



of a cervical disc herniation. In a July 12, 2005 report, Dr. Robert Chouteau, a Board-certified orthopedic surgeon and an Office referral physician, reviewed the medical history, provided test results and findings on physical examination. Based on the report of Dr. Chouteau, the Office accepted the conditions of cervical spondylosis, lumbar and thoracic strain and sprain, lesions of the median and ulnar nerves in the right wrist and elbow, chondromalacia of the right patella and a torn medial meniscus and a left shoulder impingement syndrome. Effective January 27, 2005, appellant was placed on the periodic compensation rolls in receipt of temporary total disability.

In June 27 and September 26, 2005 reports, Dr. Frederick D. Todd, II, an attending Board-certified neurologist, provided a history of appellant's condition and findings on physical examination. He noted that an October 2004 magnetic resonance imaging scan revealed a central disc herniation at C3-4 with compression on her spinal cord. On October 20, 2005 appellant underwent cervical spine surgery performed by Dr. Todd. On April 26, 2006 Dr. Todd advised that appellant had complaints of back pain and had been referred to a pain management specialist. On December 6, 2006 he stated that appellant had no evidence of cervical radiculopathy or right upper extremity median or ulnar nerve neuropathies.

In an April 13, 2006 report, Dr. Charles D. Mitchell, a Board-certified orthopedic surgeon and an Office referral physician, reviewed the medical history and provided findings on physical examination. He found that there were no medical records available for the six months following appellant's surgery by Dr. Todd but it appeared that she had not undergone any comprehensive postoperative physical rehabilitation.

In a September 17, 2007 form report, Dr. Lorin J. Freedman, an attending Board-certified neurologist, stated that he had not discussed appellant's usual occupation with her so he could not assess whether she could resume work or at what level.

In a November 12, 2007 report, Dr. Alexander N. Doman, a Board-certified orthopedic surgeon and an Office referral physician, reviewed appellant's medical history and test results and provided findings on physical examination. Appellant had a good range of motion of the cervical spine and excellent shoulder range of motion. Rotator cuff strength was normal bilaterally. There was no effusion in appellant's right knee. Appellant was diffusely tender in a nonanatomical distribution over the right proximal tibia shaft. Collateral ligaments were intact. Anterior cruciate ligament testing was normal. Reflexes were normal in the upper and lower extremities. Straight leg raising was negative. Appellant had marked nonorganic physical findings with complaints of severe back pain with simple attempts to flex the left and right knees to as little as 40 degrees while in the prone position. X-rays of the lumbar spine, left shoulder and right knee were normal. X-rays of the cervical spine revealed solid fusion from C3-5 with plate fixation that was stable anteriorly at C3-4. Dr. Doman stated that appellant's right knee condition was fully resolved. Appellant's subjective complaints were out of proportion to the fact that there were no objective findings of a continuing right knee condition. Dr. Doman stated his opinion that appellant was intentionally exaggerating her complaints for purposes of secondary gain. Appellant's complaints of excruciating back pain with simple attempts to flex the knee to as little as 40 degrees while in the prone position had no organic basis. Dr. Doman found that appellant's cervical spine condition had resolved and she had an excellent result following her anterior cervical fusion surgery. Appellant's lumbar strain, chondromalacia of the right patella, right medial meniscus tear, ulnar and median nerve lesions and left shoulder

condition had resolved. Dr. Doman opined that appellant had no residuals of her October 14, 2004 employment injury. The only diagnosis related to her employment injury was malingering and Dr. Doman recommended a psychological evaluation.

By letter dated September 17, 2008, the Office advised appellant that it proposed to terminate her wage-loss compensation on the grounds that the weight of the medical evidence, as represented by the opinion of Dr. Doman, established that she had no remaining disability or medical condition causally related to her October 14, 2004 employment injury.

In a work capacity report dated June 4, 2008, Dr. Marsha Thigpen, an attending physician whose specialty is not indicated, stated that appellant continued to have symptoms of cervical and lumbar disc disease. She advised that appellant was totally disabled for an indefinite period of time. Dr. Thigpen did not indicate whether she had examined appellant and provided no findings on physical examination.

By decision dated December 9, 2008, the Office terminated appellant's wage-loss compensation effective December 21, 2008.

In an application received by the Office on January 14, 2009, appellant requested a review of the written record. She contended that Dr. Todd found her to be totally disabled.

In a February 9, 2009 decision, the Office denied appellant's request for a review of the written record on the grounds that it was not timely filed within 30 days of the December 9, 2008 decision. It exercised its discretion and determined that the issue in the case could be resolved equally well through a request for reconsideration and the submission of additional medical evidence.<sup>1</sup>

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

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.<sup>3</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate

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<sup>1</sup> The Board notes that, while this appeal was pending, the Office issued a May 6, 2009 decision denying appellant's request for reconsideration of the December 9, 2008 termination decision. Because the December 9, 2008 decision was on appeal to the Board when the Office issued its May 6, 2009 decision, that decision is null and void. See *Douglas E. Billings*, 41 ECAB 880 (1990) (holding that the only decisions of the Office which are null and void, because they were issued while the case was on appeal to the Board, are those decisions that change the status of the decision on appeal).

