

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

R.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 09-1629
Issued: May 14, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 10, 2009 appellant filed a timely appeal from October 17, 2008 and May 1, 2009 decisions of the Office of Workers' Compensation Programs terminating his wage-loss compensation and medical benefits and a May 22, 2009 decision denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective October 17, 2008; (2) whether appellant met his burden of proof to establish that he had any employment-related disability or medical condition after October 17, 2008 causally related to his employment injury; and (3) whether the Office properly denied his request for a second hearing.

FACTUAL HISTORY

On June 8, 2004 appellant, then a 53-year-old mail processing clerk, filed a claim for a traumatic injury alleging that he sustained a back injury on June 7, 2004 when he pulled on his backpack that was caught between the door of his locker and the locker doorjamb. The Office accepted his claim for a subluxation at L3-4. On April 21, 2008 it expanded the claim to include a temporary aggravation of preexisting lumbar degenerative facet arthritis, resolved. Appellant returned to full-time work with a 20-pound lifting restriction.

In reports dated October 31, 2005 and September 1, 2006, Dr. Timothy J. Nice, an attending Board-certified orthopedic surgeon, diagnosed spondylosis and stated that appellant needed a chair with lumbar support. Lumbar x-rays taken October 31, 2005 revealed mild osteopenia, endplate sclerosis and anterior spurring at T11-12 and T12-L1. There were small posterior spurs at these levels as well as L1-2. The lumbar spine was unremarkable. In an August 1, 2007 disability certificate, Dr. Nice noted that the chair was for the diagnosis of degenerative joint disease.

In reports dated September 19 to October 22, 2007, Dr. Freddie F. Fuentes, an attending Board-certified internist, discussed appellant's symptoms and test results regarding neck, left shoulder and arm conditions that he first noticed on July 10, 2007 after transferring to another department where he had to lift buckets of mail.¹

The Office referred appellant to Dr. Karl V. Metz, a Board-certified orthopedic surgeon, who was provided with a statement of accepted facts and the case file. In a February 27, 2008 report, Dr. Metz reviewed the medical history in detail and provided findings on physical examination. He provided spinal range of motion measurements and noted that there was no list of the thoracolumbar spine although there was some flattening of the lumbar lordosis. There was no scarring, discoloration, swelling or increased warmth of the lumbar spine. There was no muscle spasm in the paralumbar musculature. There was no guarding of the low back during the physical examination. Appellant complained of slight tenderness with palpation over the midline at the L4-5 level as well as over the left posterior superior iliac spine and the right upper buttock. In the sitting position, straight leg raising was to 60 degrees bilaterally. In the supine position, active straight leg raising was to 60 degrees bilaterally but passive straight leg raising was to only 40 degrees bilaterally. Appellant could perform a full squat and return to the upright position without difficulty, although he did hold onto the examination table.

Dr. Metz opined that appellant's June 7, 2004 employment injury did not cause a permanent aggravation of his underlying lumbar degenerative disc disease and lumbar facet arthrosis, which existed at several levels on his lumbar spine. He stated that appellant sustained only a temporary aggravation of his preexisting lumbar degenerative facet arthritis that had long since resolved. Dr. Metz opined that appellant had no residuals of his accepted L3-4 subluxation. He had no continuing medical condition or disability causally related to his June 7, 2004 accepted subluxation at L3-4 and temporary aggravation of preexisting lumbar degenerative facet arthritis.

¹ Appellant filed an occupational disease claim for these conditions under OWCP File No. xxxxxx734. The claim was denied by decision dated January 2, 2008.

By letter dated September 10, 2008, the Office advised appellant of its proposed termination of his wage-loss compensation and medical benefits on the grounds that the weight of the medical evidence, represented by the report of Dr. Metz, established that he had no remaining disability or medical condition causally related to his June 7, 2004 employment injury.²

By decision dated October 17, 2008, the Office finalized its termination of appellant's wage-loss compensation and medical benefits.

