U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of CASSANDRA DOUMBOUYA-SMITH and U.S. POSTAL SERVICE, POST OFFICE, Plainfield, N.J.

*Docket No. 97-1319; Submitted on the Record;*
*Issued February 8, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective October 15, 1996; and (2) whether the Office properly denied appellant's request for a hearing as untimely filed pursuant to section 8124(b)(1) of the Federal Employees' Compensation Act.

On November 3, 1995 appellant, then a 37-year-old letter carrier, filed a notice of traumatic injury and claim for compensation, alleging that while she was moving a tub of flats at work she felt something pull in her back. The Office accepted her claim for lumbosacral sprain. Appellant was off work from November 3, 1995 until February 12, 1996, when she returned to limited duty.

In support of her claim, appellant submitted emergency room treatment notes with respect to the November 3, 1995 injury. Appellant was treated by Dr. Mark Friedman, a Board-certified physician in physical medicine and rehabilitation. Dr. Friedman diagnosed acute lumbosacral sprain and strain as a result of appellant lifting a tub filled with magazines. He recommended physical therapy, an electromyogram (EMG) and nerve conduction studies.

In an attending physician report dated February 7, 1996, Dr. Friedman noted his diagnosis of an acute lumbosacral sprain. He approved appellant for light duty effective February 12, 1996. In a February 12, 1996 note, Dr. Friedman identified appellant's work restrictions as no heavy lifting, prolonged standing, bending or walking. He extended appellant's light duty in status reports dated March 28 and April 29, 1996.

In a May 3, 1996 letter, the Office requested that Dr. Friedman provide a detailed narrative report, supported by clinical evidence, addressing whether appellant had reached maximum medical improvement.

In a work capacity evaluation form (Form OWCP-5c) dated May 5, 1996, Dr. Friedman opined that appellant could work eight hours a day with restrictions. He limited appellant to kneeling, bending, pushing, pulling and lifting no more than two hours a day, noting that lifting or using her arms could aggravate her employment injury even more. The date of maximum medical improvement was listed as uncertain.

The Office requested a second opinion examination by Dr. Joseph S. Lombardi, a Board-certified orthopedic surgeon. The Office provided Dr. Lombardi with a copy of the medical record and a statement of accepted facts. In a July 3, 1996 report, he noted appellant's history of injury, her physical therapy treatment, and appellant's statement that she was not having any difficulty performing her limited-duty job of delivering mail for two days a week. Dr. Lombardi indicated that appellant was able to walk on her tiptoes and heels well; flex her lumbar spine to 35 degrees before she had low back pain; and extend to 15 degrees, laterally. He noted negative straight leg raising and an otherwise normal physical examination. Dr. Lombardi found no objective findings to show that appellant continued to suffer from lumbar sprain, and opined that appellant was able to perform her duties as a letter carrier. According to him, appellant never had "any medical work up to substantiate the longevity of her physical therapy nor her time out of work." Dr. Lombardi opined that appellant had reached maximum medical improvement.

The Office issued a notice of proposed termination of benefits on September 10, 1996, advising appellant of her right to submit additional medical evidence.

In a decision dated October 15, 1996, the Office terminated appellant's compensation and authorization for medical treatment effective October 15, 1996 on the grounds that the weight of the medical evidence established that her employment-related disability had ceased by that date.[1]

By letter postmarked November15, 1996, which was date stamped as received by the Office on November 19, 1996, appellant requested a hearing.

In a December 4, 1996 decision, the Office informed appellant that her hearing request was untimely because it was not filed within 30 days of the October 15, 1996 decision. The Office, however, advised that appellant's request for further review could be equally well addressed through the reconsideration process.

The Board finds that the Office met its burden of proof in terminating appellant's compensation effective October 15, 1996.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

[1] Appellant submitted medical records after the issuance of the Office's final decision. The Board has no jurisdiction to review these documents for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

[2] *Harold S. McGough*, 36 ECAB 332 (1984).

without establishing that the disability has ceased or that it is no longer related to the employment.[3]

In the instant case, the Office accepted that appellant sustained a lumbosacral sprain as the result of an employment related injury on November 3, 1995. The Office paid compensation for total disability until, by decision dated October 15, 1996, the Office terminated appellant's continuing compensation on the grounds that the lumbosacral sprain had resolved such that she could return to her regular job duties.

The Board finds that the weight of the medical evidence rests with the well-rationalized opinion of Dr. Lombardi to whom the Office referred appellant for a second opinion evaluation. He specifically opined that appellant could return to her regular duties as a letter carrier because there was no objective findings to support that she still suffered from a lumbar sprain.

Although appellant submitted reports by Dr. Friedman, her treating physician, which include a diagnosis of acute lumbosacral sprain and list certain work restrictions, he does not provide any rationale to explain why appellant continues to have disability related to the accepted employment injury. His reports also do not identify any clinical or physical findings to support his opinion that appellant is unable to perform her regular duties.

Inasmuch as Dr. Lombardi reviewed the case record and a statement of accepted facts, examined appellant thoroughly, and provided a detailed and well-rationalized medical explanation of why the accepted conditions have resolved and appellant has no continuing disability, the Board finds that his conclusion represents the weight of the medical evidence and is sufficient to carry the Office's burden of proof.[4] Therefore, the Board finds that the Office properly terminated appellant's compensation.

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[5] As section 8124(b)(1) is unequivocal in setting forth the time limitation 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.[6]

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[3] *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979).

[4] *See Samuel Theriault*, 45 ECAB 586, 590 (1994) (finding that physician's opinion was thorough, well rationalized, and based on an accurate factual background and thus constituted the weight of the medical evidence that appellant's accepted injury had resolved).

[5] 5 U.S.C. § 8124(b)(1).

[6] *Ella M Garner*, 36 ECAB 238, 241-42 (1984).

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 and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[7] The Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[8] when the request is made after the 30-day period for requesting a hearing,[9] and when the request is for a second hearing on the same issue.[10]

Office regulations provide that the timeliness of a request of a review of the written record is determined by the postmark of the request.[11] Appellant's request for an oral hearing was postmarked November 15, 1996, 31 days after the Office's October 15, 1996 decision. Thus, appellant is not entitled to a hearing as a matter of rights.[12] The Office properly found appellant's request to be untimely, but nonetheless considered the matter in relation to the issue involved, and correctly advised appellant that she could pursue the issue involved through the reconsideration process. As appellant may in fact pursue her claim by submitting to the appropriate regional Office new and relevant medical evidence with a request for reconsideration, the Board finds that the Office did not abuse its discretion in denying appellant's request for a hearing.[13]

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.[13] 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 hearing request which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The decisions of the Office of Workers' Compensation Program dated December 4, 1996 and October 15, 1996 are affirmed.

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[7] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[8] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[9] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[10] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[11] 20 C.F.R. § 10.131(b).

[12] The Board has held that, in computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, Sunday or legal holiday. *John B. Montoya*, 43 ECAB 1148 (1992). In this case, the last day of the period was a Thursday and was not a legal holiday

[13] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g., Jeff Micono*, 39 ECAB 617 (1988).

Dated, Washington, D.C.
February 8, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member