United States Department of Labor
Employees' Compensation Appeals Board

VICTORIA MILLARD, Appellant	)	
and	)	**Docket No. 04-1476**
	)	**Issued: January 14, 2005**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Florence, KY, Employer	)	

Alan Shapiro, for the appellant,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 12, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated February 24, 2004 which denied modification of a prior decision that terminated her compensation. She also appealed an October 23, 2003 decision in which the Office denied appellant's request for an examination of the written record as untimely. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and the denial of her request for an examination of the written record.

ISSUES

The issues on appeal are: (1) whether the Office properly terminated appellant's compensation and medical benefits effective August 9, 2003; (2) whether appellant met her burden of proof to establish that she had any disability after August 9, 2003 causally related to the July 16, 2001 employment injury; and (3) whether the Office properly denied appellant's request for an examination of the written record.

FACTUAL HISTORY

On July 18, 2001 appellant, then a 32-year-old tax examiner, filed a traumatic injury claim alleging that on July 16, 2001 she hurt her back, right side and groin area while lifting boxes at work in the performance of duty.[1] Appellant stopped work on July 16, 2001 and returned on July 18, 2001.[2] The Office accepted her claim for a lumbar strain/sprain, and authorized a discogram on March 1, 2002 and she received compensation for her disability for work.

In a July 18, 2001 emergency room report, Dr. Thomas Richardson, Board-certified in emergency medicine, diagnosed lumbar spine strain. X-rays of the same date, read by Dr. Donald D. Gaynor, a Board-certified radiologist, noted slight sclerotic degenerative changes in the lower lumbar facet joints.

Appellant treated with Dr. Kristine Schultz, a Board-certified internist, who submitted periodic reports finding that appellant was unable to work due to residual back pain involving her injury in July. She referred appellant to Dr. Mohammad E. Majd, a neurosurgeon. In a treatment note dated August 3, 2001, Dr. Majd noted that appellant underwent an intradiscal electrothermal therapy (IDET) of L4-5 on December 23, 1999 and had a good result until she lifted a box on July 16, 2001. The physician diagnosed degenerative disc disease of the lumbar spine.

An August 8, 2001 magnetic resonance imaging (MRI) scan of the lumbar spine read by Dr. Attef Mikhail, a Board-certified diagnostic radiologist, showed mild degeneration at L4-5 and L5-S1, a mild broad-based disc bulge at L4-5 and multilevel facet joint arthritis with no spinal stenosis or foraminal narrowing. On April 18, 2002 Dr. Majd performed a discogram which confirmed earlier findings at L4-5 and L5-S1. In an August 7, 2002 repeat lumbar MRI scan, Dr. Eric Candser, a Board-certified diagnostic radiologist, determined that appellant had degenerative disc disease predominantly at L4-5 and L5-S1 consisting of both disc disease and facet hypertrophy.

In a September 11, 2002 report, Dr. Mitchell Simons, a Board-certified orthopedic surgeon, indicated that appellant had no preexisting back conditions until she lifted boxes at work on July 16, 2001. He requested nerve conduction studies of the lower extremities, lumbar epidurals and nerve blocks, a stimulator and a psychological evaluation.

Dr. Schultz continued to submit periodic reports in which she opined that appellant was disabled due to her employment-related condition.[3]

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[1] The record reflects that appellant had preexisting degenerative disc disease of the spine, fibromyalgia, chronic fatigue, shoulder surgery, knee surgery, lupus and arthritis.

[2] The record reflects that appellant was off work again due to her injury commencing September 2, 2001 and continuing.

[3] She also noted appellant's history of fatigue and fibromyalgia.

The Office referred appellant to Dr. Robert L. Keisler, a Board-certified orthopedic surgeon, for a second opinion examination. In a November 6, 2002 report, Dr. Keisler described appellant's history of injury and treatment, which included a motor vehicle accident 11 years earlier, degenerative disc disease at L5-S1 with radiculopathy, fibromyalgia and thoracic outlet syndrome, an unknown connective tissue disorder and arthritis. He conducted a physical examination, reviewed diagnostic tests and noted that regular x-rays were normal. Dr. Keisler diagnosed severe depression, chronic pain syndrome, mild degenerative disc disease of the lower lumbar spine with moderate facet arthrosis and no radicular component. He indicated that appellant's chronic pain syndrome was longstanding and noted her preexisting history of back pain with fibromyalgia. Dr. Keisler explained that appellant's current symptoms were a continuation of her preexisting problems. He noted that there were no objective findings on examination with the exception of the arthritic changes in the facet joints. Dr. Keisler explained that any effect of the work-related events would have been brief and resolved in six to twelve weeks, and that the increased symptoms were typical of chronic pain syndrome that was clearly in place years before. He determined that appellant had no limitations, secondary to the lumbar strain.

On January 14, 2003 the Office requested a supplemental opinion from Dr. Keisler. In a February 5, 2003 report, Dr. Keisler advised that appellant's lumbar strain was temporary and had long since returned to normal. He noted that appellant had signs of severe depression and chronic pain syndrome, which were independent and separate conditions which disabled her for work. Dr. Keisler opined that appellant would be able to perform daily activities, including those of her date-of-injury position, without difficulty.

