U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TRACEY V. GUINTY and U.S. POSTAL SERVICE,
HELLGATE POST OFFICE, New York, NY

Docket No. 01-1415; Submitted on the Record;
Issued January 24, 2002

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective November 5, 2000; (2) whether the Office abused its discretion in denying appellant's request for a review of the written record by the Branch of Hearings and Review; and (3) whether the Office's refusal to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On December 28, 1998 appellant, then a 34-year-old letter carrier, sustained an employment-related low back strain. She stopped work that day. The Office referred appellant to Dr. Michael J. Katz, a Board-certified orthopedic surgeon, for a second-opinion evaluation. Finding that a conflict in the medical opinion existed between the opinions of Dr. Katz and that of Dr. Cheri Durden, appellant's treating internist,[1] the Office referred appellant to Dr. Sounder R. Eswar, a Board-certified orthopedic surgeon, for an impartial medical evaluation.[2]

By letter dated September 25, 2000, the Office informed appellant that it proposed to terminate her compensation based on the opinion of Dr. Eswar. In response, appellant submitted an October 23, 2000 report from Dr. Durden. By decision dated October 27, 2000, the Office terminated appellant's benefits, effective November 5, 2000, on the grounds that her employment-related disability had ceased.

In a letter postmarked November 28, 2000, appellant requested a review of the written record. By decision dated January 22, 2001, the Office denied this request on the grounds that it

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[1] By letter dated September 1, 1999, the Office proposed to terminate appellant's compensation benefits. She submitted additional medical evidence and the Office then found that a conflict existed between the opinions of Drs. Katz and Durden.

[2] Drs. Katz and Eswar were furnished with the medical record, a statement of accepted facts and a set of questions.

was untimely filed. On February 16, 2001 appellant requested reconsideration with the Office. In a March 12, 2001 decision, the Office denied appellant's reconsideration request.

The Board has duly reviewed the case on appeal and finds that the Office met its burden to terminate appellant's compensation benefits.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.[3] Furthermore, in situations where there are opposing medical reports of virtually equal weight and rationale 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 on a proper factual background, must be given special weight.[4]

The relevant medical evidence in this case includes reports from appellant's treating internist, Dr. Durden, who diagnosed lumbar and cervical radiculopathy and was consistent in her opinion that appellant was unable to return to her preinjury job. In a report dated July 19, 1999, Dr. Katz provided a second-opinion evaluation for the Office, diagnosed lumbar strain, resolved and advised that appellant did not require orthopedic care. He concluded that she had no disability causally related to the employment injury and could return to full duty without restrictions.

By report dated April 20, 2000, Dr. Eswar provided an independent medical evaluation for the Office, advised that at the time of his examination, appellant had no demonstrable signs of lumbosacral sprain or herniated disc affecting her lower back and did not require any medical treatment for her lower back. He further advised that appellant had no orthopedic disability and could return to full duty as a letter carrier.

In this case, the Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Eswar, the referee examiner, who advised that appellant had no residuals of her low back strain and could return to full duty as a letter carrier. The Office, therefore, properly terminated appellant's compensation effective November 5, 2000.

The Board further finds that the Office acted within its discretion in denying appellant's request for a review of the written record.

By decision dated January 22, 2001, the Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. In its June 22, 2001 decision, the Office stated that appellant was not, as a matter of right, entitled to a review of the written record since her request had not been made within 30 days of its October 27, 2000 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that

[3] *See Patricia A. Keller*, 45 ECAB 278 (1993).

[4] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

appellant's request was denied on the basis that the issue could be addressed through a reconsideration application.

Section 8124(b)(1) of the Federal Employees' Compensation Act,[5] 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 the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[6] Office regulations have expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing."[7] The regulations provide that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.

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 and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[8] The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[9]

In this case, appellant's request for a review of the written record was postmarked November 28, 2000, more than 30 days after the issuance of the Office's prior decision dated October 27, 2000. Thus, appellant was not entitled to a review as a matter of right, which the Office stated in its January 22, 2001 decision.

While the Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to such review of the written record as a matter of right, the Office properly exercised its discretion by finding that whether appellant continued to have a work-related disability could equally be addressed through a reconsideration application. As the only limitation on 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,[10] the Office properly denied appellant's request for a hearing under section 8124 of the Act.

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[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8124(b)(1); *see John T. Horrigan*, 47 ECAB 166 (1995).

[7] 20 C.F.R. § 10.615 (1999).

[8] *Philip G. Feland*, 47 ECAB 418 (1996).

[9] *See Michael J. Welsh*, 40 ECAB 994 (1989).

[10] *Daniel J. Perea*, 42 ECAB 214 (1990).

The Board further finds that the Office acted within its discretion in denying appellant's request for review.

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[11] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[12] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[13]

With her February 16, 2001 request for reconsideration, appellant generally argued that Dr. Eswar's opinion should not be given special weight. The Board has long held that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[14] The Board finds that appellant did not show that the office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. The Office, therefore, properly denied appellant's request for reconsideration.

[11] 20 C.F.R. § 10.608(a) (1999).

[12] 20 C.F.R. § 10.608(b)(1) and (2) (1999).

[13] 20 C.F.R. § 10.608(b) (1999).

[14] *Supra* note 4.

The decisions of the Office of Workers' Compensation Programs, dated March 12 and January 22, 2001 and October 27, 2000, are hereby affirmed.

Dated, Washington, DC
January 24, 2002

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member