

FACTUAL HISTORY

On September 4, 1990 appellant, then a 38-year-old fossil trainee, filed a traumatic injury claim alleging that he developed low back strain twisting in the performance of duty on that date. OWCP accepted his claim for low back strain on November 6, 1990. Appellant filed recurrences of disability on June 19 and August 30, 1991. He filed a claim on October 29, 1991 alleging on June 6, 1991 that he injured his back loading a tool trailer. OWCP accepted that appellant sustained a lumbar strain on July 25, 1991 in a decision dated September 16, 1991. By decisions dated January 2, 1992, it accepted that he sustained a recurrence of disability due to his June 6, 1991 employment injury and accepted that appellant sustained a lumbar strain as a result of his June 6, 1991 employment injury.

Appellant, then an engineering aide-mechanic, filed a claim for traumatic injury on April 8, 1993 alleging that on March 11, 1993 he injured his low back and cervical spine when the chair that he was sitting in slipped from under him and he fell on the floor. OWCP accepted this claim for cervical and lumbar strain on May 4, 1993. Appellant underwent a laminotomy with excision of herniated disc at L5-S1 and fusion from L5 to the sacrum.²

On June 1, 1995 Dr. Jan M. Gorzny, a Board-certified orthopedic surgeon and second opinion physician, described appellant's employment injuries. He found evidence of a herniated disc at L5-S1 with a myelogram defect at the S1 nerve root indicative of compression. Dr. Gorzny concluded that a laminotomy at that level was appropriate. He attributed appellant's herniated disc to the two falls at work in September 1990 and March 1993.

Dr. John W. Lamb, a Board-certified orthopedic surgeon and second opinion physician, examined appellant on June 21, 2004. He diagnosed ankylosing spondylitis with marked restriction of neck and back motion, history of laminectomy and L4 to S1 fusion with persistent low back pain and loss of motion as well as history of severe neck pain associated with degenerative disc disease and ankylosing spondylitis. Dr. Lamb attributed appellant's disability in large part to his ankylosing spondylitis. He found that appellant's laminectomy and fusion would also contribute to his present disability. Dr. Lamb opined that appellant could not return to work and that ankylosing spondylitis was his major cause of disability.

Dr. Deborah S. St. Clair, a Board-certified orthopedic surgeon and second opinion physician, completed a report on June 23, 2009 and reviewed appellant's accepted employment injuries. She diagnosed chronic back pain. Dr. St. Clair stated that she had difficulty assessing the relationship between appellant's present chronic pain and depression to his initial diagnosis and back surgery. She stated that there was no work he could do due to his severe restrictions.

² This case has previously been before the Board on appeal. The Board dismissed an appeal based on appellant's request on January 24, 1995. Docket No. 94-2073 (issued January 24, 1995). In a decision dated August 9, 1999, the Board found that OWCP did not meet its burden of proof to terminate appellant's wage-loss benefits effective April 14, 1994 based on his refusal of suitable work. Docket No. 98-136 (issued August 9, 1999).

In a report received March 11, 2001, Dr. Robert Boone³ responded to questions from OWCP and diagnosed chronic pain syndrome, lumbar disc degeneration and cervical disc degeneration. He opined that appellant was permanently and totally disabled.

OWCP referred appellant for a second opinion evaluation on May 18, 2011. Dr. James G. Warmbrod, a Board-certified orthopedic surgeon, completed a report on June 7, 2011 and noted that appellant's claim was accepted for lumbar strain in 1991. He reviewed the medical records and provided the results of physical examination. Dr. Warmbrod diagnosed postcervical and lumbar strains as well as degenerative disc disease of the cervical spine and lumbar spine. He noted that appellant had a lumbar fusion between L4-5 and L5-S1 as well as ankylosing spondylitis. Dr. Warmbrod opined that the cervical and lumbar strains were related to his injuries, but did not believe that the degenerative disc disease or ankylosing spondylitis was medically connected to the employment injuries. He stated, "[Appellant] suffered cervical and lumbar strains which normally resolved themselves in about three months. The reason for disability at this time is the ankylosing spondylitis," Dr. Warmbrod concluded that appellant did not have any physical limitations resulting from his employment injuries after three to six months. He stated, "I believe his disability at this time is related to a normal aging process of degenerative disc disease and his diagnosis of ankylosing spondylitis." Dr. Warmbrod found that appellant was not capable of employment due to his ankylosing spondylitis.

In a memorandum dated July 20, 2011, OWCP stated that appellant's claim should have been expanded to include herniated discs at L5-S1 based on the June 1, 1995 second opinion report. Due to this change, OWCP provided Dr. Warmbrod with an updated statement of accepted facts and asked that he opine whether the herniated disc had resolved as well as whether all accepted conditions had resolved.

