United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 06-1249**
	)	**Issued: November 24, 2006**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Las Vegas, NV, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 8, 2006 appellant filed a timely appeal from an April 20, 2006 merit decision of the Office of Workers' Compensation Programs denying modification of a December 21, 2005 decision terminating her medical and wage benefits on the grounds that she had no residuals of her work-related orthopedic injury. She also appealed a March 24, 2006 decision, which denied a request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1). 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 her burden of proof to justify termination of appellant's compensation benefits effective December 21, 2005 for her accepted orthopedic condition; (2) whether she established that she had any continuing disability after December 21, 2005; and (3) whether the Office properly denied appellant's request for an oral hearing dated February 15, 2006.

FACTUAL HISTORY

On February 10, 2005 appellant, then a 44-year-old health technician, filed a traumatic injury claim alleging that she sustained a neck and back injury after falling from a chair on a newly waxed floor while in the performance of duty. The Office subsequently accepted the claim for lumbar strain and paid appropriate benefits.[1] Appellant stopped work on February 10, 2005 and did not return.

Appellant submitted an x-ray of the left knee dated February 10, 2005, which revealed no evidence of acute fracture or dislocation. An x-ray of the thoracic spine dated February 10, 2005 revealed moderate scoliosis with multilevel degenerative changes. An x-ray of the lumbosacral spine dated February 10, 2005 revealed moderate scoliosis, lumbar lordosis and mild anterolisthesis of L4 on L5. Appellant came under the care of Dr. Ioana M. Pahlevan, a Board-certified internist. In reports dated February 15 to 22, 2005, he noted a history of appellant's work injury and diagnosed back pain and diffuse headaches. Dr. Pahlevan indicated that appellant could return to work on March 7, 2005. A computerized tomography scan of the head dated February 17, 2005, revealed no abnormalities. A magnetic resonance imaging scan of the lumbar spine dated March 19, 2005 revealed a diffuse bulge at L1-2, L4-5 and mild degenerative changes. Appellant was also treated by Dr. John S. Thalgott, a Board-certified orthopedic surgeon, on April 1, 2005, who noted that appellant would be off work from April 1 to May 1, 2005.

On April 4, 2005 appellant submitted a Form CA-7, claim for compensation, for the period April 3 to 30, 2005.

In a letter dated April 8, 2005, the Office requested that appellant submit additional information including a comprehensive medical report from her treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by her had contributed to her claimed back injury. In a letter dated April 12, 2005, the Office requested additional information from Dr. Thalgott regarding appellant's work-related condition.

In a January 25, 2005 report, appellant submitted a report from Dr. Curtis W. Poindexter, Board-certified in physical medicine and rehabilitation, noted a history of a thoracolumbar strain due to a motor vehicle accident on November 19, 2004, chronic low back pain with evidence of symptom magnification and morbid obesity. Also submitted were reports from Dr. Walter M. Kidwell, a Board-certified anesthesiologist, dated April 14 to August 16, 2005. He noted a history of injury on February 10, 2005 and diagnosed low back pain after industrial-related axial injury to the low back from a fall, suspect facet joint mediated pain and possible disc mediated pain. Dr. Kidwell recommended facet joint injections and epidural steroid injections. In reports dated May 11 to 16, 2005, he noted that appellant's left-sided low back pain was completely resolved; however, she continued to experience radiating pain down the right side. Dr. Kidwell diagnosed low back pain, bilateral lower extremity pain after industrial injury, disc bulge at L4-5 and L5-S1 and depression. Appellant submitted additional reports from Dr. Thalgott dated April 1 to August 4, 2005, who noted a history of injury and diagnosed probable facet and

[1] The Office initially did not formally adjudicate the merits of the claim. After appellant claimed wage loss, the Office began developing the claim and, on April 27, 2005, accepted the claim for a lumbar sprain/strain.

myofascial pain and recommended physical therapy. On April 26, 2005 he diagnosed facet mediated back pain, myofascial back pain, sprain/strain and noted that appellant was totally disabled from April 26 to May 26, 2005. In reports dated May 24 and 26, 2005, Dr. Thalgott noted that appellant experienced a severe flare-up of pain after undergoing steroid injections and recommended additional physical therapy. He indicated in reports dated June 23 and August 4, 2005, that appellant was involved in a nonwork-related automobile accident on June 2, 2005, which caused neck and shoulder pain. Dr. Thalgott indicated that appellant was still symptomatic for her low back injury and advised that she was totally disabled from August 4 to September 15, 2005.

On July 27, 2005 the Office referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated August 22, 2005, Dr. Swartz discussed appellant's work history. He noted an essentially normal physical examination with no objective findings but evidence of symptom magnification. Dr. Swartz advised that appellant did not have residuals of her accepted work-related condition of low back strain. He noted that, on January 25, 2005, prior to the February 10, 2005 injury, appellant was found to have chronic back pain, evidence of symptom magnification and morbid obesity. Dr. Swartz noted that appellant had a previous injury to her back in November 2004. He opined that appellant's current diagnosis was medically connected to the February 10, 2005 work injury as an aggravation of the November 2004 injury and advised that this aggravation was temporary and resolved in approximately three weeks or by March 1, 2005. Dr. Swartz further opined that appellant had reached maximum medical improvement on March 1, 2005 and could return to work full time with restrictions on lifting.

In reports dated July 7 to October 11, 2005, Dr. Kidwell supported total disability due to her diagnosed condition of low back pain, radicular symptoms and discogenic pain at L4-5 and L5-S1. On September 20 and October 25, 2005 Dr. Thalgott noted that he disagreed with Dr. Swartz' evaluation and opined that appellant had not reached maximum medical improvement and remained totally disabled. He indicated that, although appellant had preexisting degenerative disease, her work-related condition had not resolved and he continued to support total disability due to her accepted low back sprain. Dr. Swartz recommended a functional capacity evaluation.

