United States Department of Labor
Employees' Compensation Appeals Board

LULA M. KELLY, Appellant	)	
and	)	**Docket No. 03-1920**
	)	**Issued: July 26, 2005**
DEPARTMENT OF AGRICULTURE, ALABAMA COOPERATIVE EXTENSION, Auburn, AL, Employer	)	

Appearances:
Lula M. Kelly, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On July 29, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated May 28, 2003 which denied her request for merit review under 5 U.S.C. § 8128(a). Appellant also timely appealed a March 28, 2003 decision which terminated her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues on appeal are: (1) whether the Office properly terminated appellant's compensation on the grounds that her work-related disability had ceased effective June 29, 2002; and (2) whether the Office properly refused to reopen appellant's case for further consideration on the merits of her claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 3, 1997 appellant, then a 45-year-old program assistant/nutrition aide, slipped and injured her right knee while buying groceries for the employing establishment while in the

performance of duty. Appellant stopped work on April 9, 1997 and returned to work on May 27, 1997. She subsequently stopped work on March 29, 2000. The Office accepted the claim for right knee contusion and paid appellant appropriate compensation for her injury-related disability for work.[1] The Office later accepted recurrent dislocation right patella and appellant underwent right knee proximal knee realignment on March 30, 2000.

Appellant was treated by Dr. Michael E. Freeman, a Board-certified orthopedic surgeon, who, in an October 5, 2000 report, indicated that he did not think there was much more he could offer appellant.

In a January 3, 2001 report, Dr. Roland Rivard, a Board-certified orthopedic surgeon, advised that appellant was examined to ascertain appellant's work restrictions. He noted that appellant reported pain all around the knee and stiffness after sitting or standing for extended periods of time and reported constant swelling in the right knee. He explained that appellant showed a pattern of symptom magnification and opined that it might be due to psychological causes or, possibly an expectation of secondary gain. Dr. Rivard indicated that appellant could work with restrictions.

By letter dated March 7, 2001, the Office contacted Dr. Freeman and provided him with a copy of Dr. Rivard's report and requested information regarding appellant and whether she could return to work or return with restrictions.

In a March 15, 2001 report, Dr. Freeman advised that he had reviewed Dr. Rivard's report and indicated that appellant was impaired as a result of her knee. He indicated that there could be some psychological overlay to her condition as well, but that he was not a psychologist. Dr. Freeman recommended that appellant be examined by a third party regarding her return to regular or light duty and advised that he had released appellant as there was nothing further that he could offer.

The Office continued to develop the claim and, by letter dated April 26, 2001, referred appellant for a second opinion examination to Dr. John Crompton, a Board-certified orthopedic surgeon.

In an August 7, 2001 report, Dr. Crompton noted appellant's history of injury and treatment, and that she continued to experience right knee pain. He diagnosed a lateral subluxation of the patella and opined that he did not believe that appellant was disabled due to the residuals of the April 3, 1997 employment injury. Dr. Crompton advised that he believed that appellant was able to perform the duties of a nutrition teacher as they were within the recommendations provided by the evaluation center and explained that it was a "relatively sedentary job and it would take quite a bit of 'impairment' to prevent her from returning to her regular duties as a nutrition teacher." He further advised that he believed that appellant's inability to work was due to her RSD and that he did not believe anything was specifically related to her work injury. Dr. Crompton further indicated that he did not believe that appellant

[1] The record reflects that appellant had a prior history of reflex sympathetic dystrophy (RSD) and psychological treatment following her mother's death and life stressors.

needed further rehabilitation as she had reached maximum medical improvement on June 30, 2000. He advised that no further care was needed and that there were no residuals related to the April 3, 1997 employment injury.

On October 19, 2001 the Office issued a notice of proposed termination of compensation. The Office proposed to terminate appellant's wage-loss compensation based on Dr. Crompton's report.

In response, appellant submitted a letter dated November 18, 2001 in which she asserted that she had continued residuals of the work injury that were disabling and advised that her knee continued to pop out of place. She enclosed additional reports from Dr. Freeman. They included an October 31, 2001 report in which Dr. Freeman advised that appellant related that she continued to have trouble with her knee. He indicated that she had recurrent subluxation, and that recently it occurred such that appellant popped it back in. Dr. Freeman advised that appellant's condition was also complicated by RSD and there was nothing surgically that he could do. He advised that he was going to turn appellant "loose." In a November 5, 2001 report, Dr. Freeman indicated that appellant had "recurrent subluxation of the patella, complicated by reflex sympathetic dystrophy." He opined that he did not believe that surgery would be beneficial to appellant.

In a December 14, 2001 report, Dr. Freeman provided an impairment rating of 19 percent to the whole person.

In a January 4, 2002 report, Dr. Freeman repeated that there was nothing he could do for appellant.

By letter dated May 17, 2002, the employing establishment advised that the physical demands of appellant's position included: carrying less than 15 pounds of demonstration equipment and supplies in a rolling suitcase; and driving to and from various locations to give lessons, and conducting up to two lessons per day in different locations at different times.

By decision dated July 2, 2002, the Office terminated appellant's wage-loss compensation effective June 29, 2002 on the grounds that appellant had no continuing disability causing wage loss as a result of her employment injury. The Office noted that appellant remained entitled to medical benefits for residuals of the accepted work injury.

