# United States Department of Labor
# Employees' Compensation Appeals Board

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| **T.C., Appellant** | ) | |
| **and** | ) | **Docket No. 08-1077** |
| | ) | **Issued: November 20, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, New Orleans, LA, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On February 27, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 29, 2007, which denied her request for a hearing, and a September 11, 2007 decision that terminated her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and the denial of her request for a hearing.

### ***ISSUES***

The issues are: (1) whether the Office properly terminated appellant's compensation and medical benefits effective September 11, 2007; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

## ***FACTUAL HISTORY***

On December 17, 2000 appellant, then a 29-year-old casual clerk, sustained injury when she was struck by a wire cage. She stopped work on December 18, 2000.[1] The Office accepted the claim for left wrist strain and a contusion of the right thigh and paid appellant compensation for disability for work.[2]

On May 6, 2004 Dr. Kenneth Williams, Board-certified in family medicine, noted that appellant had continued complaints of left wrist pain but that her right hip symptoms had improved. He noted that appellant had a full range of motion in the left wrist with "2+" tenderness present to palpation. Dr. Williams placed appellant off work.

By letter dated July 29, 2004, the Office referred appellant for a second opinion examination with Dr. Christopher Cenac, a Board-certified orthopedic surgeon.

In an August 4, 2004 report, Dr. Williams noted that appellant complained of left wrist pain and was awaiting approval for an electromyogram (EMG). Examination of the left wrist revealed limited range of motion with "2+" tenderness and "1+" edema. Dr. Williams placed appellant off work pending further evaluation.

In an August 16, 2004 report, Dr. Cenac reviewed appellant's history of injury and medical treatment. He advised that a functional capacity evaluation performed on January 30, 2001 revealed symptom magnification and illness behavior. Dr. Cenac conducted a physical examination and determined that there was no objective evidence of orthopedic mechanical dysfunction or neurological deficit causally related to the accepted injury. He advised that the electrodiagnostic testing should be obtained based on the recommendations of appellant's treating physicians.

In a report dated August 25, 2004, Dr. Gregory Redmann, a Board-certified neurologist, performed an EMG and nerve conduction studies. He determined that appellant had bilateral ulnar neuropathies which were moderate on the right and mild to moderate on the left. Dr. Redmann also found left C7 radiculopathy which was mild to moderate.

In a September 7, 2004 report, Dr. Cenac reviewed the diagnostic test results and concluded that appellant's work-related injuries had resolved. He noted that the imaging studies of the left wrist were normal. Testing revealed that appellant had evidence of bilateral ulnar neuropathy and a left C7 radiculopathy; however, these conditions were unrelated to the

[1] The record reflects that appellant's employment as a casual employee ended on December 29, 2000. The record also reflects that her compensation benefits commenced on December 28, 2001 and she was placed on the periodic rolls.

[2] The Office proposed to terminate appellant's compensation on May 20, 2002. It finalized the decision on September 9, 2002. On May 9, 2003 the Office hearing representative reversed the Office's decision finding that appellant remained entitled to receive payment for her medical expenses related to her accepted conditions of left wrist sprain and right hip contusion. The Office hearing representative also ordered that appellant be referred for a second opinion examination to determine the extent of her work-related condition and her ability to return to work. On September 9, 2003 the Office reinstated appellant's compensation benefits commencing September 8, 2002.

December 17, 2000 injury. Dr. Cenac again noted that the functional capacity evaluation revealed symptom magnification, illness behavior and self-limited submaximal efforts.[3]

On September 22, 2004 the Office proposed to terminate appellant's compensation benefits, finding that the medical evidence established that she no longer had any residuals or disability due to her accepted injury. It finalized the decision on October 22, 2004.

Appellant requested a hearing on November 19, 2004. A telephonic hearing was held on December 11, 2006. In a September 28, 2004 report, Dr. Williams examined appellant's left wrist and noted that diagnostic testing revealed bilateral ulnar neuropathies and left C7 radiculopathy. He advised that appellant could return to work but was restricted to sedentary activities. In an October 1, 2004 report, Dr. Williams opined that appellant's left wrist, forearm, upper limb and right hip injuries were more likely than not related to the accepted injury. He opined that appellant's symptoms were "without resolution and had reached maximum benefit of care." Dr. Williams discharged appellant from treatment. In a letter dated January 11, 2007, appellant's representative enclosed a copy of the August 25, 2004 nerve conduction study.

