United States Department of Labor
Employees' Compensation Appeals Board

WANDA P. RAY-NESMITH, Appellant	)	
and	)	
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Jacksonville, FL, Employer	)	**Docket No. 06-197** **Issued: April 5, 2006**

Appearances:
Wanda P. Ray-Nesmith, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 2, 2005 appellant filed an appeal from the April 14, 2004 merit decision of the Office of Workers' Compensation Programs, terminating her medical and compensation benefits on the grounds that she had no residuals of her May 23, 2002 injury, the August 18, 2005 nonmerit decision denying appellant's request for reconsideration and the September 28, 2005 nonmerit decision denying appellant's request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, 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 and compensation benefits effective April 18, 2004, on the grounds that she had no further residuals due to her accepted May 23, 2002 employment injury; (2) whether the refusal of the Office to reopen appellant's case for further reconsideration on the merits pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion; and (3) whether the Office properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On May 23, 2002 appellant, a 46-year-old contact representative, filed a claim for traumatic injury alleging that she injured her back when she fell off her chair at work. Her claim was accepted for lumbar strain on July 24, 2002 and she was placed on the periodic rolls.

In a report dated June 13, 2003, Dr. Alan Smith, Board-certified in the area of family medicine, provided an assessment of low back pain and myofascial pain syndrome. His objective findings included spasm in the right paraspinal muscle, upper gluteal muscles and right latissimus dorsi muscles. He noted decreased range of motion in the lumbar spine, particularly with flexion and extension. On June 19, 2003 Dr. Smith diagnosed lumbar disc displacement, sciatica and lumbar disc disease. He opined that "the sprain/strain that resulted from the injury of May 23, 2002 has not resolved as this is not simply a sprain or strain, but has underlying injury as noted on the MRI [magnetic resonance imaging] [scan]." In a July 3, 2003 report, Dr. Smith found decreased range of motion on even slight flexion or extension of the lumbar spine.

The record contains an imaging report from Dr. Smith dated April 23, 2003 reflecting decreased disc space L5-S1, degenerative joint pressure between L4-5, L5-S1, left sciolic curve of lumbar spine and decrease of normal lordotic curve.

On July 10, 2003 the Office referred appellant, together with a statement of accepted facts and the medical record, to Dr. Steven Lancaster, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion as to whether there existed residuals from the May 23, 2002 work incident.

In a report dated July 30, 2003, Dr. Lancaster related appellant's medical history and job requirements. He noted that, although appellant complained of constant pain, she sat comfortably in a chair while conversing with him. Dr. Lancaster stated that the MRI scan showed a noncompressive disc protrusion at L3-4, but reflected no other impingements or herniations. His physical examination reflected a negative straight leg raise sign bilaterally at 90 degrees. Dr. Lancaster found that appellant had quadricepts at 5/5, dorsiflexors at 5/5 and deep tendon reflexes at 2+ bilaterally and symmetric in the ankle and knee areas. He indicated that she had full extension distally, that she could flex forward to 70 degrees and had full side rotation. Dr. Lancaster noted no spasms. He pointed out that there were no objective findings to support appellant's subjective complaints of severe pain and stated his belief that her complaints were overrated. Dr. Lancaster opined that appellant's lumbar strain/sprain had fully resolved and that she was able to return to work eight hours per day with restrictions. After reviewing appellant's job offer for a limited full-duty contract representative, Dr. Lancaster opined that the job was within appellant's work tolerance, so long as she could take 5- to 10-minute breaks every 30 minutes to 1-hour, in order to move around. He also recommended that appellant be limited to standing and walking for no more than 2 hours per day and from pushing, pulling and lifting no more than 10 pounds for no more than 2 hours per day. In an accompanying work capacity evaluation, Dr. Lancaster reiterated the above restrictions.

Appellant submitted physical therapy notes reflecting treatment for back pain. She also submitted a report of an MRI scan dated August 5, 2003.

The Office asked Dr. Lancaster to clarify his July 30, 2003 report regarding whether appellant's lumbar strain/sprain had resolved. In a supplemental report dated October 8, 2003, Dr. Lancaster stated that appellant's accepted lumbar strain had resolved.

At the request of the Office, Dr. Frank R. Collier, a Board-certified physiatrist, reviewed Dr. Lancaster's second opinion report and work capacity evaluation. On October 7, 2003 Dr. Collier agreed with Dr. Lancaster's recommended restrictions and opined that there was no reason that appellant could not work eight hours per day. Dr. Collier also indicated that upon examination, appellant demonstrated some guarding in lumbar motion and tenderness in the lumbar paraspinal region, but no progressive, focal neurologic deficits. He noted that she had ongoing mechanical back pain, but that she was at maximum medical improvement and was able to return to work with the restrictions outlined by Dr. Lancaster.

By letter dated March 8, 2004, the Office proposed to terminate appellant's compensation and medical benefits on the grounds that her current condition was not related to the May 23, 2002 injury and that the evidence demonstrated that she had no residuals causally related to the accepted injury. Appellant was given 30 days to submit additional evidence or argument in support of her case. No additional evidence was submitted.

