United States Department of Labor
Employees' Compensation Appeals Board

K.F., Appellant	)	
and	)	**Docket No. 11-708**
	)	**Issued: November 21, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, LEXINGTON VETERANS MEDICAL CENTER, Lexington, KY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 21, 2011 appellant filed an appeal of the September 10, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her recurrence of disability claim and a November 29, 2010 nonmerit decision denying her request for an oral hearing. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that she sustained a recurrence of total disability on May 21 through August 12, 2010 causally related to her accepted employment-related injury; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely under 5 U.S.C. § 8124.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On February 1, 2008 appellant, then a 48-year-old nurse, filed a traumatic injury claim alleging that on January 28, 2008 she injured her back, neck, pelvis, legs and abdomen while assisting a coworker to prevent a patient from falling. She stopped work on January 29, 2008. OWCP accepted the claim for rectocele, female stress incontinence, urge incontinence, injury to bladder and urethra without open wound into cavity, injury to rectum without open wound into cavity, lumbar strain and cervical strain. It authorized a February 27, 2008 laparoscopy with lysis (repair of rectum and vagina) and paid wage-loss compensation. Appellant had additional surgery for her gynecological condition. She returned to limited duty on January 5, 2009 and resumed full-time limited duty on June 22, 2009.

In a November 17, 2009 report, Dr. Cary L. Twyman, a Board-certified neurologist, noted appellant's medical history, including her January 28, 2008 work-related back injury. He advised that she was working light duty 40 hours a week and was doing "about the same." Dr. Twyman listed appellant's frustration at being limited at work and her treatment by another specialist for mood-type issues. Appellant reported muscle aches and pain to the neck and back that Dr. Twyman advised was mostly myofascial.

In a May 21, 2010 report, Dr. Twyman stated that appellant was distraught with regard to her back pain, which had gotten worse and was primarily in the low and mid back. Appellant's pain was severe and the employing establishment cut off all of her therapy. She had been working part time with restrictions, was under stress and saw two counselors weekly. Dr. Twyman noted that appellant had a history of thoracic disc disease, thoracic spondylosis, lumbar spondylosis and cervical spondylosis as well as myofascial pain. He listed a complicating factor of extreme anxiety and questioned if she had post-traumatic stress disorder. Appellant had persistent annoyance from her employer for missing work, working with restrictions and wanting to move to another medical department. She was not able to work both physically and emotionally in her present environment and stopped work for six weeks. Dr. Twyman stated that appellant had been in this situation for almost two years and he did not see her clinically, historically or emotionally improving. He opined that she needed to pursue disability based on both physical as well as emotional components. Since appellant's pain was worse, Dr. Twyman recommended a magnetic resonance imaging (MRI) scan be repeated and the thoracic and lumbar spines rescanned.

In a June 4, 2010 report, Dr. Daniel D. Primm, Jr., a Board-certified orthopedic surgeon,[2] noted the history of injury, reviewed the medical records regarding appellant's treatment and presented examination findings. He noted that she had been off work for the last six weeks. Dr. Primm listed an impression of chronic migraine headaches; chronic fibromyalgia; chronic restless leg syndrome, by history; chronic history of anxiety and depression; cervical and lumbar strains as a result of the January 28, 2008 lifting injury at work, by history; recurrent rectocele following the January 28, 2008 lifting injury at work; status post repeat gynecological surgery

[2] Dr. Primm served as an impartial medical specialist to resolve a medical conflict in opinion between appellant's attending physician, who supported ongoing lumbar and cervical conditions necessitating work restrictions and Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon and second opinion physician, who found that the accepted condition had resolved.

involving posterior prolift revision and tension free vaginal taping. He opined that, objectively, appellant's soft tissue cervical and lumbar strains had resolved. Dr. Primm could not explain her multiple diffuse musculoskeletal complaints particularly in light of her previous diagnostic testing and her current physical findings and strongly suspected that her anxiety and stress problems were contributing to her symptoms. From an orthopedic standpoint, he opined that appellant could return to her regular duties as a registered nurse. Dr. Primm indicated that he could not comment on whether she could go back to unrestricted lifting due to her chronic gynecological problems. He recommended that appellant discontinue physical therapy as it was not helping her symptomology and that she needed to be in more active exercise. Dr. Primm further felt prescription medication was not needed.