In a March 20, 2007 decision, the Office hearing representative found a conflict in medical opinion between Dr. Williams and Dr. Cenac as to whether appellant's employment-related conditions had resolved. She remanded the case for referral to an impartial medical examiner.

On May 16, 2007 the Office referred appellant, together with a statement of accepted facts and the medical record to Dr. James Hood, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.

In a June 11, 2007 report, Dr. Hood reviewed the history of injury and medical treatment. He conducted a physical examination and noted that appellant complained of continued pain over the dorsoradial aspect of her left wrist, the base of the right thumb and at the lateral right thigh. Dr. Hood noted that the left wrist had extension of 30 degrees with flexion of 50 degrees, and radial and ulnar deviations of 10 degrees. Appellant was also tender over the first dorsal compartment or extensors of the thumb and had a markedly positive Finkelstein test. She had excellent range of motion of the hip, including internal and external rotations and tenderness in the trochanteric bursa. Dr. Hood diagnosed de Quervain's tenosynovitis and trochanteric bursitis on the right side. He stated that it would "seem strange" for appellant's symptoms to continue for seven years but indicated that she had persistent complaints of discomfort. Dr. Hood opined that, while appellant had a sore left wrist and sore area in the trochanteric bursal area, these conditions did not prevent her from performing her duties as a clerk. He recommended an injection to the trochanteric bursa and six sessions of ultrasound, plus stretching instructions. Dr. Hood opined that a release of the tendons of the first dorsal compartment would be a solution to resolve the de Quervain's tenosynovitis. A June 11, 2007 functional capacity report by Dr. Phillip Osborne, a specialist in occupational medicine, advised that the report was invalid because appellant did not provide the maximum effort required.

[3] A September 1, 2004 functional capacity evaluation revealed that appellant exhibited inappropriate responses to valid tests and a submaximal effort.

By letter dated June 25, 2007, the Office requested that Dr. Hood clarify his opinion as to whether appellant continued to have residuals of her December 17, 2000 employment injury. In a July 27, 2007 response, Dr. Hood advised that the current physical findings were not related to the effects of the December 17, 2000 injury. He noted that appellant claimed similar subjective complaints over the past several years. Dr. Hood explained that, while he recommended treatment for appellant's current condition, it was not related to the seven years prior, which had resolved to the point that she was discharged by Dr. Williams nearly three years earlier.

On August 8, 2007 the Office issued a notice of proposed termination of compensation, advising that the weight of the medical evidence, as represented by the report of Dr. Hood, established that the residuals of the December 17, 2000 injury had ceased.

By decision dated September 11, 2007, the Office terminated appellant's medical benefits and compensation for wage loss effective September 11, 2007.

On October 22, 2007 appellant's representative requested a hearing.

By decision dated November 29, 2007, the Office denied appellant's request as untimely and determined that her claim could be addressed through the reconsideration process.

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

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[4] 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.[5]

The Federal Employees' Compensation Act[6] provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[7] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

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

The Office found a conflict of medical opinion arose regarding the nature and extent of any ongoing residuals of December 17, 2000 work injury. Dr. Williams, appellant's physician,

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

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

[6] 5 U.S.C. §§ 8101-8193, 8123(a).

[7] 5 U.S.C. § 8123(a); *Shirley Steib*, 46 ECAB 309, 317 (1994).

[8] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

supported an ongoing employment-related condition and disability. Dr. Cenac, an Office referral physician, opined that the employment-related conditions had resolved. The Office properly referred appellant to Dr. Hood, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

On June 11, 2007 Dr. Hood addressed appellant's history of injury and medical treatment. He noted complaints of continued pain over the dorsoradial aspect of her left wrist, base of the right thumb and lateral right thigh. Appellant was also tender over the first dorsal compartment or extensors of the thumb. Dr. Hood provided range of motion findings on examination of the left wrist and advised that appellant had excellent range of motion of the hip, including internal and external rotations and noted tenderness in the trochanteric bursa. He diagnosed de Quervain's tenosynovitis and trochanteric bursitis on the right side. Dr. Hood stated that these conditions did not prevent appellant from performing her duties as a clerk. He recommended an injection to the trochanteric bursa and six sessions of ultrasound, plus stretching instructions. Dr. Hood opined that a release of the tendons of the first dorsal compartment would be a solution to resolve the de Quervain's tenosynovitis.

