

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID NORRIS and DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD, Portsmouth, VA

*Docket No. 00-1260; Submitted on the Record;
Issued November 5, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that he has a continuing disability causally related to his accepted employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely.

On July 1, 1986 appellant, then a 25-year-old insulator, filed a notice of traumatic injury alleging that he injured his back on May 8, 1986 in the performance of duty. He stated that he was a passenger in the rear of a truck and when the driver began to move. Appellant, to keep from being thrown from the vehicle, grabbed onto the truck and was jarred, injuring his back. The Office accepted appellant's claim for back strain and paid compensation and medical benefits.

By letter dated July 29, 1994, the Office requested that appellant's treating physician, Dr. Richard D. Knauft, a Board-certified orthopedic surgeon, submit current medical findings regarding appellant's progress. No response was received from Dr. Knauft, and appellant was referred to Dr. John A. Williamson, a Board-certified orthopedic surgeon, for a second opinion examination.

Dr. Williamson examined appellant on May 20, 1996 and concluded that appellant's soft tissue strain sustained in 1986 had resolved and that appellant could return to work as an insulator with no restrictions. He also submitted follow-up reports dated November 7 and 20, 1996 and January 7, 1997.

By decision dated December 30, 1996, the Office issued a notice of proposed termination of compensation based on Dr. Williamson's findings that appellant only sustained a minor, soft tissue injury in 1986, which had long since resolved.

By decision dated April 8, 1997, the Office terminated appellant's compensation benefits effective April 27, 1997, since the medical evidence of record established that appellant's work-related disability had ceased.

Appellant requested an oral hearing on May 7, 1997 which was held on February 23, 1998.

At the hearing, appellant submitted a medical report from Dr. Knauft dated February 9, 1998, progress notes from Dr. Knauft dated from May 12, 1986 to April 21, 1997 and a report from Dr. Werner Martens dated February 18, 1998. Both Drs. Knauft and Martens generally supported appellant's contentions that he continued to suffer from a lower back condition related to his May 8, 1986 injury.

By decision dated July 21, 1998, the hearing representative affirmed the Office's April 8, 1997 decision terminating appellant's compensation benefits but found that the medical evidence submitted by appellant created a conflict in medical opinion, warranting a referral of appellant to a referee specialist to resolve the conflict.

By letter dated November 19, 1998, the Office referred appellant to Dr. Richard T. Holden, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Holden examined appellant on December 8, 1998, and found that he needed additional data in order to make a decision. Dr. Holden ordered a bone scan and a magnetic resonance imaging (MRI) scan of the lumbar spine, which were performed on January 8, 1999.

The whole body bone scan dated January 8, 1999 was negative. The January 8, 1999 MRI scan of the lumbar spine indicated:

"No evidence of HNP [herniated nucleus pulposus] or significant spinal stenosis. There is a lateral bulging at the L4-5 disc on the left, which appears to be causing some mass effect on the left L4 nerve root after it exits the neural foramen."

Based on these two examinations, Dr. Holden submitted a report dated February 19, 1999 in which he opined that appellant suffers from depression. However, he stated that appellant's musculoskeletal complaints are an exaggeration not warranted by the physical findings or MRI findings. He opined that appellant can be returned to a reasonable level of employment with "culmination of support, counseling and retraining." The report of the impartial specialist does not support that the depression is causally related to the employment injury.

By decision dated September 10, 1999, the Office found that the weight of the medical evidence of record did not demonstrate that appellant's condition on or after April 27, 1997 was due to the original employment injury.

Appellant requested a review of the written record on November 12, 1999.¹ By decision dated December 29, 1999, the Office denied his request as untimely.

The Board has duly reviewed the case record on appeal and finds that appellant has failed to establish that he has continuing disability causally related to his accepted employment injury.

¹ This request is not found in the record.

Under the Federal Employees' Compensation Act,² once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to employment.⁴ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.⁵ In order to prevail, appellant 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.⁶

The Office, in its April 8, 1997 decision, properly terminated appellant's compensation benefits effective April 27, 1997 as the medical evidence supported a finding that he had no further disability causally related to his original employment injury. Appellant, therefore, has the burden of proving that he is entitled to compensation after that date.⁷

In support of his claim, appellant submitted reports from Drs. Knauft and Martens, who opined that appellant continued to suffer from a lower back condition as a result of his original injury.

Accordingly, the Office correctly determined that a conflict in medical opinion evidence had arisen on whether appellant remained disabled due to his accepted 1986 back strain injury and it properly referred appellant, together with a statement of accepted facts and the complete case record, to a properly chosen impartial medical specialist to resolve the conflict.

In two medical reports dated December 15, 1998 and February 19, 1999, after having reviewed the January 8, 1999 bone and MRI scan, Dr. Holden opined that appellant's bone scan was normal with no signs of arthritis, degenerative process or increased bone activity. He also opined that appellant suffers from depression, but that his musculoskeletal complaints are an exaggeration not warranted by the physical or MRI findings. He stated that appellant could be returned to a reasonable level of employment with culmination of support, counseling and retraining.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such examiner, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁸

² 5 U.S.C. §§ 8101-8193.

³ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁴ *Id.*

⁵ *Virginia Davis-Banks*, 44 ECAB 389 (1993).

⁶ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁷ *George Servetas*, 43 ECAB 424 (1992).

⁸ *Jack R. Smith*, 41 ECAB 691, 701 (1990).

In this case, as Dr. Holden's opinion was sufficiently rationalized, based upon his findings of an absence of objective symptomatology related to the accepted lower back injury, and was based upon a proper factual and medical background, it must be accorded that special weight. Therefore, it constitutes the weight of the medical opinion evidence of record in establishing that appellant had no further disability or medical residuals causally related to his 1986 back strain injury.

The Board also finds that the Office properly denied appellant's request for an oral hearing as untimely.

Any claimant dissatisfied with a decision of the Office 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. A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which a hearing is sought.⁹ The Office has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁰ In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.¹¹

Appellant's request for an oral hearing was postmarked November 12, 1999, which is more than 30 days after the Office's September 10, 1999 decision.¹² As such, appellant is not entitled to an oral hearing as a matter of right. Moreover, the Office considered whether to grant a discretionary review and correctly advised appellant that the issue of whether he has a continuing disability causally related to his accepted employment injury of May 8, 1986 could equally well be addressed by requesting reconsideration.¹³ Accordingly, the Board finds that the Office properly exercised its discretion in denying appellant's untimely request for a hearing.

⁹ 20 C.F.R. § 10.616(a) (1999).

¹⁰ *Herbert C. Holley*, 33 ECAB 140 (1981).

¹¹ *Rudolph Bermann*, 26 ECAB 354 (1975).

¹² This letter is not found in the record; *see* the Office's December 29, 1999 decision which refers to the letter.

¹³ The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

The December 29 and September 10, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 5, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member