On July 2, 2010 appellant filed a CA-2 claim for wage-loss compensation commencing May 21, 2010 alleging total disability.[3] She also later claimed compensation through August 12, 2010.

In a July 2, 2010 report, Dr. Twyman noted that appellant had been off work six weeks and was feeling better. Appellant still had a lot of pain, but was not able to go to therapy for insurance reasons. Dr. Twyman noted that she was still having communication problems with her employer and advised that he kept her off work to emotionally get her to a better level and to improve the depression and anxiety from her back pain. He stated that appellant's back pain had improved slightly, but she still experienced daily pain symptoms aggravated with activity and which also reflected her anxiety level. Dr. Twyman noted that the results of a May 28, 2010 MRI scan of the lumbar spine, showed multiple levels of spondylitic changes, disc desiccation, an annular tear at L3/4 and small disc protrusions at multiple levels. He opined that appellant was not ready to return to work, both emotionally and physically and asked her clinical psychologist and psychiatrist to document her emotional state and address the etiology of her anxiety and depression. Dr. Twyman stated that there was significant documentation of disease in the back, which she should not have at her age. He took appellant off work for another six weeks.

On July 19, 2010 the employer disputed appellant's claim for compensation. It had provided her light-duty work based on the restrictions of her physician. The employer noted that appellant worked light duty for one and one half years until May 21, 2010 without any problems except for subjective complaint of pain.

In an August 6, 2010 letter, OWCP advised appellant of the factual and medical evidence needed to support a recurrence claim and accorded her 30 days in which to supply such information.

In an August 12, 2010 report, Dr. Twyman advised that appellant had refractory upper back and low back pain due to multilevel disc degeneration and spondylitic changes. Appellant also had issues of anxiety and depression that played a role, together with hormonal issues but was able to control her pain level since she had been off work. Dr. Twyman recommended that she not return to her prior work position. He stated that appellant had a number of other issues that definitely needed to improve over time; therefore, he found that she could not work and

[3] The employing establishment indicated that appellant used annual leave on May 21, 2010.

recommended disability. Dr. Twyman kept her off work until the next visit. In an August 18, 2010 work/school excuse, he noted that appellant was off work from August 12 through October 19, 2010 due to refractory back pain related to January 28, 2008 work injury.

By decision dated September 10, 2010, OWCP denied appellant's recurrence of disability claim for the period May 21 through August 12, 2010. It found that the medical evidence failed to establish her disability was causally related to her accepted employment-related injury. In an October 9, 2010 appeal request form, postmarked October 21, 2010, appellant requested that an OWCP hearing representative review the written record. She submitted an October 19, 2010 report and work/school excuse from Dr. Twyman along with multiple medical evidence previously of record.

By decision dated November 29, 2010, OWCP denied appellant's request for a hearing on the grounds that it was untimely under 5 U.S.C. § 8124 and the matter involved could be equally addressed by requesting reconsideration and submitting evidence not previously established which established that the claimed recurrence resulted from the accepted work injury.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[4] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[5]

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[6]

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the

[4] 20 C.F.R. § 10.5(x).

[5] *Id.*

[6] *Barry C. Peterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.[7]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained rectocele, female stress incontinence, urge incontinence, injury to bladder and urethra without open wound into cavity, injury to rectum without open wound into cavity, lumbar strain and cervical strain as a result of the January 28, 2008 work injury. Following several surgical procedures, appellant returned to limited light-duty work. She claimed a recurrence of total disability for periods beginning May 21 through August 12, 2010 as causally related to her accepted employment injury. Appellant must demonstrate either that her accepted condition has changed such that she could not perform the activities required by her modified job or that the requirements of the limited light-duty job changed or were withdrawn.

The Board finds that the record contains no evidence that the limited light-duty job requirements were changed or withdrawn or that appellant's employment-related condition had changed to the point that it precluded her from engaging in limited light-duty work.

