging that on January 17, 2006 he injured his back while lifting a heavy patient. The Office accepted the claim for lumbosacral strain. Appellant stopped work on

January 18, 2006 and received wage-loss compensation. He was treated by Dr. D. Bradford Baker, Board-certified in physical medicine, who noted that appellant was disabled for work.

By letter dated April 5, 2006, the Office referred appellant for a second opinion examination with Dr. Michael J. Geoghegan, a Board-certified orthopedic surgeon. On April 26, 2006 Dr. Geoghegan reviewed appellant's history of injury and medical treatment. He advised that a functional capacity evaluation was performed on April 24, 2006. Dr. Georghegan noted that appellant's back condition was "aggravated by any pending, lifting or standing" but did not feel that this was permanent in nature. He found that appellant was capable of returning to a modified job. Dr. Geoghegan advised that due to appellant's recurring lower back problems he was going to have work restrictions which included no lifting more than 20 pounds and no excessive bending. He recommended that appellant be reevaluated in six to eight weeks. In an April 24, 2006 work capacity evaluation form, Dr. Geoghegan noted that appellant was capable of working eight hours per day with restrictions for at least the next three months. The restrictions included 10 to 15 minutes of sitting, no twisting, bending, stooping, pushing, pulling or lifting.

In progress notes dated April 10 to May 30, 2006, Dr. Barker diagnosed a bulging lumbar disc, sacroiliitis, lumbosacral strain and depression. A physical examination on April 10, 2006 revealed moderate back spasms. On May 4, 2006 Dr. Barker reported moderate myofascial tightness in the thoralumbar paraspinals and reiterated that appellant was disabled from work until May 30, 2006. On May 30, 2006 he noted that appellant did not feel capable of returning to even light-duty work. Examination that day revealed moderate lumbar spasms at L1-4 and severe spasms at L5-S1. Dr. Barker advised that appellant remained disabled as he was unable to tolerate sit/stand work.

The Office found a conflict in medical opinion between Dr. Barker and Dr. Geoghegan as to appellant's capacity for work.[1] On July 19, 2006 it referred appellant, together with a statement of accepted facts and the medical record to Dr. B.S. Bohra, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.

In an August 29, 2006 report, Dr. Bohra reviewed appellant's history of injury and medical treatment. He provided findings on examination of the lumbar spine, noting a discrepancy on straight leg raising. On review of the lumbar x-rays, Dr. Bohra noted normal alignment with no evidence of degenerative disease and a normal lordotic curve. He found no evidence of a herniated disc or nerve root compression. Dr. Bohra concluded that there was no mechanical lumbosacral spine abnormalities and that appellant was capable of performing his usual job duties. A physical examination of the lumbosacral spine revealed no erector spinae muscles spasms, negative sitting straight leg testing, negative Fabre test and subjective complaints of tenderness and pin in the L4-S1 region. Range of motion included 40 degrees forward flexion with pain, 60 degrees left and right rotation with pain, 70 degrees bilateral straight leg testing in a sitting position. Dr. Bohra noted that there was no objective evidence of a dislocation, herniated disc or fracture of the spine and there was no instability of the lumbosacral spinal column. He determined that appellant had "nonorganic symptoms of back

[1] Appellant submitted additional progress reports from Dr. Baker through November 26, 2007 reiterating that he remained disabled for work.

pain, numbness and radiculopathy, but has no organic disease to ascribe for these symptoms." Dr. Bohra noted that appellant had prior back injuries which resulted in being off work for long periods of time in each incident.

On January 17, 2007 the Office found that a new conflict in medical opinion arose between Dr. Bohra and Dr. Geoghegan as to whether appellant continued to have residuals of his accepted employment injury.[2] It noted that Dr. Geoghegan reported that appellant continued to have employment-related residuals and work restrictions, while Dr. Bohra opined that there were no employment-related residuals of the lumbar spine and that appellant was capable of returning to full-time work without restrictions.

On April 24, 2007 the Office referred appellant to Dr. Robert Levine, a Board-certified orthopedic surgeon, on whether appellant had residuals of his accepted back condition and work restrictions. On May 15, 2007 Dr. Levine reviewed appellant's employment history and medical treatment noting that appellant was returned to work with restrictions but no job was found within his restrictions. He presented findings on examination and noted that x-rays revealed that disc spaces were well maintained. Dr. Levine advised that there were no objective residuals of appellant's accepted lumbosacral strain. He reported that x-ray interpretations showed a normal lumbar spine. Dr. Levine noted that appellant "complained about pain with extension and, in fact, he guarded extension of his spine." He reported symmetrical reflexes, no decreased sensation, no muscle atrophy and negative straight leg raising. Based upon his review of the medical record and physical examination, appellant had no objective orthopedic abnormalities which accounted for his complaints of pain. Dr. Levine agreed with Dr. Bohra that appellant's pain complaints were nonorganic in origin. As to the bulging disc seen on a magnetic resonance imaging scan, he stated that this is a sign of normal aging. Dr. Levine opined that appellant problems were psychological in nature and he required treatment for his history of depression and chronic pain complaints. With respect to appellant's capacity for work, he stated that appellant had no restrictions from an orthopedic standpoint, but that the medication taken by appellant prevented him from performing his usual duties as a practical nurse.

