

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIRGINIA L. GREENIDGE-JENKINS and U.S. POSTAL SERVICE,
POST OFFICE, Carol Stream, Ill.

*Docket No. 98-1132; Oral Argument Held April 13, 1999;
Issued June 22, 1999*

Appearances: *Daniel M. Hughes*, for appellant; *Sheldon G. Turley, Jr., Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 10, 1996; and (2) whether the Office properly denied appellant's request for a hearing before an Office hearing representative.

On September 28, 1989 appellant, then a 30-year-old mail processor, was pulling trays from a postal machine when she developed back pain. She stopped working, returned the following Monday and developed pain in her back and abdomen. She filed a claim for lumbosacral and abdominal strain. In a January 23, 1990 decision, the Office denied appellant's claim on the grounds, that appellant had failed to submit sufficient medical evidence to discharge her burden of proof in establishing a causal relationship between her claimed employment injury and the conditions for which she sought compensation. In an August 6, 1990 decision, an Office hearing representative found that appellant had met her burden of proof in establishing that she was injured at the time, place and in the manner she alleged. He further found that appellant had submitted sufficient medical evidence to establish that she had sustained a strain of the lumbosacral strain and the abdominal musculature in the performance of duty. He remanded the case for referral of appellant to an appropriate physician for an examination and opinion on the extent and duration of her disability. In a March 25, 1992 letter, the Office informed appellant that it had also accepted that she had a bulging L4-5 disc causally related to the employment injury.

Appellant received continuation of pay for intermittent periods between September 29 and December 29, 1989. The Office began payment of temporary total disability effective February 5, 1990. In an undated letter received by the Office on April 12, 1994, the employing establishment offered appellant a rehabilitation assignment with work restrictions. Appellant accepted the position and returned to work on April 11, 1994 at three hours a day, increasing to

eight hours a day on April 16, 1994. Appellant subsequently filed several claims for recurrences of disability for short periods which were accepted and for which compensation was paid. She was also restricted to working six hours a day, subsequently reduced to five hours a day. The Office paid compensation for the hours appellant did not work.

In a July 10, 1996 decision, the Office denied appellant's claim for compensation after that date on the grounds that the evidence of record established that the injury-related disability had ceased. In an October 28, 1996 letter, appellant requested that her case be reopened. In a July 7, 1997 letter, appellant requested a hearing before an Office hearing representative indicating that her letter was her second request. In a September 17, 1997 merit decision, the Office denied appellant's request for modification of the July 10, 1996 decision. In a November 20, 1997 decision, the Office denied appellant's request for a hearing on the grounds that she had previously requested and received reconsideration under section 8128¹ and therefore was not entitled to a hearing as a matter of right. The Office considered appellant's request for a hearing in its own discretion and found that appellant's request could be equally well addressed by requesting reconsideration and submitting new relevant medical evidence not previously considered.

The Board finds that the Office properly terminated appellant's compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her federal employment the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.² In this case, appellant was receiving compensation for two to three hours a day that she did not work. The Office therefore had the burden to establish that any disability for which appellant was receiving compensation, even for partial disability, was no longer causally related to her employment. The Office has met that burden here.

Dr. Jerald Tornheim, a general practitioner, indicated that he had treated appellant beginning October 3, 1989 and diagnosed low back and abdominal syndrome which he related to the employment injury. In a February 19, 1990 report, Dr. Charles M. Slack, a Board-certified orthopedic surgeon, indicated that a lumbar computerized axial tomography (CAT) scan showed a possible focal protrusion at L4-5 toward the left at the neural foramen or a significant local bulging. In a March 5, 1990 report, Dr. Pietro M. Tonino stated that appellant had probable lumbar radiculopathy. He indicated that she had a positive straight leg raising test on the left and had some mild weakness in the left extensor hallucis and in the quadriceps mechanism and hamstring musculature on the left side.

In a November 20, 1991 report, Dr. Jeffrey Meisles, a Board-certified orthopedic surgeon, stated that appellant continued to complain of incapacitating low back pain but he was unable to find any objective evidence on physical examination, radiographic evaluation, or

¹ 5 U.S.C. § 8128.

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

electromyogram (EMG) results to substantiate pathology to such a significant degree as likely to be the cause of appellant's symptoms. He also noted several inconsistencies in appellant's examination which were difficult to explain on a physiological basis. He diagnosed low back pain with bulging disc at L4-5. He stated that there was no evidence of a lumbar radiculopathy. He commented that he was unable to state whether the employment injury was causing her complaints as he was unable to find objective evidence to explain why she was having the current symptoms. He concluded that appellant could return to full duty.

In a May 4, 1993 report, Dr. Alvin Kanter, a Board-certified orthopedic surgeon, reviewed appellant's medical history and stated that she appeared to have persistent, subjective symptomatology without much in the way of objective findings. He related that in examination appellant complained of considerable pain and stated that she was dragging her left foot. He indicated that appellant's strength in the legs was symmetrical although appellant tended to volitionally let the left ankle go down as she was tested. He stated that testing of both legs together, however, showed absolutely no sustained or objective evidence of weakness. He indicated that sensation was symmetrical in both legs. He concluded that appellant never had the objective evidence to substantiate the degree of residual symptomatology that she had. He referred appellant for a magnetic resonance imaging (MRI) scan. In a May 4, 1993 report, Dr. Henry H. Chan, a Board-certified radiologist, indicated that an MRI scan showed mild degenerative disc disease at L4-5 with minimal bulging.