In a September 22, 2008 report, Dr. Fuentes noted that appellant had not experienced any recent trauma but he performed repetitive lifting and pushing in his job with lower back stiffness and worsening pain at the end of the day. He received weekly spinal manipulation from a chiropractor. Dr. Fuentes provided findings on physical examination that included 2+ and symmetric reflexes and a normal motor and sensory examination. Appellant had mild pain to palpation in the lumbosacral spine, discomfort when bending over but no pain in the paraspinal muscle areas. He advised Dr. Fuentes that the pain was unchanged since 2004. Dr. Fuentes stated that appellant could return to work with no lifting over 20 pounds due to his neck condition. On September 24, 2008 he stated that he first saw appellant for his back condition on March 30, 2006. Appellant experienced back pain that was worse at the end of his workday and mild soreness in his lumbar spine. Dr. Fuentes opined that appellant had residual effects from his accepted June 7, 2004 back injury. His symptoms varied depending on his physical activity. Dr. Fuentes recommended ongoing chiropractic treatment. He opined that appellant could perform his modified job with work restrictions due to his shoulder, neck and back conditions. A November 3, 2008 report duplicated the information pertaining to appellant's back that was provided in the September 22, 2008 report. In an October 9, 2008 report, Dr. Nice indicated that he had reviewed the report of Dr. Metz, which he noted was based on a thorough examination. He described a new medical history where appellant was required to repeatedly lift, bend, squat and twist for seven hours which aggravated his underlying spondylosis.

Appellant requested an oral hearing that was held on February 9, 2009. By decision dated May 1, 2009, an Office hearing representative affirmed the October 17, 2008 decision.

On May 12, 2009 appellant requested an oral hearing. By decision dated May 22, 2009, the Office denied his request for a hearing on the grounds that he had previously requested a hearing and was not entitled to a hearing as a matter of right. It exercised its discretion and determined that the issue in the case could be addressed equally well through a reconsideration request and the submission of new evidence.³

² The only medical evidence submitted after the September 10, 2008 notice of proposed termination was a September 25, 2008 emergency room report regarding a low back injury on September 24, 2008. Appellant filed a claim for this injury under OWCP File No. xxxxxx222. The claim was denied by decision dated March 26, 2009.

³ Subsequent to the May 22, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ It may not terminate compensation without establishing that the disability 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 Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.⁷

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for a subluxation at L3-4 and temporary aggravation of preexisting lumbar degenerative facet arthritis, resolved.

Dr. Metz was provided with a statement of accepted facts and the case file. He reviewed the medical history in detail and provided findings on physical examination. Dr. Metz provided spinal range of motion measurements and noted that there was no list of the thoracolumbar spine although there was some flattening of the lumbar lordosis. There was no scarring, discoloration, swelling or increased warmth of the lumbar spine. There was no muscle spasm in the paralumbar musculature. There was no guarding of the low back. Appellant had slight tenderness with palpation at the L4-5 level, left posterior superior iliac spine and the right upper buttock. In the sitting and supine positions, straight leg raising was to 60 degrees bilaterally. However, passive straight leg raising was to only 40 degrees bilaterally. Appellant could perform a full squat and return to the upright position. Dr. Metz opined that appellant's June 7, 2004 employment injury did not cause a permanent aggravation of his underlying lumbar degenerative disc disease and lumbar facet arthrosis. He stated that appellant sustained only a temporary aggravation of his preexisting lumbar degenerative facet arthritis that had long since resolved. Dr. Metz opined that appellant also had no residuals of his accepted L3-4 subluxation. He had no continuing medical condition or disability causally related to his June 7, 2004 accepted subluxation at L3-4 and temporary aggravation of preexisting lumbar degenerative facet arthritis.