By letter dated July 20, 2002, appellant requested a hearing, which was held on January 14, 2003. In support of her claim, appellant submitted photographs of her knee and newspaper articles which was in regard to an award received by appellant from her employer. She also testified that she was currently receiving social security disability benefits and was totally disabled.

Appellant also submitted an August 8, 2002 treatment note from a provider whose signature is illegible and which contained a diagnosis of right knee pain and low back pain.

After the hearing, appellant submitted a March 24, 2003 report, which appears to be from Dr. Freeman, in which he repeated his previous opinion that there was nothing further that could be done for appellant.

By decision dated March 28, 2003, the Office hearing representative affirmed the July 2, 2002 decision.

By letter dated April 13, 2003, appellant requested reconsideration. She alleged that her new evidence was a copy of an impairment rating provided by Dr. Freeman, which was "self-explanatory." In support of her request, appellant provided copies of reports which were previously received by the Office.

She also provided a May 1, 2003 report from a physician whose signature is illegible. The physician advised that appellant came in for bilateral knee pain. He noted that appellant was taking her son's medication and cautioned her to refrain from such action.

By decision dated May 28, 2003, the Office denied appellant's request for reconsideration on the grounds that the evidence was repetitive and insufficient to warrant merit review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[3]

ANALYSIS -- ISSUE 1

In this case, the Office accepted the claim for right knee contusion and paid appellant appropriate compensation for her injury-related disability for work and later accepted recurrent dislocation of the right patella and authorized right knee proximal knee realignment on March 30, 2000.

Appellant submitted numerous reports dating from March 15, 2001 to March 24, 2003 from Dr. Freeman, who indicated that there was nothing more that could be done for appellant. In his October 31 and November 5, 2001 reports, Dr. Freeman also advised that appellant's condition was complicated by RSD and there was nothing surgically that he could do. The Board notes that RSD was not an accepted condition.

The Office subsequently referred appellant to Dr. Crompton for a second opinion examination to determine the extent and degree of any disability remaining as a result of the

[2] *Curtis Hall,* 45 ECAB 316 (1994).

[3] *Jason C. Armstrong*, 40 ECAB 907 (1989).

April 3, 1997 work injury. He conducted a thorough examination and noted appellant's history of injury and treatment, including that appellant related that she continued to experience right knee pain. Dr. Crompton diagnosed a lateral subluxation of the patella and opined that he did not believe that appellant was disabled due to the residuals of the April 3, 1997 employment injury. He explained that appellant was able to perform the duties of a nutrition teacher. Dr. Crompton indicated that the duties were within the recommendations provided by the evaluation center and explained that appellant's position was a "relatively sedentary job and it would take quite a bit of 'impairment' to prevent her from returning to her regular duties as a nutrition teacher." He further advised that he believed that appellant's inability to work was due to her RSD and that he did not believe anything was specifically related to her work injury. Dr. Crompton further indicated that he did not believe that appellant needed further rehabilitation as she had reached maximum medical improvement on June 30, 2000. He advised that no further care was needed and that there were no residuals related to the April 3, 1997 employment injury. The Board finds that Dr. Crompton's report is sufficient to establish that appellant has no disabling residuals from her employment-related orthopedic conditions and that she could return to her regular duties as he provided a thorough, well-rationalized report based on his review of the record and examination findings.[4]

As noted above, appellant submitted numerous reports from Dr. Freeman. However, the reports contemporaneous with the termination of compensation did not specifically indicate that appellant had a continuing disability causally related to her accepted injuries.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case under section 8128(a) of the Federal Employees' Compensation Act,[5] section 10.608(a) of the implementing 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).[6] 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.[7] 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 merit review.[8]

[4] Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Leslie C. Moore*, 52 ECAB 132 (2000).

[5] 5 U.S.C. § 8128(a).

[6] 20 C.F.R. § 10.608(a).

[7] 20 C.F.R. § 10.608(b)(1) and (2).

[8] 20 C.F.R. § 10.608(b).

When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.[9]

ANALYSIS -- ISSUE 2

With her April 13, 2003 reconsideration request appellant provided copies of reports that were previously received by the Office. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.[10]

With regard to appellant's allegation that the impairment rating provided by Dr. Freeman was self-explanatory, the impairment rating was previously received and considered by the Office.[11] The Board further notes that the report did not offer any opinion regarding appellant's ability to return to work, and thus was not relevant and pertinent new evidence. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[12] The Board notes that the record also contains a May 1, 2003 report from a physician whose signature is illegible, and advised that appellant came in for bilateral knee pain. He did not offer any opinion regarding appellant's condition and whether she was currently disabled or her ability to work. As noted above, evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[13] Thus this report, while new, is not relevant.

Appellant, therefore, did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. Further, she failed to submit relevant new and pertinent evidence not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, she was not entitled to a merit review.[14]

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[9] *Annette Louise*, 54 ECAB ___ (Docket No. 03-335, issued August 26, 2003).

[10] *Edward W. Malaniak*, 51 ECAB 279 (2000).

[11] *Id.*

[12] *Darletha Coleman*, 55 ECAB ___ (Docket No. 03-868, issued November 10, 2003).

[13] *Id.*

[14] *See James E. Norris*, 52 ECAB 93 (2000).

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective June 29, 2002. The Board further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 28 and March 28, 2003 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Issued: July 26, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board