

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

F.R., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Eagle Pass, TX, Employer**

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**Docket No. 12-424
Issued: August 21, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 1, 2011 appellant filed a timely appeal from an August 15, 2011 decision of the Office of Workers' Compensation (OWCP) Programs terminating his compensation benefits for his accepted work injury. He also appealed an October 24, 2011 decision of OWCP which denied his request for a review of the written record. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to justify termination of appellant's compensation benefits effective August 28, 2011; and (2) whether OWCP properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 24, 2009 appellant, then a 38-year-old custom and border patrol officer, lifted a metal box at work and injured his low back. OWCP accepted the claim for sprain of the back, lumbar region and expanded his claim to include aggravation of displacement of lumbar intervertebral disc. Appellant stopped work on July 23, 2009 and did not return.

After the work injury, appellant was treated for a lumbar sprain and found to be totally disabled. An x-ray of the lumbar spine dated August 18, 2009 revealed mild posterior degenerative changes. An August 28, 2009 lumbar spine magnetic resonance imaging (MRI) scan showed posterior central disc bulge at L4-5 and L5-S1.

Appellant came under the treatment of Dr. Gerard Zavala, a Board-certified neurosurgeon, from October 9, 2009 to February 22, 2010, for a work-related back injury. Dr. Zavala diagnosed history of protruded disc at L5-S1, possible herniated disc in the cervical and thoracic spine and left knee injury. He recommended additional testing and physical therapy and opined that appellant was totally disabled. An MRI scan of the cervical spine dated October 29, 2009 revealed muscle spasm and posterior central disc bulge at C5-6. An MRI scan of the thoracic spine revealed posterior left, paracentral disc protrusion at T7-8 and posterior central disc bulge at T5-6. An October 29, 2009 MRI scan of the left knee revealed mild patellofemoral osteoarthritis. A December 16, 2009 electromyogram (EMG) of the cervical and thoracic spine revealed no abnormalities.

Appellant continued to be treated by Dr. Zavala for cervical and lumbar radiculopathy and opined that appellant remained totally disabled. In a February 22, 2010 report, he noted pain findings all over appellant's body which prevented him from returning to his regular duties. Dr. Zavala noted decreased range of motion, decreased strength and decreased sensation at L5-S1. In an August 26, 2010 report, he noted that appellant presented with neck pain radiating into his upper extremities with low back pain radiating into his lower extremity. Dr. Zavala diagnosed cervical radiculopathy with bulging disc at L5-6, lumbar radiculopathy with protruding disc at L5-S1, thoracic radiculopathy with protruded disc at T7-8 and rheumatoid arthritis. He noted that appellant's work injury with lumbosacral radiculopathy and a protruded disc at L5-S1 was causally related to the July 23, 2009 work injury and compounded by rheumatoid arthritis. Dr. Zavala opined that appellant was totally disabled. Appellant underwent a functional capacity evaluation on April 29, 2010 which noted that he could work in a less than sedentary position.

In a letter dated October 19, 2010, OWCP notified appellant that his physician noted a newly diagnosed condition in relation to his July 23, 2009 work injury and that his claim would be further developed.²

On November 9, 2010 OWCP referred appellant to Dr. Charles D. Mitchell, a Board-certified orthopedist, to determine if the newly diagnosed conditions were work related, whether the accepted conditions had resolved and whether appellant could return to work. In a December 16, 2010 report, Dr. Mitchell noted examining appellant on November 10, 2010. He reviewed appellant's history and noted findings. Appellant had muscle spasm in the cervical and lumbar spine, restricted range of motion of the cervical and lumbar region, generalized weakness in the left upper extremity, decreased sensation in the left leg and noted that appellant appeared to be overreacting to the examination. Dr. Mitchell diagnosed marked obesity, cervical and lumbar strain, bulging discs at L4-5 and L5-S1, cervical disc bulge at C5-6 and thoracic disc protrusion at T5-6, T7-8. He opined that appellant had lumbar problems preventing him from working but noted that there was some work that he could perform with restrictions. Dr. Mitchell noted appellant's lumbar condition was related to the July 23, 2009 injury. However, the degenerative changes of the thoracic, cervical and lumbar spine were preexisting. Dr. Mitchell noted that appellant had significant pain in the left arm and legs and noted an aggravation of a lumbar condition that had not completely resolved. He recommended a work reconditioning and pain management program. Dr. Mitchell noted that appellant could return to work six hours per day with restrictions with the anticipation that appellant would increase his hours.