On September 19, 2007 the Office referred appellant for a second opinion evaluation with Dr. Saul Z. Forman, a Board-certified psychiatrist.

On November 2, 2007 Dr. Forman reviewed the medical record, statement of accepted facts and set forth findings on examination. He diagnosed chronic pain syndrome and depression due to appellant's accepted employment injury. Dr. Forman also determined that these conditions were permanent and that appellant was capable of performing his full duties. In a November 11, 2007 work capacity evaluation form (OWCP-5a), he indicated that appellant was capable of working his usual job duties for eight hours per day due to his mental health condition.

[2] The Board notes that the Office incorrectly found the conflict in medical opinion between Drs. Bohra and Geoghegan, two Office referral physicians. However, an Office referral physician cannot create a conflict on behalf of the claimant in a situation where the claimant did not use the referral physician as a treating physician. *See LeAnne E. Maynard*, 43 ECAB 482 (1992); *see also Delphia Y. Jackson*, 55 ECAB 373 (2004) (a conflict under 5 U.S.C. § 8123 cannot exist unless there is a conflict between an attending physician and an Office physician). *See infra* note 12 and accompanying text.

On December 20, 2007 the Office issued a notice of proposed termination of compensation. It notified appellant that the weight of the medical evidence was represented by Dr. Levine, the impartial medical examiner, and established that residuals of the January 17, 2006 employment injury had ceased. It noted that it had initially referred him to Dr. Bohra to resolve a conflict in the medical opinion evidence between Dr. Barker and Dr. Geoghegan regarding his work capability. Dr. Bohra concluded that appellant no longer had any residuals of his accepted employment. Thus, the Office determined that Dr. Bohra's opinion, created a new conflict in the medical opinion evidence which was between Dr. Barker and Dr. Bohra as to whether appellant continued to have any residuals or disability due to his accepted employment injury. Based upon Dr. Forman's opinion, appellant's claim was accepted for a pain disorder with associated psychological factors.

In a letter dated January 14, 2008, appellant disagreed with the proposal to terminate his benefits contending that he had residuals of his back. He contended that his severe back spasms were objective evidence of his continuing residuals and disability from his accepted employment injury. Appellant also disagreed with Dr. Forman's conclusion that he was capable of working with his pain disorder.

By decision dated January 24, 2008, the Office terminated appellant's compensation benefits for his lumbosacral strain effective that date. It noted that medical benefits for his accepted pain disorder were not affected.

Following the termination of appellant's benefits, the Office received additional progress reports from Dr. Barker dated through March 4, 2008. Dr. Barker diagnosed lumbosacral strain, bulging lumbar disc, depression and sacroiliitis. He noted that appellant had returned to work and a physical examination revealed very severe muscle spasms in the lower back.

In an appeal request form dated February 18, 2008 and postmarked March 5, 2008, appellant requested an oral hearing before an Office hearing representative.

In a March 27, 2008 report, Dr. Barker noted that appellant had very severe muscle spasms, which constituted objective evidence of continuing residuals of his accepted lumbosacral strain. He noted that the muscle spasms lead to intense pain and that appellant also had a bulging lumbar disc. Dr. Barker reiterated his finding in notes dated through May 23, 2008.

By decision dated June 5, 2008, the Office denied appellant's hearing request as untimely. It determined that his claim could be addressed through the reconsideration process.[3]

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[4] After it has determined that an

[3] The Board notes that, following the June 5, 2008 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c); *J.T.*, 59 ECAB ___ (Docket No. 07-1898, issued January 7, 2008); *G.G.*, 58 ECAB ___ (Docket No. 06-1564, issued February 27, 2007). *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

employee has disability causally related to her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[7] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[8]

The Federal Employees' Compensation Act[9] provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[10] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for lumbosacral strain. It initially found a conflict of medical opinion arose between Dr. Barker, appellant's attending physician, who supported total disability for work, and Dr. Geoghegan, an Office referral physician, who found that he was capable of working time with restrictions. The Office properly referred appellant to Dr. Bohra, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

On August 29, 2006 Dr. Bohra addressed appellant's history of injury and medical treatment. He advised that there were no mechanical lumbosacral spine abnormalities and that appellant was capable of performing his usual job duties. Dr. Bohra found no evidence of a herniated disc or spinal compression of any nerve root. He noted that there was no objective evidence of a dislocation, herniated disc or fracture of the spine and there was no instability of the lumbosacral spinal column. Dr. Bohra determined that appellant had nonorganic symptoms of back pain, numbness and radiculopathy, but no organic disease to ascribe for his symptoms.

