

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

T.M., Appellant

and

**DEPARTMENT OF THE NAVY, MARINE
CORPS LOGISTICS BASE, Albany, GA,
Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 13-1953
Issued: December 11, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 22, 2013 appellant filed a timely appeal from a May 10, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for a review of the written record and an August 9, 2013 merit decision denying modification of its termination of his medical benefits. 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 this case and over the May 10, 2013 nonmerit decision.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for a review of the written record as untimely under 5 U.S.C. § 8124; (2) whether OWCP properly terminated his authorization for medical benefits effective February 13, 2013 on the grounds that he had no residuals of his August 6, 2001 employment injury; and (3) whether appellant established the need for further medical treatment after February 13, 2013 due to his accepted work injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. By decision dated December 30, 2009, the Board affirmed the June 19, August 20 and October 15, 2008 nonmerit decisions denying his requests for a review of the written record by an OWCP hearing representative and a July 16, 2008 nonmerit decision denying his request for reconsideration as untimely and insufficient to establish clear evidence of error.² The facts as set forth in the prior appeal are hereby incorporated by reference. The facts relevant to the instant appeal are set forth.

OWCP accepted that on August 6, 2001 appellant, then a 46-year-old heavy mobile mechanic, sustained a lumbar strain in the performance of duty. On April 29, 2002 Dr. J. Kenneth Burkus, a Board-certified orthopedic surgeon, released appellant to return to work without low back restrictions.³ He noted that appellant had lumbar spondylosis and stenosis of a long-standing nature.

On October 5, 2012 OWCP requested updated medical information regarding appellant from Dr. Jeffrey A. Fried, an attending Board-certified orthopedic surgeon.⁴ In a report dated October 10, 2012, Dr. Fried noted that appellant experienced a work injury on August 6, 2001 and “still has lumbar sprain from his back sprain and lumbar strain. In addition, [appellant] was found to have a spondylolisthesis of the lumbar spine.” He opined that appellant required further medical treatment and a possible spinal fusion in the future. Dr. Fried stated, “The spondylolisthesis was more likely than not was a preexisting quiescent condition which was aggravated and made worse by his injury and his symptoms have not returned to his prior condition. The spondylolisthesis can contribute to the delayed healing of his lumbar strain.”

OWCP referred appellant to Dr. Douglas Hein, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated December 5, 2012, Dr. Hein discussed appellant’s history of injury on August 6, 2001 and reviewed the medical records. On examination he found intact strength and sensation of the lower extremities without atrophy and full thoracolumbar motion. Dr. Hein determined that appellant’s 2001 lumbar strain had “fully resolved.” He opined that appellant had L4-5 and L5-S1 degenerative changes that antedated the injury and that the spondylolisthesis developed at L4-5 as a normal progression of the disease process.

² Docket No. 09-321 (issued December 30, 2009).

³ In decisions dated August 19, 2002 and January 23, 2003, OWCP denied appellant’s claim for a schedule award. In a decision dated June 19, 2008, it denied his request for a review of the written record as he had previously received a review of the written record. On July 16, 2008 OWCP denied appellant’s request for reconsideration of its January 23, 2003 decision as untimely and insufficient to establish clear evidence of error. In decisions dated August 20 and October 15, 2008, it denied his requests for a review of the written record. By decision dated September 21, 2012, OWCP denied appellant’s request for reconsideration of its August 19, 2002 decision as it was untimely and did not show clear evidence of error.

⁴ By decision dated November 6, 2012, OWCP denied appellant’s request for further physical therapy due to his August 6, 2001 work injury. In a decision dated January 31, 2013, an OWCP hearing representative affirmed the November 6, 2012 decision.

On January 10, 2013 OWCP notified appellant of its proposed termination of his authorization for medical benefits for the accepted lumbar strain. By decision dated February 13, 2013, it terminated his medical benefits. OWCP found that the opinion of Dr. Hein represented the weight of the medical opinion and established that he had no further residuals of his accepted lumbar strain.

On April 15, 2013 appellant requested both reconsideration and a review of the written record. In a decision dated May 10, 2013, OWCP denied his request for a review of the written record as untimely.

On May 14, 2013 appellant requested reconsideration. He submitted medical evidence dated 2001 to 2011. In a report dated January 16, 2013, Dr. Fried stated:

“[Appellant] had a work[-]related injury on August 6, 2001, which was a sprain in the lower back. This has not resolved and he has instability of the back resulting in spondylolisthesis at L5-S1. [Appellant’s] condition has progressed and he eventually may need a fusion of the lumbar spine. His sprain in the lumbar spine has not resolved.”

In a progress report dated January 16, 2013, Dr. Fried diagnosed multiple conditions including acquired spondylolisthesis, cervical disc displacement, right carpal tunnel syndrome and right shoulder joint pain.

By decision dated August 9, 2013, OWCP denied modification of its February 13, 2013 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b) 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 or her claim before a representative of the Secretary.⁵ Section 10.615 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.⁶ The request must be sent within 30 days (as determined by postmark or other carrier’s date marking) of the date of the decision for which a hearing is sought.⁷ A claimant is entitled to a hearing or review of the written record as a matter of right if the request is filed within 30 days.⁸

⁵ 5 U.S.C. § 8124(b)(1).

⁶ 20 C.F.R. § 10.615.

⁷ *Id.* at § 10.616(a).