By letter dated June 25, 2007, the Office requested clarification with regard to whether appellant's employment-related injury had resolved and whether she could return to her date-of-injury position. When it secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.[9] As the Office needed clarification from the physician regarding whether the employment-related condition had resolved, it properly requested clarification from Dr. Hood.

In a supplemental report dated July 27, 2007, Dr. Hood opined that appellant's current physical findings were not related to the effects of the December 17, 2000 injury. He noted that she had experienced subjective complaints over the past several years which were not typical. Although Dr. Hood had recommended treatment for appellant's current condition, it was not related to the effects of the employment injury which had resolved. He found no basis on which to attribute any continuing condition to the December 17, 2000 employment injury.

The Board finds that Dr. Hood's opinion is entitled to special weight as his reports are sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant's employment-related condition had resolved. Dr. Hood examined appellant, reviewed her medical records, and reported accurate medical and employment histories. Accordingly, Office met its burden of proof to justify termination of benefits.

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

Section 8124(b)(1) of the Act,[10] concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a

[9] *Roger W. Griffith*, 51 ECAB 491 (2000).

[10] 5 U.S.C. § 8124(b)(1).

claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."

The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings. A claimant is entitled to a hearing as a matter of right only if the request is filed within the requisite 30 days.[11] When the Office revised its regulations effective January 4, 1999, the new regulations provided that a hearing was "a review of an adverse decision by a hearing representative" and that a claimant could choose between two formats: an oral hearing or a review of the written record.[12] These regulations also provide that the request for either type of hearing "must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."[13]

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 was made for such hearings, including when the request is made after the 30-day period for requesting a hearing, and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[14] In these instances, the Office will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.[15]

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

The Office found that appellant was not, as a matter of right, entitled to a hearing since her request, postmarked October 22, 2007, had not been made within 30 days of the September 11, 2007 decision. It considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that additional evidence could be submitted through a reconsideration application.

The Board finds that, as appellant's request for a hearing was postmarked October 22, 2007 and was thus made more than 30 days after the date of issuance of the Office's prior decision dated September 11, 2007, the Office correctly found that appellant was not entitled to an examination of the written record as a matter of right.

The Office properly exercised its discretion and determined that appellant's request for an oral hearing could be equally well addressed by requesting reconsideration and submitting additional evidence establishing that she sustained an injury as alleged.[16] The Board has held that the only limitation on the Office's discretionary authority is reasonableness. An abuse of

[11] *Tammy J. Kenow*, 44 ECAB 619 (1993); *Ella M. Garner*, 36 ECAB 238 (1984).

[12] 20 C.F.R. § 10.615.

[13] 20 C.F.R. § 10.616. *See Leona B. Jacobs*, 55 ECAB 753 (2004).

[14] *Samuel R. Johnson*, 51 ECAB 612 (2000); *Eileen A. Nelson*, 46 ECAB 377 (1994).

[15] *Claudio Vasquez*, 52 ECAB 496 (2001); *Johnny S. Henderson*, 34 ECAB 216 (1982).

[16] *See Joseph R. Giallanza*, 55 ECAB 186 (2003).

discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and probable deduction from established facts.[17] The Board finds that there is no evidence of record that the Office abused its discretion in denying appellant's request. Thus, the Board finds that the Office's denial of appellant's request for an oral hearing was proper under the law and the facts of this case.[18]

## ***CONCLUSION***

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective September 11, 2007. Further, the Board finds that the Office properly denied appellant's request for an oral hearing as untimely pursuant to 5 U.S.C. § 8124.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 29 and September 11, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 20, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[17] *See André Thyratron*, 54 ECAB 257 (2002).

[18] After appellant filed her appeal on February 27, 2008, the Board received correspondence from Kara Williams, an attorney, on March 5, 2008. On March 11, 2008 the Clerk of the Board requested that Ms. Williams provide, within 30 days, a statement signed by appellant authorizing her representation. A copy of the letter was also sent to appellant. As no response was received, Ms. Williams is not recognized as appellant's representative on this appeal. *See* 20 C.F.R. § 501.11(a).