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[4] *S.F.*, 59 ECAB ___ (Docket No. 08-426, issued July 16, 2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[5] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[6] *See J.M.*, 58 ECAB ___ (Docket No. 06-661, issued April 25, 2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[7] *T.P.*, 58 ECAB ___ (Docket No. 07-60, issued May 10, 2007).

[8] *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *James F. Weikel*, 54 ECAB 660 (2003).

[9] 5 U.S.C. §§ 8101-8193, 8123(a)

[10] *Id.* at § 8123(a); *Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008); *F.R.*, 58 ECAB ___ (Docket No. 05-15, issued July 10, 2007).

[11] *V.G.*, 59 ECAB ___ (Docket No. 07-2179, issued July 14, 2008).

Dr. Barker submitted treatment notes which listed the diagnosis of lumbar disc, sacroiliitis, lumbosacral strain, lumbar muscle spasms, severe lower back pain, depression and the inability to bend forward. He advised that appellant was totally disabled from work. An October 31, 2006 note indicated that appellant was capable of working with restrictions, but the evidence reflects that appellant did not return to work.

On January 17, 2007 the Office found that a new conflict in medical opinion arose between Dr. Geoghegan, an Office referral physician, and Dr. Bohra, the impartial medical specialist, as to whether appellant continued to have any residuals due to his accepted employment injury. Section 8123(a) of the Act provides that, if 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.[12] A conflict under 5 U.S.C. § 8123 cannot exist unless there is a conflict between an attending physician and an Office physician.[13] The Board notes that Dr. Geoghegan was not an attending physician and cannot create a conflict with Dr. Bohra. However, this is harmless error as there was a conflict between Dr. Barker, appellant's attending physician, who advised that appellant continued to be disabled due to residuals of his January 17, 2006 employment injury, and Dr. Bohra, who concluded that appellant no longer had any residuals due to his accepted employment injury. As there was a conflict in the medical opinion evidence between appellant's treating physician, Dr. Barker, and an Office referral physician, Dr. Bohra, the Office properly referred appellant for a second impartial examination with Dr. Levine.[14]

On May 15, 2007 Dr. Levine noted that there were no objective residuals of appellant's accepted lumbosacral strain on physical examination. He reported that x-ray interpretations showed a normal lumbar spine. Dr. Levine reported symmetrical reflexes, no decreased sensation, no muscle atrophy and negative straight leg raising. Based upon his review of the medical record and physical examination, appellant had no objective orthopedic abnormalities to account for his complaints of pain. Dr. Levine stated that he agreed with Dr. Bohra that appellant's pain complaints were nonorganic in origin. As to the bulging disc seen on a magnetic resonance imaging scan, he stated that it was a sign of normal aging noting that it did not warrant surgical treatment.

The Board finds that Dr. Levine's May 15, 2007 opinion is based on a proper factual and medical background and is entitled to special weight. Based on his review of the case record, statement of accepted facts, physical examination and findings on objective examination, Dr. Levine found that appellant did not have any residuals ongoing or disability causally related to his accepted lumbosacral strain. He noted that appellant's pain complaints were nonorganic in origin and there was no objective evidence supporting any continued disability or residuals as a result of the accepted degenerative lumbar disease had been aggravated by the January 17, 2006 employment injury. For this reason, Dr. Levine report constitutes the special weight of the medical opinion evidence afforded an impartial medical specialist. The Board, therefore, finds

[12] *J.J.*, 60 ECAB ___ (Docket No. 09-27, issued February 10, 2009).

[13] *Delphia Y. Jackson*, *supra* note 2.

[14] *See R.H.*, 59 ECAB ___ (Docket No. 07-2124, issued March 7, 2008).

that the Office met its burden of proof to terminate appellant's compensation benefits on January 24, 2008.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of and Office's final decision.[15] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.[16] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[17] In such a case, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[18]

ANALYSIS -- ISSUE 2

Appellant's request for a hearing dated February 18, 2008, was postmarked on March 5, 2008. Therefore it was made more than 30 days after the issuance of the Office's January 24, 2008 decision. Appellant is not entitled to an oral hearing as a matter of right. The Board finds that the Office properly found that appellant was not entitled to an oral hearing as a matter of right because his request was not made within 30 days of the Office's January 24, 2008 decision.

The Office has the discretionary authority to grant an oral hearing when a claimant is not entitled to an oral hearing as a matter of right properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and it could be addressed through a reconsideration application. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[19] The Office did not abuse its discretion in denying appellant's request for an oral hearing.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective January 24, 2008. Further, the Board finds that the Office properly denied appellant's request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

[15] 5 U.S.C. § 8124(b)(2). *See A.B.*, 58 ECAB ___ (Docket No. 07-387, issued June 4, 2007).

[16] 20 C.F.R. § 10.616(b).

[17] *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

[18] *Teresa M. Valle*, 57 ECAB 542 (2006).

[19] *Id.*; *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 5 and January 24, 2008 are affirmed.

Issued: September 14, 2009
Washington, DC

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

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

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