

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DEBRA M. ALLEN and U.S. POSTAL SERVICE,  
POST OFFICE, Chula Vista, Calif.

*Docket No. 95-2942; Submitted on the Record;  
Issued February 25, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective March 5, 1995 on the grounds that she did not have any residual disability related to her accepted employment injury; and (2) whether the Office properly denied appellant's request for a hearing pursuant to section 8124(b) of the Federal Employees' Compensation Act.<sup>1</sup>

On November 19, 1984 appellant, then a 24-year-old letter carrier, sustained an injury to her right foot when a flatbed truck backed into the jeep she was in, causing her foot to slide off the pedal and injuring her right foot and ankle. Appellant stopped work on January 9, 1985.<sup>2</sup> By decision dated December 12, 1986, the Office accepted appellant's claim for right foot neuroma.<sup>3</sup>

In a letter dated January 23, 1995, the Office advised appellant that it proposed termination of her compensation on the grounds that the medical evidence of record established that she had no residual disability from her November 1984 employment injury. By decision dated February 28, 1995, the Office terminated appellant's compensation effective March 5, 1995 on the grounds that the medical evidence established that she did not have any disability causally related to her accepted employment injury and she had not responded to the letter of proposed termination. Appellant contacted the Office on March 8, 1995 and indicated that a report by her treating physician would be forthcoming.

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<sup>1</sup> 5 U.S.C. § 8124(b).

<sup>2</sup> Appellant filed her traumatic injury claim on May 14, 1985. However, appellant had filed an occupational disease claim on February 18, 1995 in which she indicated that she had right foot neuromas causally related to her federal employment.

<sup>3</sup> In this decision, the Office vacated decisions dated June 28 and September 18, 1985 and May 9, 1986, in which it denied appellant's claim.

By letter dated March 30, 1995, the Office advised appellant that it had received the February 10, 1995 report from her treating physician, Dr. Peter D. Wile, a Board-certified orthopedic surgeon, subsequent to the issuance of its February 10, 1995 formal decision on her claim. The Office noted that Dr. Wile's report was insufficient to overcome the well-reasoned report by Dr. Stephen D. Kaster, a Board-certified orthopedic surgeon and the Office referral physician and therefore was insufficient to reopen the case.

By letter dated April 22, 1995, appellant requested review of the written record. By letter decision dated May 21, 1995, the Office denied appellant's request for a hearing as untimely filed.

By letters dated May 8 and June 7, 1995, appellant renewed her request for a review of the written record and submitted additional evidence in support of her claim. By merit decision dated July 18, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to establish modification of the Office's February 28, 1995 decision.

The Board has duly reviewed the case record and finds that the Office has met its burden of proof in terminating appellant's compensation effective March 5, 1995.

Under the Federal Employees' Compensation Act,<sup>4</sup> once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.<sup>5</sup> After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.<sup>6</sup>

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.<sup>7</sup> Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after March 5, 1995, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

In the present case, the Office properly terminated appellant's compensation, relying on the December 15, 1994 report of Dr. Kaster to find that appellant had no residual disability from her November 1984 employment injury. In his report, Dr. Kaster indicated that his examination

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.* (1974).

<sup>5</sup> *William Kandel*, 43 ECAB 1011 (1992).

<sup>6</sup> *Carl D. Johnson*, 46 ECAB 804 (1995).

<sup>7</sup> *Dawn Sweazey*, 44 ECAB 824 (1993).

<sup>8</sup> *Mary Lou Barragy*, 46 ECAB 781 (1995).

of appellant was “close to normal” and he saw no evidence of Morton’s neuromas or the need for surgery. Dr. Kaster stated that appellant had reached maximum medical improvement and that no further active medical treatment was necessary. Although Dr. Kaster noted some tenderness on examination of the affected area and provided limitations in response to appellant’s subjective complaints, he ultimately concluded that appellant had reached maximum medical improvement and that there was no evidence of Morton’s neuroma, the accepted employment-related condition.

Appellant submitted a report by Dr. Wile after the Office issued its formal decision in this matter. Dr. Wile stated that appellant continued to have neuromas involving the right three to four and four to five web spaces. However, he did not address whether these neuromas were causally related to appellant’s accepted injury or were residuals of that injury. As Dr. Wile’s report does not address the central issue in this case, *i.e.*, whether appellant has any residuals of her accepted employment injury or any condition related to factors of her federal employment, his report is not rationalized. Thus, appellant has not presented medical report evidence of substantially equal weight to the report by Dr. Kaster and the Board finds that the report by Dr. Kaster constitutes the weight of the medical evidence. Therefore, the Office met its burden of proof in terminating appellant’s compensation effective March 5, 1995.

The Board further finds that the Office properly denied appellant’s request for a hearing.

Section 8124(b)(1) of the Act provides that a “claimant for compensation not satisfied with the 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 claim before a representative of the Secretary.”<sup>9</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitations for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>10</sup> In this case, the Office issued its decision terminating appellant’s compensation on February 28, 1995. While appellant did submit additional evidence after the issuance of that decision, she did not request any type of review of the record until her letter dated April 22, 1995 was received on April 27, 1995. As appellant’s request for a hearing was not within 30 days of the Office’s February 28, 1995 decision, she is not entitled to a hearing under section 8124 as a matter of right.

Even when the hearing request is not timely, the Office has discretion to grant the hearing request and must exercise that discretion. In this case, the Office advised appellant that it considered her request in relation to the issue involved, and the hearing was denied on the basis that she could address this issue by submitting evidence which showed that she had recurrent or continued employment-related disability. Appellant was advised that she may request reconsideration with additional evidence. The Board has held that an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or

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<sup>9</sup> 5 U.S.C. § 8124(b)(1).

<sup>10</sup> *Charles J. Prudencio*, 41 ECAB 499 (1990); *Ella M. Garner*, 36 ECAB 238 (1984).

actions taken which are contrary to both logic and probable deductions from established facts.<sup>11</sup> There is no evidence of an abuse of discretion in the denial of a hearing in this case.

The decisions of the Office of Workers' Compensation Programs dated July 18, May 21 and February 28, 1995 are hereby affirmed.

Dated, Washington, D.C.  
February 25, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

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<sup>11</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).