

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BERNICE S. MORROW and DEPARTMENT OF COMMERCE,
U.S. CENSUS BUREAU, Memphis, TN

*Docket No. 03-1751; Submitted on the Record;
Issued September 4, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's disability compensation effective February 27, 2003; and (2) whether the Office properly denied appellant's hearing request.

On July 20, 2000 appellant, then a 69-year-old census enumerator, filed a notice of traumatic injury alleging that on July 18, 2000 she tripped and fell on her hands, stomach and arms while walking up a driveway in the performance of duty. The Office accepted the claim for a lumbar sprain, multiple contusions and aggravation of depression. Appellant stopped work on July 19, 2000 and received continuation of pay. On September 1, 2000 she was placed on the periodic rolls for disability compensation.

The employing establishment provided a job description indicating that appellant's position as an enumerator was temporary and not to exceed the date of September 30, 2001. The physical requirements listed for the job stated that appellant worked part time, on average of five to six hours per day. She was expected to lift and carry items weighing up to 10 pounds intermittently for 4 percent of the workday. Appellant was also required to stand for 30 percent, sit for 50 percent, walk for 8 percent and climb stairs for 4 percent of the day.

Appellant was hospitalized for depression from August 22 to September 5, 2000. In order to ascertain the nature and extent of appellant's psychological disability due to her work injury, the Office referred appellant for a second opinion examination with Dr. Melvin L. Goldin, a Board-certified psychiatrist. In a report dated February 20, 2001, Dr. Goldin, discussed appellant's medical, emotional and social history. He diagnosed major depression and stated that appellant had problems with occupational functions and the routine activities of daily living. He stated that, while appellant's depression had been aggravated by her July 18, 2000 work injury, at the time of his examination, she appeared to have returned to her baseline status from a psychological standpoint. Dr. Goldin concluded that appellant's preexisting emotional condition did not prevent her from returning to work.

On March 14, 2001 appellant underwent a decompression laminectomy with fusions at L3-4 performed by Dr. Stephen M. Waggoner, a Board-certified orthopedic surgeon.¹ In a report dated April 17, 2002, Dr. Waggoner noted that appellant had been seen in follow up for ongoing back pain. He noted that appellant's pain was not unusual for her status postfusion. He opined that appellant had reached maximum medical improvement. The diagnosis was listed as lumbar spondylosis, sacroiliitis, postlumbar laminectomy syndrome with fusion, scoliosis and moderate depression. Dr. Waggoner indicated that appellant could return to work full time with permanent restrictions of no repetitive bending, stooping, or lifting over 20 pounds on an occasional basis or over 10 pounds on a frequent basis. He repeated these restrictions in a report dated August 14, 2002.

On January 21, 2003 the Office issued a notice of proposed termination, finding that the medical evidence established that appellant was no longer disabled for work. Appellant was given 30 days to submit additional evidence or argument if she disagreed with the proposed termination. Appellant subsequently submitted a letter dated February 1, 2003, protesting the proposed termination, stating that she disagreed with Dr. Waggoner's opinion that she was capable of returning to work. Appellant expressed dissatisfaction with Dr. Waggoner's treatment and requested a change of physicians. She also submitted a December 13, 2002 report from Dr. Moacir Schnapp, a Board-certified physician in pain management, who diagnosed lumbar spondylosis, sacroiliitis, scoliosis, postlaminectomy syndrome, lumbar fusion and moderate depression. Dr. Schnapp discussed a plan of rehabilitation but did not address whether appellant had the capacity for work.

In a February 27, 2003 decision, the Office terminated appellant's compensation on the grounds that she had no further disability causally related to her work injury.² By letter postmarked April 27, 2003, appellant requested "oral reconsideration" of the Office's termination decision. In a decision dated June 18, 2003, the Office denied appellant's request for an oral hearing on the grounds that her request was untimely filed. The Office also noted that the issue of the case could be equally well addressed by requesting reconsideration.

The Board finds that the Office met its burden of proof in terminating appellant's compensation effective February 27, 2003.³

It is well established that, once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ After it is determined that an employee has disability causally related to his or her federal employment, the Office may not

¹ Although Dr. Waggoner indicated shortly following surgery that appellant was capable of working a sedentary job for four hours per day, the employing establishment was unable to accommodate her work restrictions.