On January 5, 2011 OWCP expanded appellant's claim to include aggravation of displacement of lumbar intervertebral disc.

On January 5, 2011 OWCP requested that Dr. Zavala review Dr. Mitchell's report and address whether appellant could return to work six hours per day with restrictions. In duty status reports dated January 19 and March 10, 2011, Dr. Zavala diagnosed cervical, lumbar and thoracic radiculopathy and noted that appellant was totally disabled.

OWCP found that a conflict of medical opinion existed between Dr. Zavala, who indicated that appellant had residuals of his work-related injuries and was totally disabled, and Dr. Mitchell, an OWCP referral physician who determined that appellant had residuals of his accepted work condition but could work six hours per day with restrictions.

To resolve the conflict OWCP, on April 7, 2011, referred appellant to a referee physician, Dr. Frank L. Barnes, a Board-certified orthopedist. In a May 3, 2011 report, Dr. Barnes noted reviewing the record, including the history of appellant's work injury, and examining appellant. Examination of the cervical spine revealed normal curvature, no atrophy, no palpable spasm,

² OWCP had previously referred appellant to Dr. Donald M. Mauldin, an orthopedic surgeon, who opined on May 17, 2010, that appellant's work-related lumbar spine condition had resolved. Thereafter, it referred appellant to Dr. Grant McKeever, an orthopedic surgeon, for an impartial examination. Dr. McKeever, in July 29 and September 15, 2010 reports, opined that appellant's accepted lumbar condition had resolved but that nonwork-related rheumatoid arthritis might limit his ability to work. Although OWCP, on August 11, 2010, proposed to terminate benefits, it did not finalize this proposal.

manual muscle testing showed no weakness in the upper extremity with tenderness in the lumbar, thoracic spine to light touch and cervical tenderness to moderate touch. Dr. Barnes noted examination of the lumbar spine revealed normal curvature, no rigidity or spasm, lumbar tenderness to light touch, stocking like hypoesthesia in the left lower extremity with weakness in the right knee, foot and ankle. He noted no swelling of the left knee, medial tenderness with no instability and no swelling of the left elbow. Dr. Barnes diagnosed lumbar strain syndrome, contracture left elbow and left knee, symptom magnification and depression of unknown cause. He opined that appellant was able to return to his date-of-injury position based on lack of objective findings of disability. Dr. Barnes opined that the work-related back and aggravated conditions had resolved. In a work capacity evaluation, he opined that appellant could return to his regular job without restrictions.

On May 18, 2011 OWCP requested clarification from Dr. Barnes asking that he address whether he agreed with Dr. Zavala's determination that appellant's thoracic, cervical bulges, head and low back pain, shoulder and left knee pain were related to the July 23, 2009 injury.

In a May 21, 2011 report, Dr. Barnes opined that the thoracic and cervical spine bulges were degenerative in nature and not caused by the July 23, 2009 work injury but predated that condition. With regard to head pain, he noted that appellant did not mention it and there was no evidence that he sustained a head injury on July 23, 2009. Dr. Barnes further noted that the record did not substantiate any connection between the July 23, 2009 injury and his current shoulder complaints or left elbow pain. He indicated that the evidence indicated that appellant may have strained his knee on July 23, 2009 but this would have been a soft tissue injury and would have healed within two months.

On July 13, 2011 OWCP proposed to terminate all benefits finding that Dr. Barnes's May 3 and 21, 2011 reports established no continuing residuals of his work-related condition.

On July 25, 2011 appellant asserted that he was in considerable pain and could not return to his date-of-injury position. He submitted an April 25, 2011 report from Dr. Hector Trevino, a Board-certified neurologist, who tested appellant for sleep apnea and diagnosed hypersomnia with moderate obstructive sleep apnea.

In a decision dated August 15, 2011, OWCP terminated appellant's medical and wage-loss compensation benefits effective August 28, 2011 finding that the medical evidence established that he had no continuing residuals of his accepted conditions.

On October 1, 2011 appellant requested a review of the written record. He submitted an MRI scan of the thoracic spine dated October 29, 2009, a January 5, 2011 acceptance letter from OWCP and the May 21, 2011 report from Dr. Barnes, all previously of record. Also submitted was a July 12, 2011 duty status report from Dr. Zavala who noted that appellant was disabled from work. Appellant submitted a treatment note from Dr. Sergio Zamora, a psychiatrist, who treated him for stress.

