

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

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**LORI J. SENNETT, Appellant**

**and**

**DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL  
CENTER, Wilkes Barre, PA, Employer**

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**Docket No. 04-507  
Issued: July 7, 2004**

*Appearances:*  
*Jeffrey P. Zeelander, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On December 10, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated December 9, 2003. The Office terminated appellant's medical benefits on the basis that she no longer had any residuals due to her accepted employment injuries effective November 15, 2001. The Office also determined that appellant was not entitled to compensation for wage loss on the grounds that she had no period of disability due to her accepted March 23, 1999 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this termination and denial of wage-loss case.

**ISSUE**

The issues are: (1) whether the Office has met its burden of proof to terminate appellant's medical benefits effective November 15, 2001 on the grounds that her employment-related residuals had ceased; and (2) whether the Office properly denied appellant's claim for wage-loss compensation based on disability. On appeal appellant contends that the Office erred in failing to provide appellant with a pretermination notice.

## **FACTUAL HISTORY**

This is the second appeal in this case. In the prior appeal, the Board reviewed the Office's January 23, 2002 decision by which the Office denied appellant's request for modification of the December 7, 2000 decision, which finalized the termination of appellant's compensation for wage-loss and medical benefits.<sup>1</sup> By decision dated October 28, 2003, the Board found that the Office improperly terminated appellant's compensation for wage-loss and medical benefits effective December 7, 2000 on the grounds that the medical evidence did not establish that her employment-related disability had ceased.<sup>2</sup> The complete facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.<sup>3</sup>

Subsequent to the Board's October 28, 2003 decision, appellant submitted reports from her physical therapist.

In a decision dated December 9, 2003, the Office found the opinion of Dr. George Ritz, an impartial Board-certified orthopedic surgeon, to constitute the weight of the evidence to establish that her work injury had ceased. The Office also denied appellant's claims for wage loss as the weight of the medical evidence showed there was no disability due her accepted employment injury.

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

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.<sup>4</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.<sup>6</sup> To terminate authorization for medical

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<sup>1</sup> On August 25, 1999 appellant, then a 36-year-old former nurse, filed a traumatic injury claim alleging that on March 23, 1999 her back became tight, stiff and painful and her arm was tight and heavy when she tried to turn and lift a patient. The Office accepted the claim for lumbar and thoracic strain. The record reflects that appellant last worked on May 18, 1999, when she was fired from the employing establishment for disrespectful conduct, failure to follow instructions and unauthorized absence. Appellant subsequently received Social Security benefits from May 18, 1999 for her nonwork-related degenerative disc disease, myofascial pain and a brachioplexus injury.

<sup>2</sup> Docket No. 03-583 (issued October 28, 2003).

<sup>3</sup> Subsequent to the Office's December 7, 2000 termination decision, the Office found a conflict in the medical opinion evidence and referred appellant for an examination by an impartial medical examiner. The impartial medical examiner concluded that appellant had no continuing disability or residuals due to her accepted employment injury.

<sup>4</sup> *Paul L. Stewart*, 54 ECAB \_\_\_\_ (Docket No. 03-1107, issued September 23, 2003).

<sup>5</sup> *Daniel F. O'Donnell, Jr.*, 54 ECAB \_\_\_\_ (Docket No. 02-1468, issued February 28, 2003).

<sup>6</sup> *James F. Weikel*, 54 ECAB \_\_\_\_ (Docket No. 01-1661, issued June 30, 2003).

treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>7</sup>

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

The December 9, 2003 Office decision terminated medical benefits effective November 15, 2001 on the grounds that her employment-related residuals had ceased.

The Office's procedures state in pertinent part:

*"b. Notice Required to Terminate Medical Benefits.* The [Office] must provide notice before terminating any of the following:

(1) *An authorization for treatment (e.g., Form CA-16) which was issued 60 days or less in the past.*

(2) *The services of a specific physician....*

(3) *A specific service which the claimant has received, or expects to receive, on a fairly regular basis for 60 days or more, and for which [the Office] has paid....*

(4) *All medical treatment.* Such terminations are usually associated with disallowance of all compensation payments because the claimant is no longer disabled, or the disability is no longer related to the work injury.... The CE [claims examiner] should include specific reference to medical benefits in preparing the pretermination notice."

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<sup>7</sup> *Donald T. Pippin*, 54 ECAB \_\_\_\_ (Docket No. 03-205, issued June 19, 2003).

“d. *Notice Not Required to Terminate Medical Benefits.* Pretermination notice is not needed when:

(1) *The physician indicates that further medical treatment is not necessary or that treatment has ended.*

(2) *The [Office] denies payment for a particular charge on an exception basis....*”<sup>8</sup>

In the present case, the December 9, 2003 decision terminated all medical benefits, which requires that a pretermination notice be issued under Office procedures. Neither of the exceptions to the requirement for a pretermination notice is present here; the Board notes that none of the attending physicians indicated that all treatment for an employment-related condition had ended.

