

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VALENTINE J. STAUDER and U.S. POSTAL SERVICE,
POST OFFICE, Hicksville, N.Y.

*Docket No. 97-469; Submitted on the Record;
Issued January 6, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion by denying appellant's request for surgery; and (2) whether the Office abused its discretion by denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

The Office accepted that on November 26, 1980 appellant sustained lumbosacral derangement and mild right L5-S1 radiculopathy. Appellant received appropriate compensation benefits, but on July 26, 1993 his entitlement to continuing compensation benefits was suspended. On December 8, 1993 modification of the July 26, 1993 decision was denied and on August 8, 1994 appellant's application for a merit review of the December 8, 1993 decision was denied. By decision dated October 26, 1994, surgical authorization was denied, but on August 2, 1995 a hearing representative remanded the case to resolve a conflict in medical opinion evidence. None of these aforementioned decisions are now before the Board on this appeal. The Board does not have jurisdiction to review the Office's decisions dated July 26 and December 8, 1993, August 8 and October 26, 1994 and August 2, 1995 because appellant's appeal was docketed on October 21, 1996, more than one year after the Office's 1993, 1994 and 1995 decisions.¹

On February 8, 1996 surgical authorization for his back was again denied by the Office, finding that the weight of the medical opinion evidence rested with the opinion of the impartial medical specialist. The impartial medical examiner, Dr. Richard W. Springstead, a Board-certified orthopedic surgeon, conducted a complete physical examination and opined in a thorough and well-rationalized report that there was "no indication for any type of surgical treatment as previously proposed." He based his opinion on the fact that the myelogram and computerized tomography scan did not show any significant disc herniation or stenosis.

¹ 20 C.F.R. § 501.3(d)(2).

Thereafter, on July 18, 1996 appellant requested a hearing on the issue of the suspension of his compensation benefits for his refusal to accept suitable work.

On August 15, 1996 the Office denied appellant's request for a hearing finding that he was not entitled by right to a hearing as he had previously requested and received reconsideration on this issue, and as further requests for review on this issue could be equally well addressed by requesting reconsideration from the Office and by submitting new medical evidence.

Appellant appealed to the Board on August 28, 1996, which was docketed on September 18, 1996 and assigned the docket number 96-2603, but was dismissed as being incomplete by order dated November 27, 1996.

Appellant again appealed to the Board by correspondence dated October 4, 1996. The case was docketed as number 97-0469 and the Board took jurisdiction of this case on October 21, 1996.

On October 30, 1996 the Office issued a decision on appellant's request for a hearing on the issue of the denial of surgical authorization, denying it as untimely filed and finding that the issue could equally well be addressed by a request for reconsideration and by submission of new medical evidence. As the Board had taken jurisdiction of the case prior to the Office's issuance of this decision, the October 30, 1996 decision is null and void for lack of jurisdiction.

The Board finds that the Office did not abuse its discretion in denying appellant's request for back surgery authorization.

With regard to prospective surgical authorization, section 8103(a) of the Federal Employees' Compensation Act provides for furnishing to an injured employee "the services, appliances and supplies prescribed by a qualified physician" which the Office "considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation."² The Board has found that the Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief.³ In the present case, however, the Office did not abuse its discretion in denying appellant's request for surgical authorization as the weight of the medical evidence clearly did not support the need for such surgery.

In this case, the weight of the medical evidence was constituted by Dr. Springstead's well-rationalized report. When there exists opposing medical reports of virtually equal weight and rationale, as the hearing representative in this case found and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be

² 5 U.S.C. § 8103(a).

³ *James E. Archie*, 43 ECAB 180 (1991); *Daniel J. Perea*, 42 ECAB 214 (1990); *William F. Gay*, 38 ECAB 599 (1987).

given special weight.⁴ Dr. Springstead's report in this case was well rationalized and was based upon a proper factual and medical background. Therefore, according Dr. Springstead's report this special weight results in it constituting the weight of the medical opinion evidence regarding the issue of the requested surgery, finding that such requested surgery was not indicated.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing under section 8124(b)(1).

Section 8124(b)(1) of the Act provides in pertinent part as follows:

"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 issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁵

The Office's procedures implementing this section of the Act are found in the Code of Federal regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing states in pertinent part as follows:

"A claimant is not entitled to an oral hearing 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, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and section 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."⁶

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 of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁷ Specifically, 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 for a hearing,⁸ when the request is made after the 30-day period for requesting a hearing⁹ and when the request is for a second hearing on the same issue.¹⁰ In these instances, the Office will

⁴ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁵ 5 U.S.C. § 8124(b)(1)

⁶ 20 C.F.R. § 10.131(a).

⁷ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

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

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

¹⁰ *Johnny S. Henderson*, *supra* note 7.

determine whether a discretionary hearing should be granted of, if not, will so advise the claimant with reasons.¹¹ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹²

In the present case, the Office issued its most recent merit decision denying appellant's claim on the issue in question on December 8, 1993. Appellant requested a hearing in a letter dated July 19, 1996. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.¹³ Since appellant did not request a hearing within 30 days of the Office's December 8, 1993 decision, he was not entitled to a hearing under section 8124 as a matter of right. Further, as appellant had previously requested and received reconsideration under section 8128, he was additionally not entitled to a hearing under section 8124 on that issue as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its August 15, 1996 decision, found that appellant had previously requested and received reconsideration on the issue in question and denied the request on the basis that appellant could pursue his claim by requesting reconsideration and submitting additional evidence supporting that the position that he refused was not suitable to his partially disabled condition.

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.¹⁴ There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

¹¹ *Id.*; *Rudolph Bermann*, *supra* note 8.

¹² *See Herbert C. Holley*, *supra* note 9.

¹³ 20 C.F.R. § 10.131(a).

¹⁴ *Daniel J. Perea*, 42 ECAB 214 (1990).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated August 15 and February 8, 1996 are hereby affirmed.

Dated, Washington, D.C.
January 6, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member