In a decision dated October 24, 2011, OWCP denied appellant's request for a review of the written record. It found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved, and that the request was further

denied for the reason that the issues in this case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ 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, OWCP must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁵

ANALYSIS -- ISSUE 1

OWCP found a medical conflict between appellant's attending physician, Dr. Zavala, a Board-certified neurosurgeon, who determined that appellant still had residuals of the sprain of the back, lumbar region and aggravation of displacement of lumbar intervertebral disc and was totally disabled from work, and Dr. Mitchell, a referral physician, who indicated that appellant had some residuals of his accepted conditions but could return to work six hours per day with restrictions. Consequently, it referred appellant to Dr. Barnes to resolve the conflict of opinion with respect to the extent of appellant's work-related condition.

The Board finds that, under the circumstances of this case, the opinion of Dr. Barnes is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that disabling residuals of appellant's work-related conditions have ceased. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁶

In a May 3, 2011 report, Dr. Barnes reviewed appellant's history and noted that appellant had no objective complaints or findings due to the accepted conditions. He found no credible objective evidence of ongoing condition due to appellant's July 23, 2009 work injury and opined that appellant could return to his preinjury position. In support of his opinion, Dr. Barnes noted an essentially normal examination with normal curvature of the cervical and lumbar spine, no atrophy, no palpable spasm, no weakness in the upper extremity with tenderness in the lumbar, thoracic and cervical spine and lower extremity weakness in the right knee, foot and ankle. He diagnosed lumbar strain syndrome, contracture left elbow and left knee, symptom magnification

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁵ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

⁶ *Solomon Polen*, 51 ECAB 341 (2000). See 5 U.S.C. § 8123(a).

and depression of unknown cause. In a work capacity evaluation, Dr. Barnes opined that appellant could return to his regular job without restrictions. In a May 21, 2011 report, he clarified his opinion noting that the thoracic and cervical spine bulges were degenerative in nature and not caused by the July 23, 2009 work injury.⁷ With regard to head pain, shoulder complaints and elbow pain, Dr. Barnes noted that there was no evidence that appellant sustained a head, shoulder or elbow injury on July 23, 2009.⁸ He indicated that the evidence indicates that appellant may have strained his knee on July 23, 2009 but this would have been a soft tissue injury and would have healed within two months.

The Board finds Dr. Barnes had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Barnes is a specialist in the appropriate field. At the time wage-loss and medical benefits were terminated he clearly opined that appellant had no work-related reason for disability. Dr. Barnes' opinion as set forth in his reports of May 3 and 21, 2011 are found to be probative evidence and reliable. The Board finds that Dr. Barnes's opinion constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of wage-loss and medical benefits for the accepted conditions.

On appeal, appellant asserted that he remained disabled and contended that Dr. Barnes' opinion is insufficient to terminate his benefits. As explained, the weight of the medical evidence establishes that disability due to the accepted conditions has ceased.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that "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."⁹ Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.¹⁰ A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested

⁷ See *Guiseppe Aversa*, 55 ECAB 164 (2003) (where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion).

⁸ See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury).

⁹ 5 U.S.C. § 8124(b)(1).

¹⁰ 20 C.F.R. §§ 10.616, 10.617.

reconsideration.¹¹ 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, OWCP may within its discretionary powers grant or deny appellant's request and must exercise its discretion.¹² Its procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under 5 U.S.C. § 8128(a).¹³

ANALYSIS -- ISSUE 2

Appellant requested a review of the written record in an appeal request form dated October 1, 2011 and postmarked October 2, 2011. As the request for a review of the written record was made more than 30 days after issuance of the August 15, 2011 OWCP decision, his appellant's request for a review of the written record was untimely filed and he is not entitled to a review of the written record as a matter of right.

OWCP also notified appellant that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. It has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.¹⁴ There is no indication that OWCP abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

Consequently, OWCP properly denied appellant's request for a review of the written record.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate benefits effective August 28, 2011. The Board further finds that OWCP properly denied appellant's request for a review of the written record pursuant to 5 U.S.C. § 8124(b)(1).

¹¹ *Id.* at § 10.616(a).

¹² *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

¹³ *See R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

¹⁴ *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT October 24 and August 15, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 21, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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