On November 14, 2005 the Office issued a notice of proposed termination of medical and compensation benefits for appellant's accepted lumbar strain on the grounds that Dr. Swartz report dated August 22, 2005 established no orthopedic residuals of the work-related employment injury.

In reports dated June 15 to December 5, 2005, Dr. Kidwell noted that appellant was treated conservatively with spinal injection therapy but still experienced low back pain. He found total disability due to appellant's diagnosed condition of low back pain and discogenic pain at L4-5 and L5-S1 and recommended a lumbar discography. On October 20 and November 22, 2005 Dr. Thalgott noted that appellant's condition was at a "standstill." Appellant was found totally disabled due to her diagnosed condition of low back pain. She submitted a nerve conduction study dated November 7, 2005, which revealed left posterior tibial motor neuropathy consistent with distal lesion.

By decision dated December 21, 2005, the Office terminated appellant's compensation benefits for the accepted lumbar strain effective that day. It found that the weight of the medical evidence established that appellant had no continuing orthopedic disability resulting from her accepted employment injury.

On February 15, 2006 appellant requested an oral hearing before an Office hearing representative. She submitted duplicative reports from Dr. Kidwell dated September 20, 2005 and Dr. Thalgott dated July 7, 2005.

In a decision dated March 24, 2006, the Office Branch of Hearings and Review denied appellant's request for an oral hearing as untimely. It found that, since appellant's February 15, 2006 request for an oral hearing was not made within 30 days of the Office's December 21, 2005 decision, she was not entitled to an oral hearing as a matter of right. 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.

In an undated letter appellant requested reconsideration and submitted additional medical evidence. She submitted reports from Dr. Kidwell dated May 11, 2005 and February 16, 2006. He noted that appellant displayed symptoms of lumbar discogenic pain and required a discogram and was totally disabled from work due to her lumbar condition.

In a decision dated April 20, 2006, the Office denied modification of the December 21, 2005 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] 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.[3] 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.[4]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar strain. She stopped work on the date of injury, February 10, 2005 and did not return. The Office terminated appellant's compensation effective December 21, 2005, based on Dr. Swartz' examination and report. The

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

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

[4] *Id.; Leonard M. Burger*, 51 ECAB 369 (2000).

Board finds, however, that there is a conflict in medical opinion between Dr. Swartz, the Office referral physician and Dr. Kidwell and Dr. Thalgott, appellant's treating physicians, as to whether she has residuals of her accepted condition.

Dr. Swartz opined that appellant did not have residuals of her accepted work-related condition of low back strain but exhibited evidence of symptom magnification and morbid obesity. He noted that the episode of February 10, 2005 was a temporary aggravation of a nonwork-related injury of November 2004 and resolved by March 1, 2005. Dr. Swartz opined that appellant had reached maximum medical improvement on March 1, 2005 and could return to work full time with restrictions on lifting. In contrast, Dr. Kidwell stated that appellant was totally disabled due to low back pain and radicular symptoms after the industrial injury with discogenic pain at L4-5 and L5-S1. Dr. Thalgott stated that he disagreed with Dr. Swartz' evaluation and opined that appellant's work-related lumbar condition had not resolved. He, too, supported total disability due to work-related lumbar strain. Dr. Kidwell and Dr. Thalgott supported disability related to appellant's lumbar strain, while Dr. Swartz found that she has no work-related residuals of the accepted injury and could return to full-time work. The Board, therefore, finds that a conflict in medical opinion has been created.

Section 8123 of the Federal Employees' Compensation Act[5] 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.[6] Because the Office relied on Dr. Swartz to terminate appellant's compensation without having resolved the existing conflict,[7] it failed to meet its burden of proof to terminate compensation benefits.

LEGAL PRECEDENT -- ISSUE 2

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."[8] 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.[9] 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.[10] The

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 39 (1994).

[7] *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).

[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. §§ 10.616, 10.617.

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

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.), H&R [Hearings and Reviews] will determine whether a discretionary hearing or review should be granted and, if not, will so advise the claimant, explaining the reasons."[11]

ANALYSIS -- ISSUE 2

In the present case, appellant requested an oral hearing on February 15, 2006. 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 the decision for which a hearing is sought."[12] As the request was made more than 30 days after issuance of the December 21, 2005 Office decision, appellant's request for an oral hearing was untimely filed. Appellant's request for an oral hearing was dated and postmarked February 15, 2006 and thus it is outside the 30-day statutory limitation. Therefore, the Office was correct in finding in its March 24, 2006 decision that appellant was not entitled to an oral hearing as a matter of right because her request was not made within 30 days of the Office's December 21, 2005 decision. Since appellant did not request an oral hearing within 30 days of the Office's December 21, 2005 decision, she was not entitled to an oral hearing under section 8124 as a matter of right.

While the Office also has the discretionary power to grant a hearing or review of the written record when a claimant is not entitled to a hearing or review as a matter of right, the Office, in its March 24, 2006 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for an oral hearing on the basis that the case could be resolved by submitting additional evidence to the Office in a reconsideration request. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.[13] In the present case, the evidence of record does not establish that the Office abused its discretion in denying appellant's request for an oral hearing. For these reasons, the Office properly denied appellant's request for an oral hearing under section 8124 of the Act.

CONCLUSION

The Board finds that the Office has not met its burden of proof to terminate benefits effective December 21, 2005. The Board further finds that the Office properly denied appellant's request for a hearing as untimely.

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

[12] 20 C.F.R. § 10.616.

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 20, 2006 and December 21, 2005 are reversed and the decision dated March 24, 2006 is affirmed.

Issued: November 24, 2006
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board