The Board accordingly finds that under the Office’s procedures a pretermination notice should have been sent to appellant advising that the Office proposed to terminate all medical benefits and allowing appellant an opportunity to respond. Since there is no evidence that the Office provided notice and an opportunity to respond prior to termination of all medical benefits, the termination was improper in this case.<sup>9</sup>

Regarding appellant’s contention that the Office erred in failing to reinstate benefits and pay appellant retroactively and place her on the periodic rolls, the record does not show that appellant had been on the periodic rolls at the time the Office terminated her benefits. The record shows that appellant submitted CA-7 forms for periods of disability and that the Office requested additional information for these periods of disability. As the record contains no evidence appellant received any wage-loss compensation, the Office is not required to pay her retroactively or place her on the periodic rolls.<sup>10</sup>

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

A claimant, for each period of disability claimed, has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of the employment injury. Whether a particular injury causes an employee to be disabled for employment, and the duration of that disability, are medical issues which must be proved by a preponderance of the reliable, probative and substantial evidence.<sup>11</sup>

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(b)(4) (March 1997); *see also Marsha K. Stanowski*, 48 ECAB 607 (1997) (the Office must issue a pretermination notice when it proposes to terminate medical benefits by formal decision).

<sup>9</sup> *Marsha K. Stanowski*, 48 ECAB 607 (1997); 20 C.F.R. § 10.5(f).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- *Appeals*, Chapter 2.1603.6(b) (September 1995).

<sup>11</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001).

## ANALYSIS -- ISSUE 2

Appellant filed a traumatic injury claim on September 8, 1999 for an injury sustained on March 23, 1999. The Office accepted the claim for lumbar and thoracic strain. Appellant did not stop work at the time of the injury and subsequently was fired by the employing establishment on May 18, 1999. In this case, appellant submitted claims for compensation, CA-7 forms noting the periods of her disability as May 18 to August 10, 1999, May 8, 2000 to April 6, 2001 and October 28, 1999 to the present.<sup>12</sup> Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed total disability for work for the periods and her accepted lumbar and thoracic strain.

In the present case, the record indicates that appellant's work stoppage began on May 18, 1999 when she was terminated by the employing establishment. Dr. Albert D. Janerich, an attending Board-certified physiatrist, reported on March 20, 2000 that appellant was disabled from work due to her work-related injuries of March 23, 1999, which resulted in an injury to the cervical spine and right upper extremity with aggravation of a previous work injury of December 29, 1988 to the thoracic spine. Similarly, in an April 27, 2000 report, Dr. Janerich concluded appellant was completely disabled due to an injury sustained on December 29, 1988, which was aggravated by her second employment injury on March 23, 1999. Dr. Janerich, in a July 11, 2001 report, opined that appellant sustained a right brachial plexopathy due to the March 23, 1999 employment injury and that this injury aggravated a T7-8 disc protrusion she sustained on December 29, 1988. He further stated appellant experienced constant back and right arm pain and opined that she never fully recovered and, thus, was unable to work from May 18, 1999 to the present due to injuries sustained on March 23, 1999, which aggravated the injury of December 29, 1988.

The medical evidence from Dr. Janerich, appellant's physician, does not contain a well-rationalized opinion support total disability for work as of May 19, 1999 due to her March 23, 1999 employment injury. Dr. Janerich does not address the fact that appellant was terminated from her employment as of May 19, 1999 and attributes her disability to conditions not accepted by the Office, *i.e.*, right brachial plexopathy, herniated thoracic disc and myofascitis and to a December 29, 1988 injury. Moreover, Dr. Janerich's first report of disability occurred in a March 20, 2000 disability certificate. Furthermore, Dr. Ritz, an impartial Board-certified orthopedic surgeon, concluded in his November 16, 2001 report, that appellant sustained no disability due to her March 23, 1999 employment injury, particularly since appellant continued working for approximately six weeks subsequent to the injury. There is insufficient rationalized medical evidence directly addressing the specific dates for disability for which compensation is claimed. For these reasons, the Board finds that appellant has not met her burden of proof by the weight of the medical evidence.

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<sup>12</sup> The Board notes that the periods of disability claimed by appellant on her CA-7 forms appear to overlap. Thus, the Board will consider the period of disability claimed by appellant to be the period May 18 to August 10, 1999 and October 28, 1999 to October 15, 2003, the date appellant signed her most recent CA-7 form.

**CONCLUSION**

The Board finds that the Office did not meet its burden of proof to terminate appellant's entitlement to medical benefits compensation. With regard to the issue of the denial of appellant's claim for compensation, the Board finds that the Office properly denied her claim for compensation, for wage loss as she had not period of disability due to the accepted March 23, 1999 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 9, 2003 is reversed with regards to the termination of medical benefits and affirmed with regard to the denial of her claim for wage-loss compensation.

Issued: July 7, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member