² Since appellant continued to have residuals of the accepted work injury, she remained entitled to medical benefits.

³ Although appellant submitted evidence to the Office subsequent to the February 27, 2003 decision and she has submitted evidence before the Board in this appeal, that evidence was not considered herein. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c).

⁴ *John W. Graves*, 52 ECAB 160 (2000).

terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵

In the present case, the Office terminated appellant's wage-loss compensation after determining that appellant's disability had ceased. As used in the Federal Employees' Compensation Act,⁶ the term disability means incapacity because on an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-caused impairment prevents an employee from engaging in the kind of work he was doing when he was injured.⁷ In other words, if an employee is unable to perform the required duties of the job, in which he was employed when injured, the employee is disabled.⁸

Appellant received treatment for her musculoskeletal portion of her work injury from Dr. Waggoner who opined on April 17, 2002 that she could return to work with permanent restrictions of no repetitive bending, stooping, or lifting over 20 pounds on an occasional basis or over 10 pounds on a frequent basis. The Board notes that appellant's position description indicates that as an enumerator she was not required to lift more than 10 pounds on an intermittent basis and performed no repetitive bending, stooping or lifting over 20 pounds. The work restrictions provided by Dr. Waggoner are consistent with her regular-duty job and the physician indicated that appellant's work injury resolved to the extent that she is no longer disabled from returning to work as an enumerator.

With respect to her mental condition, the Office had appellant examined by Dr. Goldin who also opined that appellant could return to work from a psychological standpoint. He further indicated that appellant's temporary aggravation of her depression due to the work injury had ceased by the time of his examination on February 20, 2001. Because the weight of the evidence consists of the uncontradicted opinions from Drs. Waggoner and Goldin finding that appellant is not disabled for work, the Board finds that the Office satisfied its burden of proof in terminating appellant's compensation.⁹

The Board finds that the Office properly denied appellant's request for a hearing under section 8124(b) of the Act.

⁵ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Mary A. Lowe*, 52 ECAB 223 (2001).

⁶ 5 U.S.C. §§ 8101-8193, 8102.

⁷ *Marvin T. Schwartz*, 48 ECAB 521 (1997); *Patricia A. Keller*, 45 278 (1993).

⁸ *Id.*

⁹ The Board notes that Dr. Schnapp did not address whether or not appellant was capable of returning to her date-of-injury job. Therefore, his opinion is not probative to the issue of whether the Office correctly terminated appellant's compensation.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states: "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 issuance of the decision, to a hearing on his claim before a representative of the Secretary."¹⁰ Office regulations at section 10.616(a) provide that a claimant, injured on or after July 4, 1966 who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the decision. The hearing request must be sent within 30 days (as determined by the postmark or other carrier's date marking) of the date of the decision, for which a hearing is sought. The claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.¹¹

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,¹² when the request is made after the 30-day period established for requesting a hearing,¹³ or when the request is for a second hearing on the same issue.¹⁴ The Office's procedures, which require the Office to exercise its discretion to 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.¹⁵

In this case, the Office properly determined that appellant's hearing request postmarked April 27, 2003, was filed more than 30 days after the Office' February 27, 2003 decision terminating her compensation. Because appellant did not comply with the 30-day filing rule specified by section 8124(a) of the Act, she was not entitled to a hearing as a matter of right. Moreover, the Office also properly denied the untimely hearing request since the issue in the case is a medical one that could be equally well addressed through the reconsideration process.¹⁶ According, the Board finds that the Office properly denied appellant's hearing request as untimely filed.

¹⁰ 5 U.S.C. § 8124(b)(1).

¹¹ 20 C.F.R. § 10.616(a) (1999); *Brenton A. Burbank*, 53 ECAB ____ (Docket No. 00-2017, issued January 3, (2002).

¹² *Rudolph Bermann*, 26 ECAB 354 (1975).

¹³ *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁴ *Johnny S. Henderson*, 34 ECAB 216 (1982).

¹⁵ *Sandra F. Powell*, 45 ECAB 877 (1994).

¹⁶ The Board has held that a denial of review on this basis is a proper exercise of the Office's discretion. E.g., *Jeff Micono*, 39 ECAB 617 (1988).

The decisions of the Office of Workers' Compensation Programs dated June 18 and February 27, 2003 are hereby affirmed.

Dated, Washington, DC
September 4, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member