⁸ See *Leona B. Jacobs*, 55 ECAB 753 (2004).

While a claimant may not be entitled to a hearing or review of the written record as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.⁹

ANALYSIS -- ISSUE 1

OWCP issued a decision on February 13, 2013 terminating appellant's entitlement to medical benefits. Appellant requested a review of the written record by letter dated and postmarked April 15, 2013. OWCP denied the request as untimely by decision dated May 10, 2013. As appellant's request for a review of the written record was dated April 15, 2013, more than 30 days after OWCP issued its February 13, 2013 decision, he was not entitled to a hearing as a matter of right.

OWCP has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right.¹⁰ It properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and denied appellant's request for a review of the written record on the basis that the case could be pursued by submitting additional evidence to OWCP supporting that he had continued residuals of his August 6, 2001 employment injury with a reconsideration request. The Board has held that the only limitation on OWCP's discretionary authority is reasonableness. An 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.¹¹ The evidence of record does not establish that OWCP committed any action in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion. For these reasons, it properly denied his request for a review of the written record as untimely under section 8124 of FECA.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.¹² OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹³ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹⁴ To terminate authorization for medical

⁹ 20 C.F.R. § 10.616(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (October 2011).

¹⁰ *Afegalai L. Boone*, 53 ECAB 533 (2002).

¹¹ *See André Thyratron*, 54 ECAB 257 (2002).

¹² *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹³ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

¹⁴ *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹⁵

ANALYSIS -- ISSUE 2

The issue is whether OWCP met its burden of proof to terminate appellant's entitlement to medical benefits for his accepted lumbar strain.

OWCP accepted that appellant sustained lumbar strain due to an August 6, 2001 employment injury. Appellant was released to return to work on April 29, 2002 without restrictions. OWCP continued to pay medical benefits.

In response to a request for updated medical information on October 10, 2012 Dr. Fried discussed appellant's history of an August 6, 2001 employment injury. He found that appellant continued to experience a lumbar sprain and strain and spondylolisthesis of the lumbar spine. Dr. Fried asserted that appellant had spondylolisthesis that was probably a preexisting condition aggravated by his injury and that could have "delayed healing of his lumbar strain." He, however, did not provide findings on examination or explain why appellant continued to experience lumbar sprain 10 years after his work injury other than to speculate that spondylolisthesis may have delayed healing. Dr. Fried did not address the reports of appellant's previous attending physician, Dr. Burkus, who released appellant to return to unrestricted duty on April 29, 2002. Medical opinions that are speculative or equivocal in character are of diminished probative value.¹⁶ Further, OWCP has not accepted spondylolisthesis as employment related. Where appellant claims that a condition not accepted or approved by OWCP was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.¹⁷ Dr. Fried did not provide sufficient rationale for his opinion that the work injury caused an aggravation of preexisting spondylolisthesis and thus his opinion is of little probative value.¹⁸

OWCP referred appellant to Dr. Hein for a second opinion examination. Dr. Hein determined that appellant had no residuals of his accepted employment injury. In a report dated December 5, 2012, he reviewed the history of injury and listed detailed findings on physical examination. Dr. Hein found full strength, motion and sensation of the lower extremities on examination and no atrophy. He concluded that appellant's lumbar strain had resolved and that his spondylolisthesis was a progression of preexisting degenerative disc disease. Dr. Hein provided a thorough review of the factual and medical background and accurately summarized the relevant medical evidence. Moreover, he provided detailed findings on examination and reached conclusions regarding appellant's condition which comported with his findings.¹⁹

¹⁵ *Id.*

¹⁶ *D.D.*, 57 ECAB 710 (2006).

¹⁷ *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

¹⁸ *Willa M. Frazier*, 55 ECAB 379 (2004); *Jimmy H. Duckett*, 52 ECAB 332 (2001).

¹⁹ *See Pamela K. Guesford*, *supra* note 14.

OWCP, therefore, properly found that Dr. Hein's opinion represented the weight of the evidence and established that appellant had no need for further medical treatment as of February 13, 2013.

LEGAL PRECEDENT -- ISSUE 3

Once OWCP met its burden of proof to terminate appellant's authorization for medical benefits, the burden shifted to him to establish that he had a need for further medical treatment after that date related to his accepted injury.²⁰ To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.²¹

ANALYSIS -- ISSUE 3

Following OWCP's termination of his medical benefits, appellant submitted January 16, 2013 reports from Dr. Fried, who reiterated that appellant's work-related back strain had not resolved. Dr. Fried stated that appellant had spondylolisthesis at L5-S1 and may in the future require a fusion. He, however, provided no additional rationale for his stated conclusion that appellant had further residuals of his accepted condition. Medical conclusions unsupported by rationale are of diminished probative value.²² As noted, OWCP has not accepted the claim for spondylolisthesis. Consequently, appellant has not established that he required further medical treatment for his accepted lumbar strain after February 13, 2013.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely under section 8124. The Board further finds that OWCP properly terminated his authorization for medical benefits effective February 13, 2013 on the grounds that he had no residuals of his August 6, 2001 employment injury and that he has not established the need for further medical treatment after February 13, 2013 due to his accepted work injury.

²⁰ *Manual Gill*, 52 ECAB 282 (2001).

²¹ *Id.*

²² *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

ORDER

IT IS HEREBY ORDERED THAT the August 9 and May 10, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 11, 2013
Washington, DC

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

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

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