

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

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**KELLY J. BUTLER, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Lakeland, FL, Employer**

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**Docket No. 03-753  
Issued: March 22, 2004**

*Appearances:*  
*Jim Butler, 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 January 30, 2003 appellant's representative filed a timely appeal from the April 26, 2002 merit decision of the Office of Workers' Compensation Programs which found appellant did not have any continuing disability or residuals due to her October 30, 1997 employment injury after November 2, 1997, the date the Office terminated her compensation benefits. The record also contains an Office decision dated October 25, 2002 denying appellant's request for a review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). Pursuant to 5 U.S.C. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit denial of compensation benefits subsequent to November 2, 1997 and the nonmerit decision in this case.

**ISSUES**

The issues are: (1) whether appellant had any continuing disability or residuals due to her accepted October 30, 1997 employment injury after November 2, 1997, the date the Office terminated her compensation benefits; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

This is the second appeal before the Board. In a prior Board decision of June 2, 2000, the Board consolidated appellant's two appeals to the Board and oral argument was held on March 16, 2000. The Board, under Docket No. 98-2443, affirmed the Office's July 20, 1998 decision which denied appellant's request for reconsideration on the merits regarding the termination of her compensation benefits and the Office's suspension of her benefits for refusing to submit to a medical examination.<sup>1</sup> Regarding Docket No. 99-1218, the Board set aside the Office decisions dated March 4, 1998 and November 28, 1997 which found that appellant had not established fact of injury for her October 30, 1997 traumatic injury claim. The Board found the evidence of record was sufficient to establish an incident<sup>2</sup> as alleged on October 30, 1997 and that appellant sustained a left cervical and left trapezius injury due to her October 30, 1997 employment injury based upon the reports of Dr. David T. Jones, an emergency room treating physician with a primary specialty of emergency room medicine and a secondary specialty of general surgery, which included an October 30, 1997 report.<sup>3</sup> The Board remanded the case for further development to determine the extent of appellant's injury and to make a determination regarding any period of disability associated with this injury.

On remand and pursuant to the Board's June 2, 2000 decision, the Office accepted on July 31, 2000 that appellant sustained a left cervical strain and left trapezius muscle strain due to her October 30, 1997 employment injury. The Office determined the period of disability to be October 30 to November 2, 1997 based upon the opinion of Dr. Jones. Lastly, the Office advised appellant to submit a claim for compensation (Form CA-7) if she believed that she had any additional disability subsequent to November 3, 1997 due to the October 30, 1997 employment injury.<sup>4</sup>

In a decision dated September 13, 2000, the Office found that any disability due to the October 30, 1997 employment injury had ceased by November 2, 1997. The Office advised appellant that she must establish entitlement to compensation after November 2, 1997 as the Office had accepted that any disability due to her October 30, 1997 employment injury had ceased by November 2, 1997. The Office referred to various actions by appellant, as detailed in an investigative report by the employing establishment, to support its finding that appellant did not have any disability subsequent to November 2, 1997 due to her October 30, 1997 employment injury. The incidents referenced by the Office included submission of an altered medical report, attending a Halloween Party on October 31, 1997, attending a wedding reception party on November 1, 1997 and being involved in a hit and run accident, while intoxicated, on

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<sup>1</sup> Docket Nos. 98-2443 and 99-1218 (issued June 2, 2000).

<sup>2</sup> Appellant filed a traumatic injury claim on October 30, 1997 alleging that she strained or pulled her left shoulder, neck and lower back while lifting trays of mail and/or sacks of mail.

<sup>3</sup> This report was transcribed on November 5, 1997.

<sup>4</sup> The Board notes that the employing establishment placed appellant in an off-duty status effective November 3, 1997 and subsequently issued notice of removal, which was finalized on January 23, 1998. Pursuant to an April 16, 1999 arbitrator's decision, the employing establishment reinstated appellant and she received back pay for the period November 3, 1997 to the date of her reinstatement in 1999.

November 1, 1997. The only medical evidence referred to by the Office in support of its decision was a November 5, 1997 report by Dr. Jones, in which the physician opined “that he did not consider you disabled for work after he examined you on [October] 30, [19]97.” In concluding, the Office stated “in accordance with my understanding of the Board decision, I gave you the benefit of the doubt by allowing that you were disabled from [October] 30, [19]97 through [November] 2, [19]97.”

Appellant’s representative submitted various requests for reconsideration dated December 13, 2000 and January 6, August 17 and October 3, 2001.

By nonmerit decisions dated January 2, March 15, 2001 and a merit decision dated November 2, 2001, the Office denied appellant’s request for reconsideration.

In letters dated November 9, 2001 and January 10, 2002, appellant’s representative again requested reconsideration and submitted a supporting medical record.

In a January 9, 2002 report, Dr. David M. Wall, an attending Board-certified anesthesiologist, opined that appellant’s “1997 injury has been repeatedly aggravated due to [the employing establishment’s] decision to ignore doctor orders.”