<sup>2</sup> *I.J.*, 59 ECAB \_\_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

<sup>3</sup> *J.M.*, 58 ECAB 478 (2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>4</sup> *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.<sup>5</sup>

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

Appellant's claim for an injury on October 14, 2004 was accepted for aggravation of a displaced cervical disc, cervical spondylosis, a lumbar and thoracic strain and sprain, lesions of the median and ulnar nerves in the right wrist and elbow, chondromalacia of the right patella and a torn medial meniscus and a left shoulder impingement syndrome. On October 20, 2005 appellant underwent cervical spine surgery performed by Dr. Todd. On April 26, 2006 Dr. Todd noted that appellant had continuing complaints of back pain and was referred to a pain management specialist. On December 6, 2006 he stated that appellant had no evidence of cervical radiculopathy or right upper extremity median or ulnar nerve neuropathies. There are no medical reports from Dr. Todd following her surgery that provide any findings on physical examination or an opinion regarding whether she had continuing disability or medical conditions causally related to her employment injury.

On April 13, 2006 Dr. Mitchell noted that there were no medical records available for the six months following appellant's surgery but it appeared that she had not undergone any comprehensive postoperative physical rehabilitation. He did not address the issue of whether appellant had any residuals of her October 14, 2004 employment injury. On September 17, 2007 Dr. Freedman stated that he was not able to assess appellant's capacity for work. Therefore, his report is not relevant to the issue of continuing work-related disability. On June 4, 2008 Dr. Thigpen stated that appellant continued to have symptoms of cervical and lumbar disc disease. She indicated that appellant was totally disabled for an indefinite period of time. However, Dr. Thigpen did not explain that she had examined appellant and made no findings on physical examination in support of her opinion. Therefore, her opinion of appellant's medical condition is of diminished probative value. Lacking objective findings on physical examination, Dr. Thigpen's opinion is not sufficient to establish that appellant has any continuing disability or medical condition causally related to her accepted medical conditions.

Dr. Doman reviewed appellant's medical history, diagnostic results and provided findings on physical examination. Appellant had good range of motion of the cervical spine and excellent shoulder range of motion. Rotator cuff strength was normal bilaterally. There was no effusion in appellant's right knee. Dr. Doman noted diffuse tenderness in a nonanatomical distribution over the right proximal tibia shaft. Collateral ligaments were intact and the anterior cruciate ligament testing was normal. Reflexes were normal in the upper and lower extremities. Straight leg raising was negative. X-rays of the lumbar spine, left shoulder and right knee were normal. X-rays of the cervical spine revealed a solid fusion from C3-5 with plate fixation that was stable anteriorly at C3-4. Dr. Doman stated that appellant's right knee condition was fully resolved. Appellant's subjective complaints were out of proportion to the fact that there were no objective findings of a continuing right knee condition.

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<sup>5</sup> *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

Dr. Doman advised that appellant was exaggerating her complaints as she described excruciating back pain with simple attempts to flex the knee while in the prone position. He stated that there was no organic basis for such complaints. Dr. Doman found that appellant's accepted cervical spine condition, lumbar strain, chondromalacia of the right patella, right medial meniscus tear, ulnar and median nerve lesions and left shoulder condition had resolved and that she had no residuals of her October 14, 2004 employment injury. The report of Dr. Doman is based upon a complete and accurate factual and medical background and detailed findings on physical examination. Dr. Doman is a Board-certified orthopedic surgeon, an appropriate field for evaluating appellant's accepted upper and lower extremity conditions. The Board finds that Dr. Doman's thorough and well-rationalized report established that appellant had no continuing disability or medical condition causally related to her October 14, 2004 employment injury. Accordingly, the Office met its burden of proof to terminate her wage-loss compensation effective December 21, 2008.

On appeal appellant contends that the reports of Dr. Todd, Dr. Freedman and Dr. Thigpen establish that she remains totally disabled due to her accepted conditions. As noted, the reports of these physicians are of reduced probative value to establish that she has continuing disability causally related to her accepted medical conditions.

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

Section 8124(b)(1) of the Federal Employees' Compensation Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section 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."<sup>6</sup> A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.<sup>7</sup> A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which the hearing is sought.<sup>8</sup> A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision for which the hearing is sought.<sup>9</sup> The Office has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>10</sup> In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.<sup>11</sup>

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<sup>6</sup> 5 U.S.C. § 8124(b)(1).

<sup>7</sup> 20 C.F.R. § 10.615.

<sup>8</sup> *Id.* at § 10.616(a).

<sup>9</sup> *James Smith*, 53 ECAB 188 (2001).

<sup>10</sup> 20 C.F.R. § 10.616(b).

<sup>11</sup> *James Smith*, *supra* note 9.

**ANALYSIS -- ISSUE 2**

Appellant's request for a review of the written record was received by the Office on January 14, 2009, more than 30 days after the Office's December 9, 2008 decision. Therefore, she was not entitled to a review of the written record as a matter of right. The Office exercised its discretion and determined that the issue in the case, whether appellant had any remaining disability or medical condition causally related to her October 14, 2004 employment injury, could be resolved through a request for reconsideration and the submission of additional evidence. The Board finds no evidence that the Office abused its discretion in denying her untimely request for a review of the written record in its February 9, 2009 decision.

**CONCLUSION**

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation effective December 21, 2008. The Board further finds that the Office did not abuse its discretion in denying her request for a review of the written record.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated February 9, 2009 and December 9, 2008 are affirmed.

Issued: March 19, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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