

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

C.R., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
LOUIS STOKES CLEVELAND MEDICAL)
CENTER, Brecksville, OH, Employer)

Docket No. 10-472
Issued: October 8, 2010

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 4, 2009 appellant timely appealed the June 8, 2009 merit decision of the Office of Workers' Compensation Programs, which terminated her compensation and medical benefits. She also timely appealed the Office's November 10, 2009 nonmerit decision, which denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective June 8, 2009; and (2) whether the Office properly denied appellant's October 14, 2009 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case was previously before the Board.¹ Appellant, a 64-year-old former nursing assistant, injured her back in the performance of duty on January 8, 1974.² Her claim was accepted for low back contusion, aggravation of discogenic pathology at L4-5, acute lumbosacral sprain, lumbar radiculitis and psychogenic overlay. The Office also approved a November 20, 1992 decompression laminectomy and removal of herniated disc at L4-5.³ It terminated appellant's compensation and medical benefits effective July 13, 2006. By decision dated September 7, 2007, the Board affirmed the termination of medical benefits with respect to the accepted condition of psychogenic overlay.⁴ However, the Board reversed the termination of wage-loss compensation and medical benefits with respect to appellant's orthopedic condition. The Board found that the Office failed to meet its burden to terminate benefits with respect to appellant's accepted orthopedic condition and approved surgery. The September 7, 2007 decision is incorporated herein by reference.

The Office paid appellant wage-loss compensation retroactive to July 14, 2006 and reinstated her on the periodic compensation rolls. On March 21, 2008 it requested that appellant provide updated medical information from her treating physician.⁵ When appellant did not respond, the Office referred her for a second opinion evaluation with Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon.

In a report dated February 3, 2009, Dr. Ghanma found that there was no current evidence of low back contusion, no evidence of acute lumbosacral strain with radiculitis and no current evidence of aggravation of discogenic pathology at L4-5 subsequent to decompression laminectomy. He noted that appellant had not recently received treatment for her back. On physical examination, there was no lumbar spasm or any focal, motor or sensory deficits. Dr. Ghanma found no evidence of any significant thigh or calf atrophy present. He noted that appellant had four positive Waddell's signs, which was indicative of abnormal illness behavior and symptom magnification.

With the exception of low back contusion, Dr. Ghanma believed it was unlikely that the other accepted conditions were connected to the work injury by direct cause, aggravation, precipitation or acceleration. He explained that the surgical intervention in 1992 occurred some

¹ Docket No. 07-1021 (issued September 7, 2007).

² She last worked in 1976.

³ Appellant had a recurrent L4-5 disc herniation following her Office-approved surgery. She was reportedly dropped from an ambulance stretcher on November 30, 1992. Despite evidence of a recurrent disc herniation, appellant was not considered a suitable candidate for further surgery.

⁴ Dr. Michael A. Kachmer, a Board-certified psychiatrist and Office referral physician, evaluated appellant on September 17, 1999 and found that she was not suffering from any significant psychiatric disorder at that time.

⁵ Dr. Steven A. Cremer, a Board-certified psychiatrist, authored the latest narrative report from a physician not otherwise associated with the Office. His January 14, 2004 findings were discussed in detail in the Board's September 7, 2007 decision. At the time, Dr. Cremer believed that appellant had ongoing residuals from her prior surgery.

18 years after the work injury, thereby making any direct connection by causation or aggravation highly unlikely. Dr. Ghanma stated that there was insufficient objective medical evidence to support that any of appellant's conditions were aggravated by the work injury despite the claim allowance.

As to the question of whether there were any residuals associated with the Office-approved surgery, Dr. Ghanma found there were none. While there was evidence of recurrent disc herniation at L4-5, he explained that it was unrelated to the November 20, 1992 surgery, but likely related to the degenerative disc disease that predated appellant's work injury. Dr. Ghanma also stated that there was insufficient evidence to support any degree of disability due to either preexisting or work-related conditions. He advised that appellant was capable of returning to work, but was unlikely to do so because of nonorganic factors. Dr. Ghanma stated that there was no need for physical restrictions if appellant were to return to work as a nursing assistant. He did not recommend any continued care for the allowed conditions because those conditions had resolved.

On May 4, 2009 the Office issued a notice of proposed termination of compensation and medical benefits based on Dr. Ghanma's February 3, 2009 report. It afforded her 30 days to submit additional evidence or argument. Appellant did not respond. In a June 8, 2009 decision, the Office terminated her monetary compensation and medical benefits that day.

