



## **FACTUAL HISTORY**

On May 6, 2002 the Office received an occupational disease claim dated June 23, 1997 in which appellant, then a 30-year-old mail handler, alleged that she developed a left knee problem due to her employment duties. Appellant stated that she first became aware of her knee problem on June 2, 1997 and first related this condition to her employment duties in January 2002. On the reverse of the form, appellant's supervisor indicated that appellant had returned to work to permanent light duty, that she first stopped work on June 2, 1997 and that she returned to work on January 14, 2002.

On September 26, 2001 appellant underwent an arthroscopy of her left knee with lateral retinacular release. Surgery revealed severe chondromalacia with a lateral displacement of the patella. In a report dated February 4, 2002, appellant's attending physician, Dr. Louis E. Levitt, a Board-certified orthopedic surgeon, noted appellant's medical treatment and stated that her left knee arthritis, resulting surgery and the infection following her surgery were not related to her employment. However, he found that upon return to work with a compromised knee, appellant's work activities definitely aggravated her preexisting knee pathology to a more symptomatic state.

The Office accepted appellant's claim for aggravation of chondromalacia in the patella and internal derangement of the left knee on July 8, 2002. Beginning August 17, 2002, the employing establishment could no longer meet appellant's limited-duty restrictions. The Office entered appellant on the periodic rolls on October 2, 2002.

On October 25, 2002 Dr. Terry L. Thompson, a Board-certified orthopedic surgeon of professorial rank, examined appellant and found that she had small effusion of her knee and limited range of motion. He diagnosed patellofemoral arthritis. Dr. Thompson found that appellant was totally disabled on January 18, 2003 and repeated his diagnosis. On June 27, 2003 he found no change in appellant's condition and recommended synvisc treatment.

In a letter dated January 8, 2004, the Office requested that Dr. Thompson provide additional descriptions of appellant's condition and the degree of disability.

Appellant alleged that she had developed a right knee injury on January 22, 2004. She also requested a schedule award for her left knee.

On January 29, 2004 the Office referred appellant for a second opinion examination with Dr. Steven Hughes, a Board-certified orthopedic surgeon. In a report dated February 17, 2004, Dr. Hughes noted appellant's medical history and found that she had restricted range of motion in her left knee, crepitus in the patellofemoral joint and laxity with valgus as well as a positive squat test. He found that appellant's right lower extremity had a full range of motion with negative testing. Dr. Hughes diagnosed osteoarthritis of the left knee, chondromalacia patella on the left and septic arthritis/synovitis chronic and aggravation of chronic synovitis in 2002. He opined that appellant reached maximum medical improvement three months after the 2002 aggravation and that she did not continue to suffer residuals of the accepted injury. Dr. Hughes stated that appellant's current complaints and restrictions were due to preexisting knee osteoarthritis and chronic synovitis.

In a letter dated March 9, 2004, the Office proposed to terminate appellant's compensation and medical benefits on the grounds that her employment-related disability had ceased.<sup>1</sup>

By decision dated April 14, 2004, the Office terminated appellant's compensation and medical benefits effective April 18, 2004 on the grounds that she had no continuing employment-related disability.

Appellant, through her attorney, requested an oral hearing in a letter dated April 21, 2004 and stamped received by the Office on April 23, 2004. The postmark on the copy of the envelope included in the record is not legible.

Appellant requested reconsideration on April 28, 2004 and submitted additional medical evidence in support of her claim. On April 28, 2004 the employing establishment's physician released appellant to return to light duty effective May 1, 2004. Dr. Thompson completed a form report on January 28, 2004 and diagnosed patellofemoral arthritis of the left knee and provided appellant's work restrictions. On April 23, 2004 he indicated that appellant could return to light duty with no prolonged standing, pushing, pulling, climbing or lifting over 20 pounds. Dr. Thompson stated that appellant could work in a seated position only. Dr. Thompson completed a form report on April 28, 2004 and diagnosed patellofemoral arthritis. He indicated with a checkmark "yes" that appellant's condition was due to her employment and provided work restrictions effective April 5, 2002.