By decision dated April 14, 2004, the Office terminated appellant's compensation and medical benefits effective April 18, 2004. The Office found that the weight of the medical evidence, which rested with Dr. Lancaster, established that appellant had no remaining residuals related to the May 23, 2002 injury.

On May 12, 2004 appellant requested an oral hearing. At the January 25, 2005 hearing, appellant alleged that the May 23, 2002 injury aggravated her preexisting arthritis. The hearing representative indicated that the record would be kept open for 30 days in order for appellant to submit medical evidence showing that her current condition was related to her accepted injury. No further evidence was submitted.

By decision dated April 21, 2005, the Office hearing representative affirmed the termination of benefits, finding that Dr. Lancaster's report established that appellant had no remaining residuals from her accepted injury.

On May 17, 2005 appellant requested reconsideration of the April 21, 2005 decision. Appellant submitted a report dated May 17, 2005 from Dr. Roger Menze, Board-certified in the area of emergency medicine, who indicated that appellant presented with "weakness," with no exact cause, as well as high blood pressure.

In a report dated May 31, 2005, Dr. Bradley G. Semegon, a chiropractor, indicated that he made chiropractic adjustments to relieve nerve pressure. He provided diagnoses of sciatica; L5 subluxation and spondylosis of the lumbar region. On a Form CA-20, Dr. Semegon indicated that appellant was unable to work.

Appellant also submitted psychotherapy notes from Dr. Marcie Turner, PhD, discharge instructions from Memorial Hospital, an undated note from Dr. Alpha Patel, a treating physician, indicating a referral to Dr. John Carey, Board-certified in family medicine, for pain management

and a form dated and signed by Dr. Carey on May 24, 2005 indicating that appellant was unable to work.

On August 18, 2005 the Office denied appellant's request for reconsideration, on the grounds that the evidence submitted was insufficient to warrant further merit review.

On August 23, 2005 appellant requested an oral hearing.

By decision dated September 28, 2005, the Office denied appellant's request for an oral hearing on the grounds that she had previously requested reconsideration and that the case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] 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 Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[4] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[5]

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits as of April 18, 2004.

Having accepted the condition of lumbar strain, the Office based its decision to terminate appellant's compensation on the opinion of Dr. Lancaster, who performed a second opinion examination. In a July 30, 2003 report, Dr. Lancaster opined that appellant's accepted lumbar sprain/strain had fully resolved and that she was able to return to work with restrictions. He noted that although appellant complained of constant pain, she sat comfortably in a chair while conversing with him. Dr. Lancaster stated that the MRI scan showed a noncompressive disc protrusion at L3-4, but reflected no other impingements or herniations. His physical examination reflected a negative straight leg raising sign bilaterally at 90 degrees. Dr. Lancaster found that

[1] *See Kathryn E. Demarsh*, 56 ECAB ___ (Docket No. 05-269, issued August 18, 2005). *See also Beverly Grimes*, 54 ECAB 543 (2003).

[2] *Id.*

[3] *James M. Frasher*, 53 ECAB 794 (2002).

[4] *See Kathryn E. Demarsh, supra* note 1. *See also Franklin D. Haislah*, 52 ECAB 457 (2001).

[5] *See Kathryn E. Demarsh, supra* note 1.

appellant had quadricepts at 5/5, dorsiflexors at 5/5 and deep tendon reflexes at 2+ bilaterally and symmetric in the ankle and knee areas. He indicated that she had full extension distally, that she could flex forward to 70 degrees and had full-side rotation. Dr. Lancaster noted no spasms. There were no objective findings to support appellant's subjective complaints of severe pain and Dr. Lancaster stated his belief that her complaints were overrated. Dr. Lancaster's report was thorough, well rationalized and based on an accurate factual history. The Board finds that Dr. Lancaster's opinion constituted the weight of medical evidence and was sufficiently rationalized to support the Office's decision to terminate appellant's compensation benefits.

Medical evidence submitted by appellant does not support that she had continuing disability after April 18, 2004. In his June 13, 2003 report, Dr. Smith opined that appellant's accepted condition had not resolved, in that it was "not simply a sprain or strain, but [had] an underlying injury." He noted decreased range of motion in the lumbar spine and diagnosed lumbar disc displacement, sciatica and lumbar disc disease. In his October 14, 2003 report, Dr. Smith again noted decreased range of motion on flexion and extension. However, he did not explain how appellant's current condition was causally related to her accepted employment injury,[6] nor did he indicate that appellant was disabled as a result of her alleged condition. Moreover, Dr. Smith provided negligible objective findings. Therefore, his reports are of diminished probative value.

