United States Department of Labor
Employees' Compensation Appeals Board

VIANN BURTON, Appellant	)	
and	)	**Docket No. 05-1914**
	)	**Issued: February 17, 2006**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, New York, NY, Employer	)	

Appearances:
Viann Burton, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 14, 2005 appellant filed a timely appeal from a June 16, 2005 decision of the Office of Workers' Compensation Programs, terminating her compensation benefits effective that day and an August 15, 2005 decision which denied her request for a review of the written record. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective June 16, 2005 on the grounds that she no longer had residuals of her August 23, 2001 employment injury; and (2) whether the Office properly denied her request for a review of the written record.

FACTUAL HISTORY

On September 5, 2001 appellant, then a 50-year-old licensed practical nurse, filed a traumatic injury claim alleging that on August 23, 2001 she injured her lower back while

transferring a patient from bed to a chair. She stopped work that day. On September 18, 2001 the Office accepted that appellant sustained acute thoracic and lumbar sprains. Appellant received appropriate continuation of pay and was placed on the periodic rolls.

Appellant came under the care of Dr. Luigi J. Mazzella, a family practitioner, who advised that she was totally disabled due to the employment injury. An August 18, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated early degenerative changes at L5-S1. Dr. Mazzella referred her to Dr. Sami M. Aboumatar, a Board-certified neurologist, who provided reports dated August 30 and October 29, 2002. He noted that a head computerized tomography was negative and that the MRI scan findings and electromyography (EMG) demonstrated mild chronic denervation. Dr. Aboumatar recommended pain management with epidural injections.

By letter dated January 9, 2003, the Office referred appellant, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Paul G. Jones, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated January 24, 2003, he reviewed the medical record and the history of injury. Physical findings included diminished sensation to pinprick below appellant's midcalf area bilaterally with normal straight leg raising examination and tenderness at the sacroiliac joint and lumbosacral junction. Dr. Jones diagnosed lumbar syndrome, opining that her complaints "appear to outweigh positive physical findings." He recommended pain management and advised that she was capable of working at least 4 hours of restricted duty per day with the restrictions that appellant avoid frequent bending and should not lift more than 10 pounds. In conclusion, he noted objective findings of degenerative changes on appellant's MRI scan and stated, "although I felt that she had significant symptom magnification, appellant still has problems with her lower back and cannot return to her regular full-duty job as a nurse."

Dr. Aboumatar and Dr. Mazzella submitted reports in which they advised that appellant remained disabled. On April 14, 2003 the Office authorized epidural injections. In May and July 2003, appellant underwent carpal tunnel releases.[1] On June 25, 2003 the employing establishment offered her a limited-duty position for four hours per day, based on Dr. Jones' restrictions. By letter dated June 27, 2003, the Office informed her that the offered position was suitable and afforded appellant 30 days to respond. On July 2, 2003 appellant refused the offered position.

The Office determined that a conflict in medical evidence was created between Dr. Jones and Dr. Aboumatar regarding appellant's ability to work. On November 4, 2003 it referred her, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Robert A. Levine, a Board-certified neurologist, for an impartial evaluation.

In a November 18, 2003 report, Dr. Levine noted his review of the medical record and appellant's complaints of intermittent low back pain. Physical findings included no palpable spasm with complaints of pain with forward flexion. Pin sensation was diffusely decreased over both feet. Dr. Levine diagnosed low back pain by history. Regarding causal relationship, he stated that, based on the history as presented by appellant and his review of the medical records,

[1] There is no indication in the record that these were accepted conditions.

"there would appear to be a causal relationship" between her complaints and the August 23, 2001 employment injury. However, he failed to find any objective findings to account for her complaints. Dr. Levine noted that he did not review appellant's EMG but noted Dr. Aboumatar's review. Dr. Levine advised that appellant was able to return to her regular work without restrictions.

By letter dated January 29, 2004, the Office proposed to terminate appellant's compensation benefits, based on the opinion of Dr. Levine. She disagreed with the proposed termination and submitted a February 19, 2004 report from Dr. Mustafa A. Khan, a neurologist, who noted that appellant was in some distress due to pain. Straight leg raising examination was negative but he advised that this was limited due to severe lower back pain with exquisite tenderness along the lumbosacral spine and paraspinal areas. Dr. Levine diagnosed lower back pain syndrome and lumbar radiculopathy based upon the EMG.

In a decision dated March 8, 2004, the Office finalized the termination of appellant's compensation benefits, effective that day. On April 1, 2004 she requested a hearing and submitted reports dated April 14 and July 15, 2004 in which Dr. Khan requested authorization for facet blocks. By decision dated August 20, 2004, an Office hearing representative reversed the termination and remanded the case for the Office to obtain the EMG referred to by Dr. Aboumatar and request that Dr. Levine review the study and advise whether appellant could perform her regular job.

Appellant was returned to the periodic rolls. Following a request by the Office, she forwarded a February 5, 2003 upper extremity EMG study and a September 17, 2002 EMG study of the lower extremities which demonstrated mild chronic bilateral denervation. In a February 14, 2005 report, Dr. Levine noted his review of the September 17, 2002 EMG which showed mild chronic denervation bilaterally involving the L5-S1 myotomes symmetrically with no acute changes. He concluded that, because the EMG changes were symmetric and appellant's complaints were asymmetric, the September 17, 2002 EMG did not account for her complaints, again noting that the August 18, 2002 MRI scan was essentially unremarkable and that on his examination of November 17, 2003 he failed to find any objective findings to account for her complaints. Dr. Levine concluded that appellant did not have residuals of the August 23, 2001 employment injury and was capable of performing her normal work duties as a practical nurse and that any medical conditions were not related to that injury.