In a series of reports beginning on December 30, 1993, Dr. Jeffrey Oken, a Board-certified physiatrist, indicated that appellant complained of low back pain, made worse by all activities. He noted her other complaints of foot drop on the left, trouble with walking and gait and trouble with endurance and fatigue. He noted a slight decrease in sensation in the left foot and positive straight leg raising test on the left, sitting and supine. He concluded that appellant was status post lumbosacral injury. He subsequently diagnosed disc bulge, gait, dysfunction, chronic pain syndrome and myofascial pain as well as status post lumbosacral strain.

In an April 20, 1995 report, Dr. Audley R. Loughran, a Board-certified orthopedic surgeon, noted that appellant complained of constant back pain with radiation into the left leg, occasional numbness and tingling in the left leg, and increased back pain in wet weather or after prolonged standing, sitting or walking. He noted there was a slight alteration of light touch sensation along the L5 dermatome of the left leg. He reported that x-rays showed no evidence of fracture, dislocation or degenerative change. He diagnosed left low back and lumbar radicular syndrome without objective findings. He noted appellant had chronic weakness but no atrophy. He stated that the restrictions of appellant's low back motions were unfounded as she could sit comfortably on the examination table with the hips flexed at 90 degrees.

The Office referred appellant, together with the statement of accepted facts and the case record, to Dr. Marshall I. Matz, a Board-certified neurosurgeon, for an examination and second opinion on her condition. In a May 24, 1996 report, Dr. Matz reviewed appellant's medical history. He noted that he examined two MRI scans, one from April 5, 1990 which was negative and a second from May 2, 1996 which showed a small protrusion on the left side at L4 which did not appear on all the views from the scan and therefore might not exist. He noted that appellant walked in dragging the toes of her left foot on the ground which was not typical steppage or drop

foot gait. He indicated that appellant had no atrophy. He commented that on motor examination appellant displayed equal extensor strength with no demonstrable weakness in the toes. He reported that on straight leg raising appellant complained of lower back discomfort, quite severe bilaterally, with no leg pain. Dr. Matz noted that Dr. Oken had reported several trigger points around the back which Dr. Matz considered to be consistent with nonorganic pain behavior. He commented that the concept of fibromyalgia, myofascial pain and trigger points was highly debatable with no concrete evidence that such conditions actually existed. He stated that appellant's current presentation with regard to gait and weakness was fictitious. He declared that she did not have a drop foot and that her claim of weakness was bogus. He indicated that treatment, including trigger point injections should be discouraged and discontinued because it prolonged and fed into her subjective complaints and would only further her symptomatology. He commented that appellant's obsession with blaming the Office for her current problem was, in his opinion, the etiology of her continuing complaints.

In a July 1, 1997 report, Dr. Oken indicated that he had reviewed the reports of Dr. Matz and Dr. Loughran. He stated that appellant had weakness in the dorsiflexor of the left foot. He commented that many times it would be difficult to fully assess a patient's strength when they have ongoing pain. Therefore, they may be a fluctuation in the assessment of the examinations of different physicians. He stated that the MRI scans referred to by Dr. Matz showed a small disc herniation and disc protrusion at L4 without nerve root involvement. He noted that many times discs like this do not necessarily cause pain. He indicated that appellant's diagnosis was myofascial pain syndrome, radicular in nature. He stated that the objective evidence of this diagnosis was myofascial trigger points. He cited several studies from medical journals to show that myofascial pain syndrome did exist. He concluded that appellant had limitations in her physical capacity related to her pain. He commented that he could relate this condition to appellant's employment injury only by her history.

The Office accepted appellant's condition for lumbosacral strain, abdominal strain and bulging disc at L4-L5. The reports of Dr. Matz, Dr. Loughran, Dr. Kanter and Dr. Meisles show that appellant did not have any objective findings to support her claim of disabling low back pain or radicular pain. All these physicians presented detailed findings in support of their common conclusion that appellant was no longer disabled. Dr. Matz indicated that the most recent MRI scan did not fully support a diagnosis of a disc bulge. The other physicians indicated that any disc bulge that existed did not cause appellant's condition. These reports provide a sufficient basis for the Office's decision to terminate appellant's compensation on the grounds that the injury-related condition no longer existed.

Dr. Oken, in his July 1, 1997 report, stated that appellant had myofascial pain syndrome. However, that condition was not accepted by the Office. Appellant therefore has the burden to establish that appellant has such a condition and that such a condition is causally related to the employment injury. Dr. Oken indicated that the condition was shown by the myofascial trigger points. However, he was only able to relate the condition to the employment injury by history. He did not provide a detailed, physiological description on how the employment injury would cause appellant's condition and alleged disability eight years later. His report therefore has little probative value.

The Board further finds that the Office properly denied appellant's request for a hearing before an Office hearing representative.

Under section 8124(b)³ a claimant can request a hearing before an Office hearing representative before seeking reconsideration under section 8128. Appellant requested initially that her request be reopened which was treated as a request for reconsideration. She subsequently requested a hearing. As the Office first received and acted upon a request for reconsideration and, as appellant's request for either method was beyond the 30-day time limit for requesting a hearing, appellant was not entitled to a hearing under the Federal Employees' Compensation Act.

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 the Office must exercise this discretionary authority in deciding whether to grant a hearing. 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 to a hearing, when the request is made after the 30-day period established for requesting a hearing, or when the request is for a second hearing on the same issue. The Office's procedures, which require the Office to exercise its discretion grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.⁴ In this case, the Office exercised its discretion and denied appellant's request for a hearing because she could seek review by requesting reconsideration and submitting medical evidence not previously considered. 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.⁵ There is no evidence that the Office abused its discretion in this case.

³ 5 U.S.C. § 8124(b).

⁴ *Henry Moreno*, 39 ECAB 475 (1988).

⁵ *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs, dated November 20 and September 17, 1997, are hereby affirmed.

Dated, Washington, D.C.
June 22, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member