

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHRISTENA M. BAUGHER and U.S. POSTAL SERVICE,
POST OFFICE, Fort Wayne, Ind.

*Docket No. 96-2409; Submitted on the Record;
Issued August 5, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant had any disabling residuals or permanent impairment after May 31, 1995, causally related to her December 20, 1994 accepted L4-5 herniated disc injury or to the January 19, 1995 corrective surgery; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for a review of the written record under 20 C.F.R. § 10.131(b).

On December 22, 1994 appellant, then a 33-year-old letter carrier, filed a claim alleging that she injured her back on December 20, 1994 while lifting mail. An L4-5 herniated disc was diagnosed; appellant underwent surgery on January 19, 1995; she was released to return to light duty on March 6, 1995; and she was able to return to regular duty in May 1995.

Thereafter the Office referred appellant for a second opinion evaluation to Dr. Jerome C. Schubert, a Board-certified neurosurgeon. By report dated August 7, 1995, Dr. Schubert noted that appellant had "apparently recovered completely from lumbar disc surgery" performed on January 19, 1995 and that in May 1995 she was "placed back on regular duty with no restrictions whatsoever." Dr. Schubert noted that appellant had continued to work at her normal job without any complaints of discomfort, and noted that on that day she had absolutely no complaints referable to her back or lower extremities whatsoever. He noted that examination revealed no back scar tenderness, no muscle tenderness and no muscle spasm in the area. He noted that lumbosacral range of motion was completely normal, lower extremity deep tendon reflexes were equal and normal and straight leg raising was negative bilaterally to 90 degrees. Dr. Schubert recommended no work restrictions.

On October 18, 1995 the Office accepted that appellant sustained a herniated disc, for which she underwent surgery on January 19, 1995. It further noted that her condition was considered to be resolved when she was returned to regular duty with no restrictions no later than May 31, 1995.

Thereafter appellant submitted two CA-20 attending physician's reports from Dr. Guillermo Gonzalez, the Board-certified neurosurgeon who had operated on her, dated November 22 and December 20, 1995. These form reports stated the same things as one completed two weeks postoperatively, except that the latter two reports noted that appellant was able to resume regular work as of May 17, 1995. No postoperative injury residuals or work restrictions were noted.

By decision dated January 31, 1996, the Office rejected appellant's eligibility for a schedule award, even though appellant had not requested one. The Office referred to Dr. Schubert's report and noted that the evidence of record failed to establish that appellant had any residuals of her December 20, 1994 work injury.

Thereafter, appellant submitted a February 5, 1996 narrative report from Dr. Gonzalez.¹ In response, by letter dated March 13, 1996, the Office inquired as to whether appellant sought a reconsideration of the January 31, 1996 decision. It requested that she submit any such request in writing. By letter dated March 18, 1996, appellant requested a "review of the written record" instead of requesting reconsideration.

By nonmerit decision dated April 30, 1996, the Office denied appellant's request for a review of the written record noting that the request was not made within 30 days, and hence appellant was not, as a matter of right, entitled to a review of the written record or to an oral hearing. The Office explained that it also considered the nature of appellant's request, and found that she could address the issue in question equally well by requesting reconsideration and by submitting evidence not previously considered by the Office with her reconsideration request.

By letter dated July 9, 1996, appellant requested reconsideration. However, by letter dated July 11, 1996, appellant requested an appeal on the same issue. The Board took jurisdiction and docketed appellant's request for an appeal on July 17, 1996. Thereafter, on August 5, 1996 the Office issued a decision on appellant's reconsideration request. As the Board had taken jurisdiction of the case on July 17, 1996, this subsequently issued decision by the Office on the same issue on appeal before the Board, is null and void for lack of jurisdiction.²

The Board finds that appellant has failed to establish that she had any disabling residuals or permanent impairment after May 31, 1995, causally related to her accepted December 20, 1994 back injury or to subsequent corrective surgery.

Once the Office 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, the Office may not terminate compensation

¹ As this report has not been considered for a formal final decision by the Office, it is not now before the Board upon this appeal; *see* 20 C.F.R. § 501.2(c).

² *See Arlonia B. Taylor*, 44 ECAB 591 (1993).

³ *Harold S. McGough*, 36 ECAB 332 (1984); *see* Federal (FECA) Procedure Manual, Chapter 2.812.3 (March 1987).

without establishing that the disability has ceased or that it is no longer related to the employment.⁴ The Office met its burden in this case.

The Office determined that appellant had no disability or residuals related to her accepted December 20, 1994 injury or the January 19, 1995 corrective surgery based upon the thorough and rationalized narrative report of Dr. Schubert, who noted that appellant had recovered completely from lumbar disc surgery, and that she was placed back on regular duty with no restrictions in May 1995. Dr. Schubert further specifically noted that appellant continued to work at her regular job without any complaints of discomfort, that on the day of examination she had absolutely no complaints referable to her back or lower extremities, that examination revealed no scar tenderness, no muscle tenderness or spasm, negative straight leg raising test results, equal and normal lower extremity deep tendon reflexes, and a completely normal range of lumbosacral motion. The Board finds that the Office appropriately determined that this medical report supported that appellant had no injury residuals or injury-related permanent impairment after May 31, 1995.

Thereafter appellant submitted no further rationalized medical evidence supporting that she had any injury residuals or permanent impairment related to her December 20, 1994 injury. The two CA-20 form reports from Dr. Gonzalez that appellant submitted contained no information regarding the presence of injury residuals or permanent impairment. Consequently, they do not support appellant's claim. As nothing else was submitted to and considered by the Office prior to its issuance of the January 31, 1996 merit decision, there is no other medical evidence now before the Board on this appeal.⁵ Consequently, the Office was correct in finding that appellant failed to establish that she had injury residuals or permanent impairment after May 31, 1995, causally related to her December 20, 1994 employment injury.

Following the January 31, 1996 Office decision, appellant submitted further medical evidence, but she failed to request reconsideration, instead requesting a review of the written record.

The Board now finds that the Office properly denied appellant's request for review of the written record under 20 C.F.R. § 10.131(b).

Section 10.131(b) of Title 20 of the Code of Federal Regulations states that, in lieu of an oral hearing, a claimant may request a review of the written record, but indicates that such a review of the written record must be requested in writing within 30 days of the date of issuance of the decision. Section 10.131(b) goes on to state that a claimant is not entitled to a review of the written record if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request. The Board notes that the date of issuance of the decision at issue was January 31, 1996 but that appellant's request for a review of the written record was dated and postmarked March 18, 1996, which was clearly more than 30 days after January 31, 1996. Therefore, in accordance with 20 C.F.R. § 10.131(b) appellant was not

⁴ See *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ See 20 C.F.R. § 501.2(c).

entitled to the requested review of the written record. The Board, consequently, finds that the Office properly denied appellant's request on the basis that it was untimely requested. Further, the Board notes that the Office explained that the issue in question could be equally well addressed by appellant requesting reconsideration and submitting new and relevant evidence in support of her request. 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 deductions from known facts.⁶ Clearly, no such abuse of discretion has been shown in this case.

Consequently, the decisions of the Office of Workers' Compensation Programs dated April 30 and January 31, 1996 are hereby affirmed.

Dated, Washington, D.C.
August 5, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

⁶ *Daniel J. Perea*, 42 ECAB 214 (1990).