On May 12, 2005 the Office again proposed to terminate appellant's compensation benefits. She was given 30 days in which to respond. In reports dated November 15, 2004 and April 6, 2005, Dr. Khan noted appellant's continued complaints of back pain and reiterated his prior diagnoses. By decision dated June 16, 2005, the Office finalized the termination, effective that day, on the grounds that appellant had no residuals of her work-related injury.

By letter dated June 15, 2005, received by the Office on June 16, 2005, appellant responded to the proposed termination and submitted additional evidence. In a letter dated June 17, 2005, the Office noted its review of the materials submitted but stated that the June 16, 2005 decision stood. A June 17, 2005 telephone memorandum contained in the record notes that appellant was informed of the termination.

On July 29, 2005 appellant requested a review of the written record asserting that she did not receive the termination decision until July 8, 2005. She also submitted additional evidence. By decision dated August 15, 2005, the Office denied her request for a review of the written record on the grounds that it was untimely filed.[2]

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[3] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4] 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.[5]

ANALYSIS -- ISSUE 1

The Board finds the opinion of Dr. Levine, based on his two reports, sufficiently well rationalized and based upon a proper factual background to find that appellant had no residuals of these accepted conditions. In the instant case, the Office found that a conflict in medical opinion existed between the opinions of her treating physician, Dr. Aboumatar, Board-certified in neurology, and Dr. Jones, a Board-certified orthopedic surgeon, who had provided a second-opinion examination for the Office. The Office then properly referred appellant to Dr. Levine, also Board-certified in neurology, for an impartial medical evaluation.[6]

In his November 18, 2003 report, Dr. Levine noted appellant's complaints and his review of the record, including MRI scan and physical examination findings. He concluded that, as he found no objective evidence on which to base appellant's complaints, she was able to return to work without restrictions. Dr. Levine, however, noted that he had not reviewed a lower extremity EMG study. In a report dated February 14, 2005, Dr. Levine reviewed the EMG, which demonstrated no acute changes and mild bilateral chronic denervation which was symmetrical. He concluded that, because the EMG changes were symmetric and appellant's complaints were asymmetric, the September 17, 2002 EMG did not account for her complaints,

[2] On September 12, 2005 appellant requested reconsideration with the Office and submitted additional evidence. She, however, had also filed an appeal with the Board. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case. *Cathy B. Millin*, 51 ECAB 331 (2000); *Linda Thompson*, 51 ECAB 695 (2000).

[3] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[4] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[5] *Manuel Gill*, 52 ECAB 282 (2001).

[6] *Id.*

again noting that the August 18, 2002 MRI scan was essentially unremarkable and that, on his examination of November 17, 2003, Dr. Levine failed to find any objective findings to account for her complaints. He stated that any medical conditions were not related to that injury and concluded that appellant did not have residuals of the employment injury and was capable of performing her normal work duties as a practical nurse.

The Board, therefore, finds that Dr. Levine's opinion is entitled to special weight and sufficient to meet the Office's burden of proof to terminate appellant's compensation benefits for her accepted injuries.[7] Accordingly, the Office met its burden of proof to terminate her compensation benefits effective June 16, 2005.[8]

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[9] The Board has held that the Office, in its broad discretionary authority in the administration of the Act,[10] 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.[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]

It is presumed, in the absence of evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual. This presumption arises when it appears from the record that the notice was properly addressed and duly mailed. The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.[13]

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[7] *Id*.

[8] The Board notes that the medical evidence submitted by appellant on June 17, 2005 was duplicative of evidence previously reviewed by the Office. *See William A. Couch*, 41 ECAB 548 (1990).

[9] *Claudio Vazquez*, 52 ECAB 496 (2001).

[10] 5 U.S.C. §§ 8101-8193.

[11] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[12] *Claudio Vazquez, supra* note 9.

[13] *Cresenciano Martinez*, 51 ECAB 322 (2000).

ANALYSIS -- ISSUE 2

The Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. In an August 15, 2005 decision, the Office found that she was not, as a matter of right, entitled to a record review as her request, postmarked July 29, 2005, had not been made within 30 days of the June 16, 2005 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue in the instant case could be addressed through a reconsideration application.

On appeal, appellant stated that she did not receive the June 16, 2005 decision until July 8, 2005 and thereafter could not timely request reconsideration due to health problems. The record demonstrates that the Office mailed the June 16, 2005 decision to appellant's address of record. The appearance of a properly addressed copy of the decision in the case record, together with the mailing custom or practice of the Office itself, raises the presumption that the June 16, 2005 decision was received by the addressee.[14] The Board further notes that the case record contains a telephone memorandum dated June 17, 2005 in which appellant was notified that her compensation benefits had been terminated. The record also contains a letter sent that day in which the Office formalized the telephone discussion and informed her that the June 16, 2005 decision stood. The Board finds that, as appellant's request for a review of the written record was postmarked July 29, 2005, more than 30 days after the date of the June 16, 2005 decision, the Office properly determined that she was not entitled to a review of the written record as a matter of right as her request was untimely filed.

The Office also has the discretionary power to grant a request for a hearing when a claimant is not entitled to such as a matter of right. In the August 15, 2005 decision, the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. 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.[15] 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 request for a review of the written record which could be found to be an abuse of discretion. The Office, therefore, properly denied her request.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective June 16, 2005. The Board further finds that the Office did not abuse its discretion in denying her request for a review of the written record.

[14] *See Levi Drew, Jr.*, 52 ECAB 442 (2001).

[15] *See Claudio Vazquez, supra* note 9; *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 15 and June 16, 2005 be affirmed.

Issued: February 17, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board