In a merit decision dated April 26, 2002, the Office denied appellant’s request for modification of its prior decision.

Appellant again requested reconsideration by letters dated July 11 and September 13, 2002 and submitted an October 9, 2002 disability note by Dr. Wall, which stated that appellant was “unable to work at this time, due to” 1995 and 1997 employment injuries.

In a nonmerit decision dated October 25, 2002, the Office denied appellant’s request for reconsideration.

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

It is well established that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>5</sup> After it has been determined that, an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it is no longer related to the employment.<sup>6</sup>

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial

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<sup>5</sup> *LaDonna M. Andrews*, 55 ECAB \_\_\_\_ (Docket No. 03-1573, issued January 30, 2004).

<sup>6</sup> *Joseph Roman*, 55 ECAB \_\_\_\_ (Docket No. 03-1883, issued January 8, 2004).

evidence that she had an employment-related disability which continued after termination of compensation benefits.<sup>7</sup>

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

In the instant case, the Board instructed the Office on remand to determine the extent of appellant's October 30, 1997 employment injury and to make a determination regarding any period of disability associated with this injury. On July 31, 2000 the Office authorized compensation for temporary total disability for the period October 30 through November 2, 1997. At the time the Office issued its September 13, 2000 decision accepting that appellant's October 30, 1997 employment injury resulted in a left cervical strain and left trapezius injury and finding that her disability ceased on November 2, 1997, there was no medical evidence supporting continuing disability. As there was no medical evidence supporting continuing disability after November 2, 1997, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits as of that date.

As the Office met its burden to terminate appellant's compensation, the burden of proof shifted to appellant to establish any continuing disability due to her accepted October 30, 1997 injury. In this case, the record is devoid of any medical evidence or factual evidence, *i.e.*, claims for compensation (Form CA-7) relating any disability beyond November 2, 1997 due to the accepted October 30, 1997 employment injury. As appellant has failed to meet her burden of proof to establish any continuing disability due to her accepted October 30, 1997 employment injury, the Board finds that the Office properly determined that appellant was not entitled to compensation beyond November 2, 1997.

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

Section 8128(a) of the Federal Employees' Compensation Act<sup>8</sup> vests the Office with discretionary authority to determine whether it will review an award for or against compensation. Thus, the Act does not entitle a claimant to a review of an Office decision as a matter of right.<sup>9</sup>

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide 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.<sup>10</sup> Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for

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<sup>7</sup> *Id.*

<sup>8</sup> 5 U.S.C. § 8128(a) (“[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

<sup>9</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>10</sup> 20 C.F.R. § 10.606(b)(2).

reconsideration without reopening the case for a review on the merits.<sup>11</sup> When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>12</sup>

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

In the present case, the underlying issue of whether appellant had any disability on and after November 3, 1997 due to her October 30, 1997 employment injury is a medical issue. In support of her claim, appellant submitted a disability note dated October 9, 2002 by Dr. Wall who noted that appellant was disabled due to employment injuries sustained in 1995 and 1997. However, since Dr. Wall does not provide any opinion regarding appellant's condition after November 2, 1997, when she stopped work and filed her claim, this report is not relevant to the main issue of the present case and, therefore, is insufficient to warrant reopening appellant's claim for further review of the merits.<sup>13</sup> Thus, appellant did not submit any relevant and pertinent new medical evidence on this issue and, therefore, she did not meet the standard set forth at section 10.606(b)(2)(iii).

Appellant's request for reconsideration appears to be based on an allegation that the Office erred by failing to refer her for a second opinion evaluation directed by the Board. The prior decision by the Board, however, merely directed the Office to accept that appellant sustained an injury on October 30, 1997 and to determine the extent of her injury as well as a determination on any period of disability. The Office reviewed the evidence and properly determined the period of disability was from October 30 through November 2, 1997.

Appellant did not provide a valid legal argument or show that the Office erroneously applied or interpreted a point of law. The Office considered the evidence and issued a decision based on the evidence of record. The Board finds that appellant's July 11 and September 13, 2002 requests for reconsideration do not meet any of the standards set forth at section 10.606(b)(2) and, therefore, the Office properly denied the request without reviewing the merits of the claim.

### **CONCLUSION**

The Board finds that the Office properly found that appellant failed to meet her burden of proof in establishing any continuing disability or residuals due to her accepted October 30, 1997 employment injury after November 2, 1997. The Board further finds that the Office properly declined to reopen appellant's claim for consideration of the merits as she failed to submit the necessary evidence or argument to warrant review of the merits of her claim.

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<sup>11</sup> 20 C.F.R. § 10.608(b).

<sup>12</sup> *Annette Louise*, 54 ECAB \_\_\_\_ (Docket No. 03-335, issued August 26, 2003).

<sup>13</sup> *Kevin M. Fatzer*, 51 ECAB 407 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 25 and April 26, 2002 are affirmed.

Issued: March 22, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member