The Board finds that the report of Dr. Metz established that appellant's June 7, 2004 accepted subluxation at L3-4 and temporary aggravation of preexisting lumbar degenerative facet arthritis had resolved. Dr. Metz provided a comprehensive report with a thorough review of appellant's medical history, including diagnostic tests. The report of Dr. Metz is based upon a complete and accurate factual and medical background and detailed findings on physical

⁴ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁵ *J.M.*, 58 ECAB 478 (2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁷ *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

examination. The Board finds that Dr. Metz' thorough and well-rationalized report established that appellant had no continuing disability or medical condition causally related to his accepted subluxation at L3-4 and temporary aggravation of preexisting lumbar degenerative facet arthritis. Accordingly, the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective October 17, 2008 based on the medical opinion of Dr. Metz that appellant's accepted back conditions had resolved.

On appeal, appellant contends that the Office decisions are contrary to fact and law. However, the weight of the medical opinion evidence establishes that his accepted back conditions had resolved. The Office properly terminated appellant's wage-loss compensation and medical benefits.

LEGAL PRECEDENT -- ISSUE 2

Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the employment injury.⁸ In order to prevail, the employee 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.⁹

ANALYSIS -- ISSUE 2

The Board finds that, following the proper termination of his compensation and medical benefits on October 17, 2008, appellant failed to establish that he had any continuing disability or medical condition causally related to his June 7, 2004 employment-related subluxation at L3-4 and temporary aggravation of preexisting lumbar degenerative facet arthritis.

On September 22, 2008 Dr. Fuentes noted that appellant had not experienced any recent trauma but he performed repetitive lifting and pushing in his job that resulted in lower back stiffness and worsening pain at the end of the day. Appellant reported receiving weekly spinal manipulation from a chiropractor. However, no chiropractic treatment records were provided. Dr. Fuentes provided findings on physical examination that included 2+ and symmetric reflexes and a normal motor and sensory examination. Appellant had mild pain to palpation in the lumbosacral spine and discomfort when bending over but no pain in the paraspinal muscle areas. He advised Dr. Fuentes that the pain was unchanged since 2004. Dr. Fuentes stated that appellant could return to work with no lifting over 20 pounds due to his neck condition. On September 24, 2008 he opined that appellant had residual effects from his accepted June 7, 2004 back injury. Appellant's symptoms varied depending on his physical activity. Dr. Fuentes recommended ongoing chiropractic treatment. He opined that appellant could perform his modified job with work restrictions regarding his shoulder, neck and back conditions.

⁸ *I.J.*, *supra* note 4; *Anna M. Blaine*, 26 ECAB 351, 353-54 (1975); *see Fred Foster*, 1 ECAB 127, 132-33 (1948).

⁹ *I.J. supra* note 4; *Gary R. Sieber*, 46 ECAB 215, 222 (1994); *see Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

The reports of Dr. Fuentes are not sufficient to establish that appellant had any medical condition or disability after October 17, 2008 causally related to his accepted back conditions. Dr. Fuentes did not explain, with medical rationale, how appellant's accepted L3-4 subluxation and temporary aggravation of preexisting lumbar degenerative facet arthritis caused disability on and after October 17, 2008. Such medical rationale is particularly necessary in light of the fact that he provided no findings on physical examination in his September 24, 2008 report and the limited findings in his September 22, 2008 report included no motor or sensory deficit and only mild pain to palpation in the lumbosacral spine and discomfort when bending over. Dr. Fuentes provided no range of motion findings for the back. He did not indicate that there was any radiculopathy caused by appellant's accepted back conditions. The limited findings on physical examination and lack of medical rationale are not sufficient to establish that appellant had any disability or medical condition after October 17, 2008 causally related to his accepted back conditions or to overcome the opinion of Dr. Metz that appellant's accepted back conditions had resolved.

