

FACTUAL HISTORY

On November 1, 2002 appellant, then a 44-year-old clerk, filed an occupational disease claim alleging that she developed bilateral upper extremity pain when she lifted letters repetitively while in the performance of duty. Her claim was accepted for bilateral upper extremity tendinitis. Appellant stopped work on October 29, 2002 and returned to a light-duty position on November 1, 2002 and worked intermittently thereafter. The Office requested that she submit CA-7 forms with supporting medical evidence to substantiate any claimed disability.

Appellant submitted a report from Dr. Robert P. Schiermeyer, a Board-certified orthopedist surgeon, dated October 29, 2002, who noted a history of her work-related injury and diagnosed chronic pain in her right forearm area. Thereafter, she came under the treatment of Dr. Gregory Hollar, an osteopath, who treated her from February 11 to May 28, 2003 and diagnosed bilateral upper extremity tendinitis secondary to repetitive motion injury and low back strain. He recommended physical therapy and noted that she could return to light-duty work. In reports dated March 31 to May 28, 2003, Dr. Hollar diagnosed a history of shoulder, neck and wrist pain. A magnetic resonance imaging (MRI) scan dated May 9, 2003 revealed straightening of the cervical lordosis suggesting a muscle spasm, but was otherwise unremarkable. A May 13, 2003 report from Dr. Karen Davis, an osteopath, noted treating appellant for chronic upper extremity tendinitis, neck and shoulder pain secondary to repetitive motions.

On August 19, 2003 appellant submitted a CA-7, claim for intermittent leave buy back for the period March 10 to 31, 2003. In a decision dated September 29, 2003, the Office denied her claim for leave buy back.

Thereafter, appellant submitted reports from Dr. Hollar dated June 22 and August 25, 2003, which noted his continued treatment for chronic pain of the neck and shoulders. His report of November 11, 2003 noted her complaint of shoulder pain and diagnosed chronic shoulder and arm pain. On December 11, 2003 Dr. Hollar treated appellant for right shoulder and right arm pain and advised that she could return to work subject to various restrictions. Also submitted were reports from Dr. R.K. Gadi, Board-certified in occupational medicine and rehabilitation, dated July 17 and September 17, 2003, who noted upon physical examination triggering over the bilateral upper trapezius and splenius capitis muscles. He diagnosed significant myofascial dysfunction, history of thyroid surgery and psychological symptoms. Dr. Gadi recommended that appellant work the afternoon shift, four days per week. In reports dated October 27 to December 29, 2003, he treated her for myofascial symptoms and overall fatigue. Dr. Gadi noted a normal physical examination.

On October 9, 2003 appellant submitted a CA-7, claim for eight hours of leave without pay for September 28, 2003. In a decision dated December 4, 2003, the Office denied her claim.

On December 22, 2003 the Office referred appellant for a second opinion evaluation by Dr. Richard Kim, a Board-certified orthopedic surgeon. In a report dated January 29, 2004, he indicated that he reviewed the records provided to him and performed a physical examination, which he noted was essentially normal. Dr. Kim opined that there were no residual effects of the work-related bilateral upper extremity tendinitis that occurred in October 2002. He noted that appellant's complaints were subjective and there were no significant objective findings other

than the implication of ulnar nerve dysfunction on the nerve conduction studies; however, the ulnar nerve dysfunction had no significant correlation with her work-related injury. He concluded that as she had no evidence of upper extremity tendinitis, she could return to work full time. Dr. Kim indicated that appellant had reached maximum medical improvement as of January 29, 2004 and would require no further care secondary to her injury of October 2002.

On January 8, 2004 appellant submitted a CA-7, claim for compensation for 40 hours of intermittent leave without pay for the period September 6 to December 29, 2003. In a decision dated February 23, 2004, the Office denied appellant's claim for compensation, except four hours of compensation for attending an appointment with Dr. Gadi on December 29, 2003.

On February 19, 2004 the Office issued a notice of proposed termination of compensation and medical benefits on the basis that Dr. Kim's January 29, 2004 reports established no continuing disability due to her employment injury.

Appellant submitted a report from Dr. Hollar dated November 14, 2003 which diagnosed chronic left shoulder pain with hand pain when lifting letters. He opined that her work-related injury caused chronic pain in her right arm, shoulder and armpit, difficulty when lifting her right arm and when grasping and lifting letters on a repetitive basis. Dr. Hollar advised that appellant continued to have chronic pain in her right arm and shoulder. In a February 26, 2004 report, he diagnosed right arm pain resolving. Dr. Hollar noted that appellant was working as a receptionist and was not experiencing arm pain at that time. He advised that he was never been able to substantiate all of her pain symptoms. Also submitted was a report from Dr. Gadi dated January 28, 2004, which noted symptoms of tightness in appellant's neck and upper back and triggering in the left mid trapezius muscles; however, her shoulder was improving.