Appellant requested a schedule award on April 23, 2004. In a letter dated May 12, 2004, the Office requested that appellant provide additional evidence in support of her schedule award request.<sup>2</sup>

By decision dated May 10, 2004, the Office denied modification of its April 14, 2004 decision finding that the medical evidence submitted was not sufficient to establish appellant's entitlement to continuing medical and compensation benefits.<sup>3</sup>

By decision dated June 9, 2004, the Branch of Hearings and Review denied appellant's request for an oral hearing on the grounds that she was not entitled to such a hearing as a matter of right and she had previously accepted and received reconsideration of her claim by the Office. The Branch of Hearings and Review exercised its discretion and noted that appellant's claim could equally well be addressed through the submission of additional evidence in the reconsideration process.

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<sup>1</sup> The record before the Board does not support the Office's finding that appellant sustained a work-related injury on June 2, 1997 and a recurrence of this condition on August 17, 2002. There is no evidence in the record that the Office accepted any condition prior to the 2002 aggravation of chondromalacia patella and internal derangement of the left knee.

<sup>2</sup> As the Office did not issue a final decision regarding appellant's request for a schedule award, the Board will not address this issue on appeal. 20 C.F.R. § 501.2(c).

<sup>3</sup> The Board notes that, following the Office's May 10, 2004 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

### LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Federal Employees' Compensation Act 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.”<sup>4</sup>

The claimant can choose between two formats: an oral hearing or a review of the written record.<sup>5</sup> The requirements are the same for either choice.<sup>6</sup> 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<sup>7</sup> and before the claimant has submitted a reconsideration request on the same decision.<sup>8</sup> However, when the request is not timely filed or when reconsideration has previously been requested, the Office may within its discretion, grant a hearing or review of the written record, and must exercise this discretion.<sup>9</sup>

### ANALYSIS -- ISSUE 3

In this case, appellant, through her attorney, requested an oral hearing regarding the April 14, 2004 termination decision in a letter dated April 21, 2004 and stamped as received by the Office on April 23, 2004. The postmark on the copy of the accompanying envelope included in the record is illegible. The Board has found that when a postmark is illegible or the envelope is not included in the record the case must be remanded for the Office to determine, if possible, the date that the letter requesting an oral hearing was postmarked.<sup>10</sup> The Board has also held that if there is no postmark, then other evidence of timeliness must be considered.<sup>11</sup> In this case, the receipt of the oral argument request is evidenced by the Office’s stamp of April 23, 2004. This date stamp establishes that appellant’s request for an oral hearing was received by the Office within 30 days of the April 14, 2004 decision, but also prior to the April 28, 2004 reconsideration request. In this situation, the Office should have considered and issued a decision on appellant’s

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<sup>4</sup> 5 U.S.C. § 8124(b)(1).

<sup>5</sup> 20 C.F.R. § 10.615.

<sup>6</sup> *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

<sup>7</sup> 20 C.F.R. § 10.616(a). *Tammy J. Kenow*, 44 ECAB 619 (1993).

<sup>8</sup> 20 C.F.R. § 10.616(a). *Martha A. McConnell*, 50 ECAB 129, 130 (1998).

<sup>9</sup> *Id.*

<sup>10</sup> *Carolyn O’Neal*, Docket No. 02-198 (issued July 3, 2002); *Gus N. Rodes*, 43 ECAB 268, 270-71 (1991).

<sup>11</sup> *Lee Black*, Docket Nos. 99-347 and 99-620 (issued December 4, 2000).

request for a hearing before issuing a decision on her subsequent request for reconsideration. A chronological development of appellant's claim would have avoided the creation of a conflict with the requirements of section 8124(b) that a hearing may be granted only before review under section 8128(a).<sup>12</sup> As the record before the Board establishes that appellant properly and timely requested an oral hearing before she requested reconsideration, the May 10, 2004 reconsideration decision of the Office must be set aside and the case remanded for an oral hearing.<sup>13</sup>

### **CONCLUSION**

The Board finds that the Office improperly issued a decision on May 10, 2004 regarding appellant's April 28, 2004 request for reconsideration when it had a timely request dated April 23, 2004 for an oral hearing of the April 14, 2004 decision before it, thereby eliminating appellant's entitlement to an oral hearing as a matter of right. The May 10, 2004 decision must be set aside and the case remanded for an oral hearing.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 10 and April 14, 2004 are set aside and the case remanded for an oral hearing.

Issued: December 2, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>12</sup> *Mary G. Allen*, 40 ECAB 190, 194 (1988).

<sup>13</sup> Due to the disposition of this issue, the remaining issues before the Board are not in posture for a decision, as the Branch of Hearings and Review has not issued a final decision on these issues. 20 C.F.R. § 501.2(c).