On October 14, 2009 appellant's counsel requested reconsideration. He argued that the June 8, 2009 decision did not take into account all of appellant's allowed conditions. Counsel noted that, while Dr. Ghanma was an orthopedic surgeon, appellant's claim had also been accepted for a psychiatric condition -- psychogenic overlay. He contended that appellant should have been examined by an appropriate mental health specialist. Counsel requested that the June 8, 2009 decision be vacated, and that appellant be referred for further evaluation. Appellant's October 14, 2009 request for reconsideration was not accompanied by any additional medical evidence.

By decision dated November 10, 2009, the Office denied appellant's request for reconsideration. It found that appellant had already been referred to a psychiatric specialist on September 17, 1999 who determined that her work-related psychogenic overlay had resolved. Therefore, the argument raised was not relevant to the issue on which the termination decision was based.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁶ Having determined that an employee has a disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has either ceased or that it is no longer related to the employment.⁷ The right to medical benefits for an accepted condition is not limited to the period of entitlement

⁶ *Curtis Hall*, 45 ECAB 316 (1994).

⁷ *Jason C. Armstrong*, 40 ECAB 907 (1989).

to compensation for disability.⁸ 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.⁹

ANALYSIS -- ISSUE 1

On July 13, 2006 the Office terminated appellant's medical benefits with respect to her accepted condition of psychogenic overlay, which the Board affirmed by decision dated September 7, 2007. The Board's decision reversed the Office as to appellant's accepted orthopedic condition. When requested in March 2008, she did not submit any current medical evidence as to her employment-related orthopedic condition. The Office properly referred appellant for a second opinion evaluation.¹⁰

Dr. Ghanma examined appellant on February 3, 2009 and found that all of her accepted orthopedic conditions had resolved. He also found that there were no residuals from the November 20, 1992 Office-approved surgery. Dr. Ghanma explained that on examination appellant's only positive findings were Waddell's signs, which were in fact indicative of symptom magnification. According to him, appellant did not recommend any further medical treatment for her accepted orthopedic conditions and found that she was able to resume her previous nursing assistant duties without restriction. Dr. Ghanma noted that she had not received any recent treatment for her back. The Board notes that the last narrative report submitted by an attending physician was more than five years prior to the time Dr. Ghanma examined her in February 2009.

The Board finds that Dr. Ghanma's opinion is well rationalized and represents the weight of the medical evidence regarding appellant's orthopedic condition. Because appellant no longer has residuals or disability related to her accepted January 8, 1974 orthopedic injury and subsequent surgery, the Office properly terminated entitlement to wage-loss compensation and medical benefits effective June 8, 2009. Accordingly, the Office's decision to terminate appellant's compensation and medical benefits shall be affirmed.

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.¹¹ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.¹²

⁸ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁹ *Calvin S. Mays*, 39 ECAB 993 (1988).

¹⁰ *See* 20 C.F.R. § 10.320.

¹¹ 5 U.S.C. § 8128(a) (2006).

¹² 20 C.F.R. § 10.606(b)(2) (2009).

When an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application without reopening the case for a review on the merits.¹³

ANALYSIS -- ISSUE 2

On reconsideration, appellant's counsel argued that the June 8, 2009 decision terminating benefits did not take into account appellant's accepted condition of psychogenic overlay. Because Dr. Ghanma was an orthopedist and not a psychiatrist, counsel argued that the Office should have referred appellant to a mental health specialist. As noted, the Office had previously terminated appellant's entitlement to benefits with respect to the accepted condition of psychogenic overlay. The Board affirmed aspect of appellant's claim in the September 7, 2007 decision. Since then appellant did not submit any additional evidence of an ongoing employment-related psychiatric condition. The October 14, 2009 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Therefore, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁴ Appellant also failed to satisfy the third requirement under section 10.606(b)(2).¹⁵ She did not submit any relevant and pertinent new evidence with her October 14, 2009 request for reconsideration. Consequently, appellant is not entitled to a review of the merits of her claim.¹⁶

CONCLUSION

The Office properly terminated appellant's wage-loss compensation and medical benefits effective June 8, 2009. The Board further finds that the Office properly denied appellant's October 14, 2009 request for reconsideration.

¹³ *Id.* at § 10.608(b).

¹⁴ *Id.* at § 10.606(b)(2)(i) and (ii).

¹⁵ *Id.* at § 10.608(b).

¹⁶ *Id.* at § 10.608(b).

ORDER

IT IS HEREBY ORDERED THAT the November 10 and June 8, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 8, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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