On February 21, 2003 the Office referred appellant, together with a statement of accepted facts and the medical record to Dr. LeRoy Shouse, a Board-certified orthopedic surgeon, to resolve a medical conflict found between Dr. Schultz and Dr. Keisler.

In his report dated March 13, 2003, Dr. Shouse noted appellant's history of injury and treatment and noted examination findings. He conducted a physical examination and noted that appellant flexed 45 degrees before she complained that she was not able to flex any further and extended 20 degrees. Though the doctor noted appellant's complaints of pain, he also advised that she was able to move "very easily" during the examination. Dr. Shouse noted that appellant was not able to do lateral bending and rotating and her straight leg raise examination showed pain at 90 degrees. He noted the calves were symmetrical and the extensor hallucis longus was of normal strength, with no apparent atrophy. Dr. Shouse noted normal pinprick sensation throughout both feet and legs, with normal hip motion, and excellent knee range of motions. He noted that the MRI scan report of August 7, 2002 showed degenerative disease of the lumbar spine of L4-5, and L5-S1, with a broad-based disc at L5-S1 which did not impede the S1 nerve roots. Dr. Shouse opined that the accepted injury caused temporary pain but that the lumbar strain due to the July 16, 2001 work injury had resolved. He listed some behavior of chronic pain syndrome, for which he advised that no treatment was needed and filled out a work tolerance form stating that appellant had no work restrictions due to the July 16, 2001 employment injury. Dr. Shouse opined that appellant was able to return to her date-of-injury job as a tax examiner, if she could get her pain under control. He indicated that any current pain and difficulty were due to her preexisting conditions.

By letter dated April 8, 2003, the Office requested a supplement report from Dr. Shouse regarding whether appellant's employment injury had resolved. The Office also requested clarification with respect to whether she could return to her date-of-injury position.

In an April 14, 2003 addendum, Dr. Shouse opined that appellant's lumbar strain due to her employment injury had resolved. He noted that any current disability or symptoms were due to her preexisting conditions.

On July 1, 2003 the Office issued a notice of proposed termination of compensation. The Office proposed to terminate appellant's compensation on the basis that the weight of the medical evidence, as represented by the report of Dr. Shouse, established that the residuals of the work injury of July 16, 2001 had ceased.

By decision dated August 4, 2003, the Office terminated appellant's compensation benefits effective August 9, 2003.

In an undated response to the pretermination notice, received on August 7, 2003, appellant alleged that she remained disabled and submitted additional medical evidence. In a July 31, 2003 report, Dr. Majd summarized appellant's condition but did not address the cause of her symptoms. In a report dated January 13, 2003, Dr. Schultz advised that appellant suffered from "chronic pain" which was due to "an injury which occurred at work." He indicated that returning to work would improve appellant's overall physical and mental well being. In a July 28, 2003 report, Dr. Schultz advised that appellant was off work due to the employment injury of July 16, 2001. She noted appellant's course of treatment, results of diagnostic testing in 2001 and 2002. Dr. Schultz opined that because of appellant's chronic pain she had also developed significant depression that affected her daily activities, and it was likely that her depression was making her pain even worse. She indicated that appellant had a preexisting condition of lumbar disc disease, chronic fatigue syndrome and chronic low back pain prior to the injury, which was relatively under control due to an IDET on her back in 1999 and that her improvement from the procedure was reversed when she sustained the injury on July 16, 2001. Dr. Schultz opined that there was no "diagnostic way to prove the current etiology of her pain," and advised that she could not deny or confirm that the lumbar strain was completely healed.

In a letter dated September 8, 2003, appellant requested a review of the written record.[4]

By decision dated October 23, 2003, the Office denied appellant's request as untimely and determined that her claim could be addressed through the reconsideration process.

By letters dated November 11, 2003, appellant requested reconsideration and submitted argument that her request was postmarked on September 8, 2003 and was within the effective date.

In undated letters received on November 14 and 19, 2003 appellant submitted arguments regarding her condition and that she continued to be disabled.

[4] The envelope bearing the letter was postmarked September 8, 2003.

By decision dated February 24, 2004, the Office denied modification of the August 4, 2003 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[5] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[6]

The Federal Employees' Compensation Act[7] provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[8] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS -- ISSUE 1

The Office determined that a conflict of medical opinion existed regarding the nature and extent of any ongoing residuals of the employment injury based on the opinions of Dr. Schultz, appellant's physician, who supported an ongoing employment-related condition and disability, and Dr. Keisler, an Office referral physician, who opined that the employment-related condition had resolved. Therefore, the Office properly referred appellant to Dr. Shouse, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In a March 13, 2003 report, Dr. Shouse noted examining appellant and reported that she appeared to exhibit pain behavior. He opined that appellant's back injury may have caused temporary pain, but that her accepted back strain had resolved and that she could resume her normal work activities. Regarding her ability to return to work, Dr. Shouse advised that appellant would certainly be able to function as a tax examiner if she could get her pain under control, and opined that appellant was at maximum medical improvement. He advised that her pain symptoms were due to her preexisting conditions and not the July 16, 2001 injury.

