U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSITA R. CAREY and U.S. POSTAL SERVICE,
POST OFFICE, San Francisco, CA

Docket No. 00-2175; Submitted on the Record;
Issued March 21, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

The Office accepted that appellant sustained a lumbar strain in the performance of duty on May 12, 1992 and paid compensation for temporary total disability.

By decision dated October 15, 1997, the Office terminated appellant's compensation on the grounds that the weight of the medical evidence established that she no longer suffered from residuals of her May 12, 1992 injury. The Office found that the weight of the medical evidence was represented by the May 30, 1996 report of Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon who resolved a conflict of medical opinion between appellant's attending physicians and the Office's referral physician.

By letter dated October 29, 1997, appellant requested a hearing. By decision dated September 10, 1998, an Office hearing representative found that Dr. Ferretti's May 30, 1996 report was equivocal in nature and insufficient to resolve the conflict of medical opinion. The hearing representative directed the Office "to reinstate compensation benefits and direct inquiry back to Dr. Ferretti in an attempt to get a more unequivocal opinion regarding causality and disability supported with medical rationale."

By letter dated October 29, 1998, the Office referred appellant, the case record and a statement of accepted facts to Dr. Ferretti for a reasoned medical opinion whether she continued to suffer from residuals of her May 12, 1992 employment injury. In a report dated November 20, 1998, Dr. Ferretti stated, "There are no objective residuals evident."

On February 16, 1999 the Office issued a notice of proposed termination of compensation on the grounds that the weight of the medical evidence established no objective residuals of appellant's employment injury.

By decision dated March 18, 1999, the Office terminated appellant's compensation on that date on the grounds that the weight of the medical evidence established that appellant had no residuals of her May 12, 1992 employment injury and no disability.

By letter dated February 28, 2000, appellant, through her representative, requested reconsideration, contending that the Office's referral of appellant, the case record and a statement of accepted facts to Dr. Ferretti did not comply with the Office hearing representative's order to direct an inquiry to Dr. Ferretti. Her representative also contended that the Office's February 16, 1999 notice of proposed decision failed to relate all the facts and medical evidence, and failed to mention that Dr. Ferretti performed the original impartial medical specialist report.

By decision dated April 6, 2000, the Office found that the evidence submitted in support of appellant's request for reconsideration was of an immaterial nature and was not sufficient to warrant review of its prior decision.

The only Office decision before the Board on this appeal is the Office's April 6, 2000 decision finding that appellant's application for review was not sufficient to warrant review of its prior decision. Since more than one year elapsed between the date of the Office's most recent merit decision on March 18, 1999 and the filing of appellant's appeal on June 12, 2000, the Board lacks jurisdiction to review the merits of appellant's claim.[1]

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

[1] 20 C.F.R. § 501.3(d)(2) requires that an application for review by the Board be filed within one year of the date of the Office final decision being appealed.

Appellant's February 28, 2000 request for reconsideration was not accompanied by any new evidence, and does not refer to any of the evidence added to the case record after the Office's March 18, 1999 decision. The February 28, 2000 request for reconsideration does not show that the Office erroneously applied or interpreted a specific point of law. Although the request for reconsideration advances arguments not previously considered by the Office, these arguments are not relevant.

The Office's action in referring appellant, the case record and a statement of accepted facts to Dr. Ferretti is not contrary to the Office's hearing representative's September 10, 1998 decision. Section 8123(a) of the Act authorizes the Office to require an employee who claims disability as a result of an employment injury to undergo such physical examination as it deems necessary. The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.[2] The Board sees nothing unreasonable in the Office undertaking the inquiry to Dr. Ferretti, directed by the Office hearing representative's decision, by referring appellant back to Dr. Ferretti. Through this referral, the Office obtained the supplemental report needed to resolve the conflict of medical opinion.[3]

The arguments raised in the February 28, 2000 request for reconsideration regarding the Office's February 16, 1999 notice of proposed termination of compensation are also irrelevant. This notice discusses the proposed decision and contains a detailed discussion of the weight of the medical evidence. That this notice did not mention that Dr. Ferretti had submitted an earlier report is not relevant. The Office's February 16, 1999 notice complies with the requirements of the Office's procedure manual.[4]

[2] *John Watkins*, 47 ECAB 597 (1996).

[3] When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. *Harold Travis*, 30 ECAB 1071 (1979).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.7a(1) (March 1997) describes the contents of notices of proposed decisions.

The April 6, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 21, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member