United States Department of Labor
Employees' Compensation Appeals Board

LOUDEAN MELVIN, Appellant	)	
and	)	**Docket No. 04-611**
	)	**Issued: December 22, 2005**
ENVIRONMENTAL PROTECTION AGENCY, Washington, DC, Employer	)	

Appearances:
Loudean Melvin, pro se
Thomas Giblin, Esq., for the Director

Oral Argument November 1, 2005

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 6, 2004 appellant filed a timely appeal from a November 5, 2003 merit decision of the Office of Workers' Compensation Programs, terminating her medical benefits on the grounds that she had no residuals of her work-related injury. She also appealed decisions dated February 26, 2003, which denied her reconsideration request, and February 10, 2003 which denied her request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's medical benefits effective October 23, 2003; (2) whether the Office properly denied appellant's request for reconsideration of the decision dated October 29, 2002; and (3) whether the Office properly denied appellant's request for an oral hearing on February 10, 2003.

FACTUAL HISTORY

On January 6, 2004 appellant, then a 47-year-old enforcement clerk, filed a claim for injuries sustained on January 17, 2002 when she tripped on carpet while walking out of a door. The Office accepted that she sustained bilateral knee strains/sprains, cervical sprain, lumbar sprain and left shoulder sprain. Appellant stopped work on January 18, 2002 and did not return.

Appellant came under the treatment of Dr. William Dorn, a Board-certified orthopedic surgeon, who treated her commencing February 27, 2002. He diagnosed strains of the cervical and lumbosacral spines with generalized arthritic conditions involving the knees and shoulders and recommended physical therapy. Dr. Dorn noted in an April 3, 2002 report that appellant experienced soreness of the neck and back. An electromyography (EMG) revealed no abnormalities. In an attending physician's report dated April 24, 2003, Dr. Dorn noted that appellant sustained a cervical strain, lumbar strain, tendinitis and bursitis on January 17, 2002 when she tripped on carpet when leaving work. He noted with a checkmark "yes" that her condition was caused or aggravated by an employment activity and advised that appellant was totally disabled.

On May 22, 2002 the Office referred appellant to a registered nurse to assist in the medical management of her case. In a letter dated July 12, 2002, the nurse advised appellant that she attempted to contact her by telephone but was unsuccessful and requested that appellant contact her as soon as possible. On September 25, 2002 she advised that appellant was being referred for a work hardening program and a functional capacity evaluation.

In reports dated May 15 to June 26, 2002, Dr. Dorn noted appellant's complaint of pain in the right knee, both wrists and hips. He diagnosed cervical and lumbar strains and noted with a checkmark "yes" that the condition was caused or aggravated by an employment activity. Dr. Dorn indicated that appellant was totally disabled. On June 26, 2002 he noted that an EMG revealed bilateral carpal tunnel syndrome and opined that she sustained injuries to both wrists on January 17, 2002.

Appellant was referred to the Washington Work Referral Program. In a September 20, 2002 note, a representative of the program indicated that appellant refused to participate in the work hardening program or to attend the functional capacity evaluation. By report dated September 25, 2002, the assigned nurse advised that appellant's case was in interrupted status because she was noncompliant.

In a letter dated September 25, 2002, the Office notified appellant that she was refusing to cooperate with nurse intervention and, by association, the vocational rehabilitation efforts. In accordance with 5 U.S.C. § 8113(b), her refusal to cooperate with Office vocational rehabilitation efforts could result in a reduction of any compensation benefits. The Office provided appellant 30 days to make a good faith effort to participate in vocational rehabilitation efforts or give good reason for not participating in this effort.

Appellant came under the treatment of Dr. Peter S. Trent, a Board-certified orthopedic surgeon and partner of Dr. Dorn. In reports dated July 18 and August 15, 2002, Dr. Trent addressed neck, back, knee and hand pain. He noted that a magnetic resonance imaging (MRI)

scan of the right knee revealed chondromalacia and evidence of a medial meniscus tear with a Baker's cyst posteriorly. On September 12, 2002 Dr. Trent received a letter from the nurse intervention caseworker noting that appellant refused the work hardening program. He advised that he had postponed the program until after he obtained the results of the MRI scan of the right knee. In an attending physician's report dated September 12, 2002, Dr. Trent diagnosed cervical and lumbar strains and noted with a checkmark "yes" that appellant's condition was caused or aggravated by an employment activity. He found that appellant was totally disabled. Dr. Trent opined that appellant was a good candidate for arthroscopic surgery on both knees and recommended physical therapy. A functional capacity evaluation dated October 1, 2002 revealed that appellant was deconditioned and showed poor tolerance for most weighted and nonweighted tasks. It was recommended that appellant participate in a half-day work hardening program progressing to full days, five days a week for four to six weeks.

On October 11, 2002 the Office referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination.

In a letter dated October 16, 2002, appellant contended that she complied with the requests of the nurse intervention program. She met with her assigned nurse and had returned all telephone calls from her nurse except one because her answering machine was broken. Appellant advised that the functional capacity evaluation and work hardening program were postponed by her physician until diagnostic testing was completed.