In an October 9, 2008 report, Dr. Nice indicated that he had reviewed the report of Dr. Metz, which he noted was based on a thorough examination. He described a new medical history where appellant was required to repeatedly lift, bend, squat and twist for seven hours, which aggravated his underlying spondylosis, but he did not address the issue of whether appellant had any medical condition or disability after October 17, 2008 causally related to his June 7, 2004 accepted L3-4 subluxation and temporary aggravation of preexisting lumbar degenerative facet arthritis. The Office did not accept a permanent aggravation of lumbar spine arthritis as a result of the June 7, 2004 employment injury. Dr. Nice did not explain how the June 7, 2004 incident where appellant felt a twinge in his back while pulling a locker door latch resulted in ongoing residuals through and after October 17, 2008. He described an aggravation of appellant's underlying back condition caused by recent activities, not the June 7, 2004 incident. For these reasons, the report of Dr. Nice does not establish that appellant had any medical condition or disability after October 17, 2008 causally related to his June 7, 2004 employment injury or outweigh the opinion of Dr. Metz that his accepted back conditions had resolved.

Appellant failed to submit medical evidence establishing that he had any work-related disability or medical condition after October 17, 2008 causally related to his accepted employment-related subluxation at L3-4 and temporary aggravation of preexisting lumbar degenerative facet arthritis. Accordingly, the Office properly affirmed the October 17, 2008 termination decision and denied his claim for compensation after October 17, 2008.

On appeal, appellant contends that the Office decisions are contrary to fact and law. However, he failed to submit medical evidence sufficient to establish that he had any medical condition or disability after October 17, 2008 causally related to his June 7, 2004 accepted back conditions. The Office properly denied appellant's claim for compensation benefits after October 17, 2008.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "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 section 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.”¹⁰ A claimant is not entitled to an oral hearing, however, if he has already received a hearing on the same issue or set of issues.¹¹ Nonetheless, the Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and has held that the Office must exercise its discretion in such cases.¹² The Office shall determine whether a discretionary hearing should be granted and, if not, shall so advise the claimant with reasons.¹³ The Office’s procedures, which require the Office to exercise its discretion to grant or deny a hearing when no legal provision is made for such hearings, are a proper interpretation of the Act and of Board precedent.¹⁴

ANALYSIS -- ISSUE 3

Having already received an oral hearing before an Office hearing representative on February 9, 2009 on the issue of whether the evidence established that appellant’s June 7, 2004 accepted medical conditions had resolved, he was not entitled to another hearing on the same issue as a matter of right. The Office correctly made this finding in its May 22, 2009 decision. It considered whether to grant a discretionary hearing but denied such a hearing on the grounds that appellant could equally well address the issue in his case -- whether his June 7, 2004 accepted medical conditions had resolved, -- through the reconsideration process. As appellant may pursue this issue through an alternative procedure, by submitting to the Office a request for reconsideration and by supporting that request with well-reasoned medical evidence on whether he continued to have a work-related disability or medical condition, the Board finds that the Office did not abuse its discretion in denying his request for a second hearing on the same issue.¹⁵

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant’s wage-loss compensation and medical benefits effective October 17, 2008. The Board also finds that he did not meet his burden of proof to establish that he had any work-related disability or medical

¹⁰ 5 U.S.C. § 8124(b)(1).

¹¹ See *Charles D. Watson*, 35 ECAB 1068 (1984) (if a claimant has received a hearing on an issue or set of issues and the hearing representative affirms the Office’s decision, the claimant is not entitled to another hearing on that issue or set of issues even if her proffers new evidence; he may receive a second hearing only if the Office, in its discretion, grants him a second hearing).

¹² *Johnny S. Henderson*, 34 ECAB 216 (1982) (request for a second hearing).

¹³ Federal (FECA) Procedure Manual, Part 2-- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.b(3) (June 1997).

¹⁴ See *Jeff Micono*, 39 ECAB 617 (1988).

¹⁵ See *L.D.*, 58 ECAB 344 (2007).

condition after October 17, 2008. Further, the Board finds that the Office properly denied appellant's request for a second hearing on the same issue.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 22 and 1, 2009 and October 17, 2008 are affirmed.

Issued: May 14, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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