The Board finds that the medical evidence of record establishes that appellant's residuals of her accepted condition resolved as of April 18, 2004. In his well-rationalized report, which was based on a proper factual background, Dr. Lancaster opined that appellant had no residuals from her accepted condition. He noted that there were no objective findings to support appellant's subjective complaints of severe pain. Dr. Lancaster's detailed findings on examination and his thorough explanation support his conclusion. On the other hand, appellant submitted no probative medical evidence prior to the termination supporting that she suffered residuals from that injury. Dr. Smith failed to explain how his objective findings of spasms and decreased range of motion in the lumbar spine related to appellant's accepted condition. On the

[6] Once the Office meets its burden of proof to terminate appellant's compensation benefits, the burden shifts to appellant to establish that she had disability causally related to her accepted injury. *See Manuel Gill*, 52 ECAB 282 (2001). To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship. *Id*. Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence. *See Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000). Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationalize explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Leslie C. Moore*, 52 ECAB 132 (2000). Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship. *See Ernest St. Pierre*, 51 ECAB 623 (2000).

contrary, he opined that appellant had an underlying condition and provided diagnoses of lumbar disc displacement, sciatica and lumbar disc disease. The Board notes that none of these diagnoses was accepted by the Office. Accordingly, the Board finds that the Office met its burden of proof to terminate appellant's medical benefits as of April 18, 2004.

LEGAL PRECEDENT -- ISSUE 2

The Federal Employees' Compensation Act[7] provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee may obtain this relief through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[8]

The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[9]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and is reviewed on its merits.[10] Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[11]

ANALYSIS -- ISSUE 2

The Board finds that the Office properly denied appellant's May 17, 2005 request for reconsideration. Appellant has not alleged or shown that the Office erroneously applied or interpreted a specific point of law. Nor has she advanced a relevant legal argument not previously considered by the Office. Moreover, the new evidence submitted by appellant in support of her request is not relevant to the underlying issue in this case. Therefore, appellant has failed to satisfy any of the standards provided in the Act's implementing regulations.

The underlying issue in this case is whether or not appellant had residuals due to her accepted employment injury on or after April 18, 2004. Dr. Turner opined that appellant was having problems adjusting to disability related to her accepted condition and suffered a major depressive episode. However, Dr. Turner failed to addressed how the newly diagnosed condition was related to the accepted employment injury. Therefore, her report is irrelevant. Similarly,

[7] 5 U.S.C. § 8101 *et seq.*

[8] 20 C.F.R. § 10.605.

[9] 20 C.F.R. § 10.606.

[10] *Donna L. Shahin*, 55 ECAB ___ (Docket No. 02-1597, issued December 23, 2003).

[11] 20 C.F.R. § 10.608.

reports from Drs. Carey and Patel provided diagnoses but no explanation as to how appellant's current condition was related to the accepted employment injury.[12] Discharge instructions from Memorial Hospital lack probative value, in that they do not provide any information regarding the reason for the hospital visit or history of injury. Dr. Menze's May 17, 2005 report also lacks probative value, due to its failure to provide a specific diagnosis or an opinion as to the cause of appellant's weakness.[13] The May 31, 2005 reports from appellant's chiropractor, Dr. Semegon, are not considered probative medical evidence, in that a chiropractor is considered a physician for purposes of the Act only where he diagnoses subluxation by x-ray.[14] There is no indication in the record that an x-ray was performed on appellant that supports a diagnosis of spinal subluxation. Moreover, appellant's claim was not accepted for a subluxation of the spine. Accordingly, Dr. Semegon's reports are also irrelevant. The Board finds that none of the medical evidence submitted in support of appellant's request for reconsideration is relevant to the underlying issue in this case.

As appellant's reconsideration request failed to meet any of the standards required by 20 C.F.R. § 10.606, the Board finds that the Office properly denied appellant's request for reconsideration.

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 her claim before a representative of the Secretary.[15] Sections 10.617 and 10.618 of the federal regulations implementing this section of the Act provide 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.[16] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[17]

[12] *Willa M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004).

[13] Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *Willie M. Miller*, 53 ECAB 697 (2002).

[14] 5 U.S.C. § 8101(2). Section 8101(2) of the Act provides as follows: (2) "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the secretary. *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. §§ 10.616, 10.617.

[17] *Claudio Vasquez*, 52 ECAB 496 (2002).

ANALYSIS -- ISSUE 3

The Board finds that the Office properly denied appellant's request for a hearing. Section 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.[18] Office regulations provided that a claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[19]

Appellant submitted a request for reconsideration on May 17, 2005. Therefore, when she made a request for an oral hearing on August 23, 2005, she was not entitled to a hearing as a matter of right. The Board finds that the Office properly exercised its discretion in denying appellant's hearing request and determining that her case could be addressed equally well by requesting reconsideration and submitting evidence not previously considered.

CONCLUSION

The Board finds that the Office properly terminated compensation and medical benefits on the grounds that appellant had no continuing employment-related residuals subsequent to April 18, 2004 and properly denied appellant's request for an oral hearing. The Board further finds that the Office properly denied appellant's May 17, 2005 request for reconsideration.

[18] *See* 5 U.S.C. § 8124(b).

[19] 20 C.F.R. § 10.616(a) (2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 28 and August 18, 2005 and April 14, 2004 are affirmed.

Issued: April 5, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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