On August 1, 2011 Dr. Warmbrod stated that OWCP had accepted herniated disc at L5-S1 and lumbar strains. He noted that appellant underwent a two-level lumbar fusion with bone graft, implanted bone stimulator and four electrodes. Dr. Warmbrod opined that all of the accepted conditions had resolved. He stated, "I believe at this time that [appellant's] condition is related to a normal aging process of degenerative disc disease of the lumbosacral spine and his diagnosis of ankylosing spondylitis.

In a letter dated August 19, 2011, OWCP proposed to terminate appellant's compensation and medical benefits based on Dr. Warmbrod's June 7 and August 1, 2011 reports. It allowed 30 days for a response. On August 22, 2011 appellant requested \$750.00 in reimbursement as he had no electricity. OWCP responded on September 21, 2011 and provided him with a form for medical reimbursement.

By decision dated September 23, 2011, OWCP terminated appellant's medical and wage-loss compensation benefits effective September 25, 2011. It noted that he had not responded to the notice of proposed termination.

Appellant requested a review of the written record by an OWCP hearing representative on January 11, 2012 received on January 20, 2012. The request was postmarked

³ Dr. Boone's area of practice cannot be determined from the record.

January 17, 2012. In a decision dated February 1, 2012, OWCP's Branch of Hearings and Review denied appellant's request for a review of the written record as untimely. The Branch of Hearings and Review found that as appellant did not request a review of the written record within 30 days his request was untimely. The Branch of Hearings and Review considered appellant's request and determined that the issue in the case could be equally well addressed by requesting reconsideration and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ 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.⁵ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.⁷

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for lumbar and cervical strains as well as herniated disc at L5-S1 and resulting surgery. In response to questions from OWCP, Dr. Boone provided brief answers on March 11, 2011 diagnosing chronic pain syndrome, lumbar disc degeneration and cervical disc degeneration. He opined that appellant was permanently and totally disabled. As the conditions identified by Dr. Boone had not been accepted by OWCP, the claims examiner referred appellant to Dr. Warmbrod for a second opinion evaluation. Dr. Warmbrod considered the medical evidence in the record including the reports from Drs. Gorzny, Lamb and St. Clair and determined that appellant's current disability and medical residuals were due to his nonemployment-related condition of ankylosing spondylitis. He noted that appellant's strains should have resolved within six months. Following Dr. Warmbrod's initial report of June 7, 2011, OWCP expanded appellant's accepted conditions to include herniated disc at L5-S1 based on Dr. Gorzny's report. OWCP provided Dr. Warmbrod with an updated statement of accepted facts and asked that he opine whether appellant had any disability or residuals due to his accepted herniated disc and resulting surgery. He responded on August 1, 2011, listed all the accepted conditions and surgery and opined that all of the accepted conditions had resolved. Dr. Warmbrod stated, "I believe at this time that [appellant's] condition is related to a normal aging process of degenerative disc disease of the lumbosacral spine and his diagnosis of ankylosing spondylitis."

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Id.*

⁶ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁷ *Id.*

The Board finds that Dr. Warmbrod's reports are entitled to the weight of the medical evidence. Dr. Warmbrod reviewed the statement of accepted facts, the medical history and concluded that appellant's current condition and disability was not due to his accepted employment injuries. His reports are the only contemporary medical evidence to address appellant's work-related disability and residuals. Dr. Boone's report is not based on a proper history of injury and does not implicate appellant's accepted employment injuries as resulting in his current disability for work. The Board finds that OWCP met its burden of proof to terminate appellant's medical and wage-loss compensation benefits effective September 25, 2011.

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

A claimant dissatisfied with a decision of OWCP shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.⁸ The Board has held that OWCP, in its broad discretionary authority in the administration of FECA has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.⁹ OWCP's procedures, which require OWCP to exercise its discretion to grant or deny a request for a hearing or review of the written record when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.¹⁰

ANALYSIS -- ISSUE 2

In its February 1, 2012 decision, OWCP denied appellant's request for a review of the written record on the grounds that it was untimely filed. It found that he was not, as a matter of right, entitled to a review of the written record as his request, dated January 11, 2012, was not made within 30 days of its September 23, 2011 decision. As appellant's request was dated January 11, 2012, more than 30 days after the date of the September 23, 2011 OWCP decision, the Board finds that OWCP properly determined that he was not entitled to a review of the written record as a matter of right as his request was untimely filed.

OWCP also has the discretionary power to grant a request for a hearing or review of the written record when a claimant is not entitled to such as a matter of right. In the February 1, 2012 decision, it properly exercised its discretion by stating that it had considered the matter in

⁸ *Claudio Vazquez*, 52 ECAB 496 (2001). 20 C.F.R. § 10.616.

⁹ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

¹⁰ *Vazquez*, *supra* note 8.

relation to the issue involved and had denied appellant's request on the basis that the issue could be addressed through a reconsideration application.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective September 25, 2011. The Board further finds that OWCP's Branch of Hearings and Review properly denied appellant's request for a review of the written record as untimely.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2012 and September 23, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 17, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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