On February 6, 2004 appellant submitted a CA-7, claim for 61.5 hours of intermittent leave with out pay for the period September 28, 2003 to February 13, 2004. In a decision dated March 24, 2004, the Office denied her claim for compensation.

On February 13, 2004 appellant filed a claim for 57.5 hours of intermittent leave without pay for the period March 28 to May 30, 2003. In a decision dated May 30, 2004, the Office denied her claim, except for four hours on March 28, 2003 and four hours on May 30, 2003 for attending medical appointments.

By decision dated March 23, 2004, the Office terminated appellant's compensation benefits effective March 23, 2004 on the grounds that Dr. Kim's report established that she had no continuing disability resulting from her employment injury.

In a letter postmarked May 30, 2004, appellant requested an oral hearing before an Office hearing representative.

In a decision dated June 22, 2004, 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 district Office and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim it has the burden of proof to justify 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 The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.³

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for bilateral upper extremity tendinitis and paid appropriate compensation. In December 2003, the Office referred appellant for a second opinion evaluation by Dr. Kim. In a report dated January 29, 2004, he reviewed appellant's history, reported findings on examination and noted that she exhibited no objective complaints or definite abnormality in her condition. Dr. Kim advised that x-rays, magnetic resonance imaging (MRI) scans and electrodiagnostic studies revealed no abnormality which would result in appellant's current subjective complaints. He opined that there were no residual effects of the work-related bilateral upper extremity tendinitis that occurred in October 2002. Dr. Kim further advised that all of appellant's complaints were subjective and there were no significant objective findings. He concluded that she had no evidence of upper extremity tendinitis and could return to work full time. Dr. Kim indicated that appellant had reached maximum medical improvement as of January 29, 2004 and would require no further care secondary to her injury of October 2002.

Appellant submitted numerous reports from Dr. Hollar, who noted appellant's continued treatment for chronic pain of the neck and shoulders. In a November 14, 2003 report, he opined that her work-related injury has caused chronic pain in her right arm, shoulder and armpit, difficulty when lifting her right arm and when grasping and lifting letters on a repetitive basis. In a report of December 11, 2003, Dr. Hollar noted treating appellant for right shoulder and right arm pain and advised that she could return to work subject to various restrictions. Although he generally indicated that her ongoing upper extremity condition was causally related to her employment, he noted that he had not been able to substantiate all her pain symptoms. The Board notes that on February 26, 2004 Dr. Hollar opined that appellant's right arm pain was resolving, but specifically stated that he had never been able to substantiate all of her pain symptoms. The Board finds that his opinion on causal relationship is vague and of diminished probative value.⁴

¹ *Eddie Franklin*, 51 ECAB 223 (1999); *Jeff M. Burns*, 52 ECAB 241 (1999).

² *Id.*

³ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

⁴ *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

Dr. Gadi diagnosed significant myofascial dysfunction, history of thyroid surgery and psychological symptoms. He noted treating appellant for myofascial symptoms and overall fatigue. The Board notes that Dr. Gadi did not specifically address how appellant's continuing conditions or medical restrictions were causally related to the accepted October 2002 claim. The Office never accepted that appellant sustained myofascial dysfunction or fatigue as a result of her federal employment and he provided insufficient medical opinion explaining how the myofascial symptoms and fatigue were caused or aggravated by the accepted bilateral upper extremity tendinitis.

The Board finds that the opinion of Dr. Kim is sufficiently well rationalized and based upon a proper factual background. It represents the weight of the evidence and establishes that appellant's work-related tendinitis resolved. Dr. Kim indicated that she did not have residuals from the condition of bilateral upper extremity tendinitis and that she could return to her regular duties.

For these reasons, the Office met its burden of proof in terminating appellant's compensation benefits.

LEGAL PRECEDENT -- ISSUE 2

A claimant has the burden of proving by a preponderance of the evidence, that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.⁵ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.⁶ The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.⁷

ANALYSIS -- ISSUE 2

In the instant case, appellant sustained bilateral upper extremity tendinitis while in the performance of duty. She stopped work on October 29, 2002 and returned to a light-duty position on November 1, 2002. Appellant claimed intermittent periods of disability.