By letter dated April 8, 2003, the Office requested clarification with regard to whether appellant's employment-related injury had resolved and whether she could return to her date-of-

[5] *Curtis Hall*, 45 ECAB 316 (1994).

[6] *Jason* C. *Armstrong*, 40 ECAB 907 (1989).

[7] 5 U.S.C. §§ 8101-8193, 8123(a).

[8] 5 U.S.C. § 8123(a); *Shirley Steib*, 46 ECAB 309, 317 (1994).

[9] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

injury position. When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.[10] As the Office needed clarification from the doctor regarding whether the employment-related condition had resolved, it properly requested clarification from Dr. Shouse.

In a supplemental report dated April 14, 2003, Dr. Shouse opined that appellant's accepted condition of a lumbar strain had resolved and indicated that her current pain and disability were due to the preexisting conditions. The Board finds that Dr. Shouse's opinion is entitled to special weight as his reports are sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant's employment-related condition had resolved. Dr. Shouse examined appellant, reviewed her medical records, and reported accurate medical and employment histories. Dr. Shouse indicated that the lumbar strain should have resolved, that while she exhibited pain behavior on examination she was also observed to move "very easily." In his supplemental report, the physician emphasized that the employment injury had resolved and that the only factor precluding any return to work were her preexisting conditions. Accordingly, Office met its burden of proof to justify termination of benefits.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability, which continued after termination of compensation benefits.[11]

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of appellant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[12]

[10] *Roger W. Griffith*, 51 ECAB 491(2000).

[11] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

[12] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

ANALYSIS -- ISSUE 2

Subsequent to the Office's August 4, 2003 decision, appellant submitted reports dated January 13, June 4 and July 28, 2003 from Dr. Schultz, her attending physician. She continued to opine that appellant had chronic back pain and was limited in her ability to work.[13] However, Dr. Schultz essentially reiterated previously stated findings and conclusions regarding appellant's condition. As this doctor was on one side of the conflict that had been resolved, the additional reports, in the absence of any new findings or rationale, from appellant's doctor were insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[14] Furthermore, while Dr. Schultz's July 28, 2003 report provided a new discussion of appellant's history and her preexisting condition, the doctor concluded by noting that she could not "prove" the etiology of appellant's pain and that she "could not deny or confirm that her lumbar strain is completely healed." Thus, at best this provides equivocal support for causal relationship and is insufficient to meet appellant's burden of proof.[15]

Other medical reports submitted by appellant did not address the cause of her condition. Consequently, appellant has not established that her condition on and after August 9, 2003 was causally related to her accepted employment injury.

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Act,[16] 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."

The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[17] When the Office revised its regulations effective January 4, 1999, the new regulations provided that a hearing was "a review of an adverse decision by a hearing representative" and that a claimant could choose between two formats: an oral hearing or a review of the written record.[18] These regulations also provide that the request for

[13] She also indicated that appellant had marked depression; however, depression is not an accepted condition.

[14] *See Guiseppe Aversa*, 55 ECAB ___ (Docket No. 03-2042, issued December 12, 2003); *Jaja K. Asaramo*, 55 ECAB ___ (Docket No. 03-1327, issued January 5, 2004).

[15] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions which are speculative or equivocal in character have little probative value).

[16] 5 U.S.C. § 8124(b)(1).

[17] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[18] 20 C.F.R. § 10.615.

either type of hearing "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."[19]

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, including when the request is made after the 30-day period for requesting a hearing, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[20] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[21]

ANALYSIS -- ISSUE 3

In its October 23, 2003 decision, the Office stated that appellant was not, as a matter of right, entitled to an examination of the written record since her request, postmarked September 8, 2003, had not been made within 30 days of its August 4, 2003 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue in the instant case could be addressed through a reconsideration application.

The Board finds that, as appellant's request for an examination of the written record was postmarked September 8, 2003 and was thus made more than 30 days after the date of issuance of the Office's prior decision dated August 4, 2003, the Office correctly found that appellant was not entitled to an examination of the written record as a matter of right.

While the Office also has the discretionary power to grant an examination for a written record when a claimant is not entitled to the examination as a matter of right, the Office, in its October 23, 2003 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue of whether she continued to suffer residuals of the employment injury could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, 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.[22] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for an examination of the written record which could be found to be an abuse of discretion.

[19] 20 C.F.R. § 10.616. *See Leona B. Jacobs*, 55 ECAB ___ (Docket No. 04-1429, issued September 30, 2004).

[20] *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

[21] *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

[22] *See Daniel J. Perea*, 42 ECAB 214, 221 (1990).

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective August 9, 2003 and that appellant did not meet her burden of proof to establish that she had any injury-related condition or disability after August 9, 2003 causally related to the July 16, 2001 employment injury. Further, the Board finds that the Office properly denied appellant's request for an examination of the written record.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2004, October 23 and August 4, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 14, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member