In a report dated October 28, 2002, Dr. Smith noted appellant's history, reviewed the medical record and listed examination findings. He noted that range of motion was normal; neurological examination revealed no abnormalities; there was no sensory or reflex deficit and no focal atrophy. Examination of the shoulders revealed a full range of motion without crepitation, instability or impingement. Examination of the back revealed no objective findings and range of motion was satisfactory and examination of the knees revealed diffuse tenderness with mild varus deformities but no effusion, instability or weakness. Dr. Smith diagnosed resolved contusions and strains to the knees, spine and left shoulder. He opined that, based on the accepted facts, the objective studies and a clinical examination, appellant was not totally disabled and could return to her position as an enforcement specialist without restrictions. Dr. Smith indicated that there was no evidence appellant had ongoing residuals of the January 17, 2002 work-related injury and did not require any further medical treatment, physical therapy or diagnostic testing.

By decision dated October 29, 2002, the Office reduced appellant's compensation to zero. The Office determined that she had, without good cause, declined to cooperate with the nurse intervention program and by association the vocational rehabilitation efforts of the Office. Appellant's compensation was reduced to zero until she cooperated with the nurse intervention program in good faith or showed good cause for not complying, at which time the reduction of compensation would cease.

In a letter dated December 4, 2002, appellant requested reconsideration of the decision dated October 29, 2002. She submitted attending physician's reports from Dr. Trent dated October 10 and November 7, 2002 in which he diagnosed cervical and lumbar strains and noted with a checkmark "yes" that her condition was caused or aggravated by her employment. He

noted that she was totally disabled. On November 7, 2002 Dr. Trent advised that appellant presented with knee pain with a mild effusion and tenderness medially. He opined that appellant was improving; however, she was not ready to return to work full duty and recommended that she continue to wear the leg brace. In a work capacity form dated November 7, 2005, Dr. Trent indicated that appellant was totally disabled. In a treatment note dated November 21, 2002, he indicated that her symptoms were slowly resolving; however, she still had stiffness and pain with prolonged sitting or standing. Dr. Trent advised that appellant was seen by Dr. Smith and thereafter was returned to work. He indicated that, at the present time, he did not think appellant was ready to return to her usual work, but agreed to release her to work part time on a provisional basis and increase her hours thereafter. Dr. Trent returned appellant to work part time with restrictions including avoid bending, stooping, climbing or lifting and advised that she would be reevaluated on December 5, 2002. In an attending physician's report dated December 12, 2002, he diagnosed cervical and lumbar strains and checked a box "yes" that her condition was caused or aggravated by an employment activity. Dr. Trent advised that appellant could return to work part time and avoid bending, stooping, climbing or lifting.

In a letter dated January 3, 2003, appellant requested an oral hearing before an Office hearing representative.

On January 21, 2003 the Office issued a notice of proposed termination of medical benefits on the grounds that Dr. Smith's report dated October 28, 2002 established no residuals of the January 17, 2002 employment injury.

In a closure report dated January 25, 2003, appellant's assigned nurse advised that appellant returned to full-duty work on November 25, 2002 without restrictions.

By decision dated February 10, 2003, the Office denied appellant's request for an oral hearing. The Office found that the request was not timely filed. Appellant was informed that her case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the Office and submitting evidence not previously considered.

Appellant submitted reports from Dr. Trent who noted that she returned to work full time, but was experiencing neck pain radiating down her legs. Physical examination revealed limited range of cervical and lumbar flexion due to pain and stiffness. Dr. Trent opined that appellant should be working only part-time limited duty and should be given a comfortable chair at work. In work capacity reports, Dr. Trent advised that appellant was able to work part time and avoid bending, stooping, heavy lifting, prolonged standing or walking and he recommended further physical therapy. On February 13 and 20, 2003 he diagnosed cervical and lumbar strains and noted with a checkmark "yes" that her condition was caused or aggravated by an employment activity and noted that appellant could return to work light duty.

In a decision dated February 26, 2003, the Office denied appellant's request for reconsideration of the decision dated October 29, 2002 on the grounds that she neither raised substantive legal questions or included any new and relevant evidence and was, therefore, insufficient to warrant a merit review of the prior decision.

In a statement dated April 16, 2003, appellant disagreed with the proposed termination of compensation and attached duplicative reports from Dr. Dorn dated February 27 to June 26, 2002 and reports from Dr. Trent dated January 25, 2002 to March 20, 2003.

In a November 5, 2003 decision, the Office terminated appellant's medical benefits effective October 23, 2003 on the grounds that the weight of the medical evidence established that she had no continuing disability or residuals attributable to her January 17, 2002 work injury.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral knee strains/sprains, cervical sprains, lumbar sprains and left shoulder sprains. She returned to full-time light duty in November 2002. The Office terminated appellant's compensation effective October 23, 2002 based on Dr. Smith's examination and report. The Board finds, however, that there is a conflict in medical opinion between Dr. Smith, the Office referral physician, and Dr. Trent, appellant's treating physician, both of whom are Board-certified specialists in their respective fields.

