



December 28, 2001 and returned to work on December 31, 2001. She periodically stopped work thereafter and returned to work in a light-duty position at the employing establishment for four hours per day.<sup>1</sup>

Appellant received treatment for her condition from several attending physicians, including Dr. Joe Flood and Dr. Deborah L. Ausman, both chiropractors and Dr. Cheng-Ti Judy Dai, a Board-certified anesthesiologist specializing in pain management. In an undated report received by the employing establishment on January 23, 2002, Dr. Ausman noted that x-ray testing of the lumbar spine revealed no fractures, dislocations or gross aggressive osseous lesions.<sup>2</sup> She diagnosed radiculitis, facet syndrome, sacroiliac strain/sprain and lumbar intervertebral disc disease syndrome.

Appellant continued to submit reports of her chiropractic treatment through early 2004, albeit on a less frequent basis than in the past.<sup>3</sup> It does not appear that she submitted reports from medical doctors on a regular basis after late 2003.

In December 29, 2004, the Office referred appellant to Dr. Bernard Albina, a Board-certified orthopedic surgeon, for an evaluation of the continuing residuals of her December 27, 2001 employment injury.

In a report dated January 18, 2005, Dr. Albina noted that it had been accepted that appellant sustained a lumbar strain at work on December 27, 2001. He reviewed appellant's factual and medical history, including a recitation of the treatment of her low back condition and the results of diagnostic testing. Dr. Albina stated that appellant's gait was normal with no obvious limp and that her sensory examination was normal. Upon examination of the low back, she reported some tenderness without any sign of spasm. He stated that there was no indication that the December 27, 2001 injury was causing limitation of appellant's work activity and concluded that the accepted employment-related lumbar had resolved. Dr. Albina noted that appellant could perform her regular work and recommended that she return to that work for six hours per day and then begin working eight hours per day after six to eight weeks. He indicated that this gradual return to work was dictated by poor conditioning and motivation concerns rather than by residuals of the December 27, 2001 employment injury.

By notice of proposed termination of compensation dated February 7, 2005, the Office advised appellant that her compensation would be terminated based on the opinion of Dr. Albina. The Office provided appellant with 30 days to submit evidence or argument showing that her compensation should not be terminated.

Appellant submitted a February 28, 2005 report in which Dr. Dai indicated that her low back problems were related to degenerative disc disease at L4-5.

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<sup>1</sup> The Office paid appellant appropriate compensation. It reduced her compensation effective July 15, 2002 based on her actual wages as a modified postal clerk.

<sup>2</sup> The record contains the findings of x-ray testing obtained on January 3, 2002.

<sup>3</sup> It appears that the last chiropractic report appellant submitted in 2004 was dated in March 2004.

By decision dated March 15, 2005, the Office terminated appellant's compensation effective March 15, 2005, on the grounds that she had no residuals of her December 27, 2001 employment injury after that date.

On a form which was postmarked April 15, 2005, appellant requested a review of the written record by an Office hearing representative in connection with the Office's termination determination.<sup>4</sup>

By decision dated June 17, 2005, the Office denied appellant's request for a review of the written record. The Office found that appellant's April 15, 2005 request for a review of the written record was made more than 30 days after the March 15, 2005 decision and, thus, she was not entitled to a review of the written record as a matter of right.<sup>5</sup> The Office indicated that it was exercising its discretion and determined that appellant's request was denied for the further reason that the issue in the present case could equally well be addressed by submitting new and relevant evidence and requesting reconsideration.

### **LEGAL PRECEDENT -- ISSUE 1**

Under the Federal Employees' Compensation Act,<sup>6</sup> once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>7</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>8</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant sustained an employment-related lumbar strain on December 27, 2001 and paid compensation for extended periods of disability. The Office terminated appellant's compensation effective March 15, 2005 on the grounds that she had no residuals of her December 27, 2001 employment injury after that date. The Office based its termination on the opinion of Dr. Albina, a Board-certified orthopedic surgeon, who served as an Office referral physician.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Albina.<sup>10</sup> The January 18, 2005 report of Dr. Albina establishes

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<sup>4</sup> Appellant also submitted additional reports from attending medical doctors and chiropractors.

<sup>5</sup> The request was postmarked April 15, 2005 and therefore was made 31 days after March 15, 2005.

<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>8</sup> *Id.*

<sup>9</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>10</sup> *See id.* and accompanying text.

that appellant had no residuals of her December 27, 2001 employment injury after March 15, 2005.

In a January 18, 2005 report, Dr. Albina provided an extensive review of appellant's factual and medical history and reported findings on examination of her low back. For example, he noted that appellant's gait was normal with no obvious limp, that her sensory examination was normal and that upon examination of the low back she reported some tenderness without any sign of spasm. He concluded that her December 27, 2001 employment-related lumbar strain had resolved and indicated that she could return to her regular work. Although Dr. Albina recommended a gradual return to work, he indicated that this circumstance was dictated by poor conditioning and motivation concerns rather than by residuals of the December 27, 2001 employment injury.

The Board has carefully reviewed the opinion of Dr. Albina and notes that, it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Albina's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>11</sup> Dr. Albina provided medical rationale for his opinion by pointing out the limited findings on examination and explaining that appellant's December 27, 2001 lumbar sprain was of such a nature that it would have resolved by the time of his examination. He further explained that appellant could return to her regular work on a gradual schedule, but emphasized that this gradual return to work was not related to the December 27, 2001 employment injury.<sup>12</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision. The Office's 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." The Office has provided 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.<sup>13</sup>

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 has been made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>14</sup> The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles

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<sup>11</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>12</sup> Appellant submitted a February 28, 2005 report in which Dr. Dai, an attending anesthesiologist specializing in pain management, indicated that her low back problems were related to degenerative disc disease at L4-5. However, Dr. Dai provided no indication that this condition was related to appellant's December 27, 2001 employment injury.

<sup>13</sup> 20 C.F.R. § 10.616(a); see *Michael J. Welsh*, 40 ECAB 994, 996 (1989).

<sup>14</sup> *Henry Moreno*, 39 ECAB 475, 482 (1988).

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.<sup>15</sup> 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.<sup>16</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's April 15, 2005 request for a review of the written record was made more than 30 days after the Office's March 15, 2005 decision and, thus, he was not entitled to a review of the written record as a matter of right. Hence, the Office was correct in finding in its June 17, 2005 decision that appellant was not entitled to a review of the written record as a matter of right. Moreover, the Office properly exercised its discretion by determining that appellant's request was denied for the further reason that the issue in the present case could equally well be addressed by submitting new and relevant evidence and requesting reconsideration. 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.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective March 15, 2005 on the grounds that she had no residuals of her December 27, 2001 employment injury after that date. The Board further finds that the Office properly denied appellant's request for a review of the written record.

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<sup>15</sup> See *Welsh*, *supra* note 13 at 996-97.

<sup>16</sup> *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' June 17 and March 15, 2005 decisions are affirmed.

Issued: February 9, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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