Appellant submitted CA-7 forms requesting total disability benefits for 57.5 hours from March 28 to May 30, 2003 and 8 hours for September 28, 2003. The Office properly granted her leave for four hours on March 28, 2003 and four hours on May 30, 2003 for doctor's appointments as the record supports that she was getting treatment for her accepted condition during these hours. Appellant was properly granted compensation for these periods of wage loss. However, the Board finds that the medical evidence is insufficient to establish disability for work during the additional time claimed. In treatment notes from February 11 to May 28, 2003, Dr. Hollar diagnosed bilateral upper extremity tendinitis secondary to repetitive motion injury and low back strain and noted that appellant could return to work full-time light duty. In reports

⁵ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁶ *Id.*

⁷ See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

dated March 31 to May 28, 2003, he diagnosed a history of shoulder neck and wrist pain. Dr. Holler noted on June 22 and August 25, 2003 that appellant continued to experience chronic pain of the neck and shoulders. However, he did not support that she was totally disabled for work for the hours claimed. Rather, Dr. Holler advised that appellant could return to work full-time subject to various restrictions.

Appellant also requested disability for 40 hours of intermittent leave without pay for the period of September 6 to December 29, 2003 and 61.5 hours of intermittent leave without pay for the period September 28, 2003 to February 13, 2004. The record reflects that she attended a doctor appointment with Dr. Gadi on December 29, 2003 and was treated for her work-related condition. The Office properly granted for this time. The Board finds that the medical evidence is insufficient to establish temporary total disability for any additional time during these periods. In medical treatment notes dated November 11 and 14 and December 11, 2003, Dr. Hollar addressed appellant's complaint of shoulder pain and diagnosed chronic shoulder and arm pain. He returned her to work full time subject to various restrictions. In a report of February 26, 2004, Dr. Hollar diagnosed right arm pain resolving and opined that he was never able to substantiate all of appellant's pain symptoms. Other reports from Dr. Gadi dated July 17 and September 17, 2003 diagnosed significant myofascial dysfunction, history of thyroid surgery and psychological symptoms. In reports dated October 27 to December 29, 2003 and January 28, 2004, he noted treating appellant for myofascial symptoms and overall fatigue and noted a normal physical examination. Dr Gadi recommended that appellant work the afternoon shift, four days per week and supported total disability one day a week. Although he supported total disability one day a week, Dr. Gadi attributed appellant's disability to significant myofascial dysfunction, previous thyroid surgery and psychological symptoms. As noted, the Office has not accepted myofascial dysfunction, thyroid surgery or psychological symptoms as a result of her November 1, 2002 claim and there is no medical rationalized evidence to support such a conclusion.⁸

The Board notes further that the Office referred appellant to Dr. Kim for purposes of determining any continuing work-related condition or disability. His report clearly establishes that her disability had ceased as of his examination January 29, 2004 and Dr. Kim gave no support for any employment-related disability for any claimed periods prior to his examination.

The Office accepted that appellant attended doctor's appointments for treatment of her work-related injury on December 29, March 28 and May 30, 2003 and was granted a total of 12 hours of compensation for these days. The Board notes that the record supports that appellant was getting treatment for her accepted condition during these hours and that she was properly granted wage-loss compensation for these periods of disability. However, for other claimed periods of intermittent disability, appellant has not met her burden of proof by submitting reasoned medical evidence supporting that the disability was due to her accepted employment injury.

⁸ For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship. *Alice J. Tysinger*, 51 ECAB 638 (2000).

LEGAL PRECEDENT -- ISSUE 3

Section 8124(b)(1) of the Federal Employees' Compensation 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 or her claim before a representative of the Secretary."⁹ Section 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.¹⁰ 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.¹¹ 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, *Dr. Holler*), [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."¹²

ANALYSIS -- ISSUE 3

In the present case, appellant requested a hearing in a letter dated and post-marked May 30, 2004. Section 10.616 of the federal regulations provide: "The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought."¹³ As the postmark date of the request was more than 30 days after issuance of the March 24, 2004, Office decision, appellant's request for a review of the written record was untimely filed.

The Office notified appellant that it had 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.¹⁴ There is no

⁹ 5 U.S.C. § 8124(b)(1).

¹⁰ 20 C.F.R. §§ 10.616, 10.617.

¹¹ *Delmont L. Thompson*, 51 ECAB 155 (1999); *Eddie Franklin*, 51 ECAB 223 (1999).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

¹³ 20 C.F.R. § 10.616.

¹⁴ *Samuel R. Johnson*, 51 ECAB 612 (2000).

indication that the Office abused its discretion in this case in finding that appellant could further pursue the matter through the reconsideration process.

CONCLUSION

The Board finds that the Office has met its burden of proof to terminate appellant's compensation benefits effective March 23, 2004. The Board further finds that she has not met her burden of proof to establish that she was disabled for intermittent periods of September 6 to February 13, 2004 and from March 28 to May 30, 2004. Finally, the Board finds that the Office properly denied appellant's request for a hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the Office decisions dated June 22 and March 24, 23 and February 23, 2004, December 4 and September 29, 2003 are affirmed.

Issued: May 12, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
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