Dr. Twyman opined in several reports that appellant was taken off work for the period May 21 through August 12, 2010 so she could emotionally and physically get to a better level and to improve the depression and anxiety from her back pain. He indicated that her back pain tends to be aggravated with activity and reflects her anxiety level. Dr. Twyman also opined, in his August 18, 2010 report, that appellant was off work from August 12 through October 19, 2010 due to refractory back pain related to January 28, 2008 work injury. The Board notes that OWCP has not accepted an emotional component to this claim.[8] Furthermore, Dr. Twyman does not provide any explanation or rationale of how appellant's refractory back pain is related to the January 28, 2008 work injury other than noting that there were multilevel disc degeneration and spondylitic changes.[9] This is important given that, in his November 17, 2009 report, he advised that her neck and back pain were mostly myofascial. As indicated, OWCP has not accepted a myofascial condition and it also did not accept any degenerative or spondylitic conditions. Accordingly, Dr. Twyman's reports are insufficient to establish appellant's claim as he fails to address the causal relationship between her accepted employment injury and her disability for the claimed period.

[7] *James H. Botts*, 50 ECAB 265 (1999).

[8] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (for conditions not accepted by OWCP as due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the work injury).

[9] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

Furthermore, the record reflects that Dr. Primm[10] opined that appellant could return to her regular duties as the accepted cervical and lumbar strains had resolved and there was no objective basis to explain her diffuse musculoskeletal complaints. Although he was not asked to address the particular period of disability claimed by her, his report is contemporaneous with the onset of her claimed disability and he found no basis on which to attribute any disability to the accepted conditions. There is no other medical evidence of record supporting that appellant's disability beginning May 21, 2010 is due to her accepted conditions.

The Board finds that the medical evidence of record is insufficient to establish appellant's claim. Appellant has not met her burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the limited light-duty requirements which would prohibit her from performing the limited light-duty position she assumed after she returned to work.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides in pertinent part as follows:

> "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."[11]

The claimant can choose between two formats: an oral hearing or a review of the written record.[12] The requirements are the same for either choice.[13] The Board has held that section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking[14] and before the claimant has requested reconsideration.[15] However, when the request is not timely filed or when reconsideration has previously been

[10] Dr. Primm was selected by OWCP as an impartial medical specialist to resolve a medical conflict regarding whether appellant's work-related condition had resolved. *See* 5 U.S.C. § 8123(a). Dr. Primm was not selected as an impartial specialist with regard to whether disability beginning May 21, 2010 was due to the accepted conditions. Thus, his report cannot be accorded special weight, afforded to the opinion of a referee specialist, with regard to the claimed period of recurrent disability. However, Dr. Primm's report may be considered for its own intrinsic value. *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[11] 5 U.S.C §§ 8101-8193, § 8124(b)(1).

[12] 20 C.F.R. § 10.615.

[13] *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

[14] 20 C.F.R. § 10.616(a); *Tammy J. Kenow*, 44 ECAB 619 (1993).

[15] *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

requested, OWCP may within its discretion, grant a hearing or review of the written record and must exercise this discretion.[16]

ANALYSIS -- ISSUE 2

OWCP denied appellant's claimed recurrence on September 10, 2010. Appellant's request for review of the written record before an OWCP hearing representative was dated October 9, 2010 but not postmarked until on October 21, 2010. The date of filing of her hearing request is determined by the date of the postmark.[17] Appellant's October 21, 2010 hearing request was made more than 30 days after the date of OWCP's September 10, 2010 decision. Therefore, she was not entitled to a hearing as a matter of right.

OWCP has the discretionary authority to grant a hearing even though a claimant is not entitled as a matter of right. In its November 29, 2010 decision, it properly exercised its discretion. OWCP considered the issue involved and had denied appellant's request for review of the written record on the basis that her claim on the issue of whether the claimed recurrence resulted from the accepted work injury could be adequately addressed through the reconsideration process and the submission of additional evidence. The Board has held that the only limitation on OWCP'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.[18] In the present case, OWCP did not abuse its discretion in denying a discretionary hearing.

On appeal, appellant notes that she had several surgeries since her initial injury of January 28, 2008. The Board notes that she may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 and 10.607.

CONCLUSION

The Board finds that appellant has failed to establish that she sustained a recurrence of total disability on May 21 through August 12, 2010 causally related to her accepted employment-related injury. The Board further finds that OWCP properly denied her request for an oral hearing.

[16] *Id.*

[17] *See supra* note 14*; N.M.*, 59 ECAB 511 (2008) (a hearing request must be sent within 30 days of the date of the decision for which a hearing is sought as determined by postmark or other carrier's date marking).

[18] *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated November 29 and September 10, 2010 are affirmed.

Issued: November 21, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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