Dr. Smith opined that appellant had no residuals of the work injury. He diagnosed resolved contusions and strains to the knees, spine and left shoulder. Dr. Smith opined, based on his review of the record and examination findings, that appellant could return to her position as an enforcement specialist without restrictions. He indicated that there was no evidence that she had ongoing residuals of the January 17, 2002 work-related injury and that she did not require any further medical treatment, physical therapy or diagnostic testing. By contrast, Dr. Trent diagnosed medial meniscus tear, a Baker's cyst and chondromalacia patella and carpal tunnel syndrome causally related to the work-related injury of January 17, 2002 and noted that appellant was totally disabled. He advised that she continued to have residuals of her work-related injury of pain in her knee, with a mild effusion and tenderness medially and opined that appellant was improving; however, she was not ready to return to work full duty and advised that she was totally disabled from work. Dr. Trent supported work-related disability related to appellant's bilateral knee strains/sprains, cervical sprains, lumbar sprains and left shoulder sprains, while Dr. Smith found that she has no work-related residuals of the accepted injury and could return to unrestricted work. The Board, therefore, finds that a conflict in medical opinion has been created.

[1] *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

[2] *Mary A. Lowe*, 52 ECAB 223 (2001).

Section 8123 of the Federal Employees' Compensation Act[3] provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.[4]

The Board finds that, because the Office relied on Dr. Smith's opinion to terminate appellant's compensation without having resolved the existing conflict,[5] the Office has failed to meet its burden of proof in terminating appellant's compensation benefits.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of the Office's regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[6] Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[7]

ANALYSIS -- ISSUE 2

The Office's February 26, 2003 decision denied appellant's reconsideration request, without conducting a merit review, on the grounds that the evidence submitted neither raised substantive legal questions nor included new and relevant evidence and was, therefore, insufficient to warrant review of the prior decision. However, with her December 4, 2002 reconsideration request, appellant submitted relevant and pertinent evidence not previously considered by the Office. After the October 29, 2002 decision, which reduced her compensation to zero because she had, without good cause, declined to cooperate with vocational rehabilitation, appellant submitted attending physician's reports from Dr. Trent dated October 10 and November 7, 2002, who advised that she was totally disabled. On November 7, 2002 Dr. Trent advised that appellant presented with pain in her knee, with a mild effusion and tenderness medially. In a work capacity form that same date, he indicated that appellant could not return to work and was totally disabled. This evidence is relevant as it addresses the underlying point at issue of whether appellant without good cause, declined to cooperate with the nurse intervention program. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 39 (1994).

[5] *See Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

[6] 20 C.F.R. § 10.606(b)(2).

[7] 20 C.F.R. § 10.608(b).

may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[8] The Board finds that, in accordance with 20 C.F.R. § 10.606(b)(2)(iii), the new evidence submitted by appellant is sufficient to require reopening of her claim for further review on its merits.

The Board finds that the Office improperly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128.[9] Consequently, the case will be remanded for the Office to reopen her claim for a merit review.[10]

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Act provides that "a claimant for compensation not satisfied with a decision of the Secretary ... 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."[11] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[12] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, the Office may within its discretionary powers grant or deny appellant's request and must exercise its discretion.[13] The Office's procedures concerning untimely requests for hearings and review of the written record are found in the Federal (FECA) Procedure Manual, which provides:

> "If the claimant is not entitled to a hearing or review (*i.e*., the request was untimely, the claim was previously reconsidered, *etc*.), the branch of hearing and review will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."[14]

ANALYSIS -- ISSUE 3

Appellant requested a hearing in a letter dated January 3, 2003 and postmarked January 7, 2003. Section 10.616 of the federal regulations provides: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of

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[8] *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

[9] 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999); *see also Claudio Vazquez*, 52 ECAB 496 (2001).

[10] The Board notes that at the oral hearing the Solicitor's Office requested that this issue be remanded for further development by the Office.

[11] 5 U.S.C. § 8124(b)(1).

[12] 20 C.F.R. §§ 10.616, 10.617.

[13] *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (June 1997).

the decision for which a hearing is sought."[15] As the postmark date of the request was more than 30 days after issuance of the October 29, 2002 Office decision, appellant's request for a review of the written record was untimely filed.

The Office notified appellant that it had also considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. The Office has broad administrative discretion in choosing means to achieve its general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[16] There is no indication that the Office abused its discretion in this case.

CONCLUSION

The Board finds that the Office has not met its burden of proof to terminate benefits effective October 23, 2003. The Board finds that the Office, in its decision dated February 26, 2003, improperly denied appellant's request for reconsideration of her case on its merits. The Board further finds that the Office properly denied appellant's request for a hearing as untimely.

[15] 20 C.F.R. § 10.616.

[16] *Samuel R. Johnson*, 51 ECAB 612 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 5, 2003 is reversed. The Board further finds that the Office's decision dated February 26, 2003 is set aside and remanded for further development. Finally, the decision dated February 10, 2003 denying appellant's request for a hearing as untimely is affirmed.

Issued: December 22, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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