

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

H.B., Appellant)	
)	
and)	Docket No. 13-1704
)	Issued: December 24, 2013
DEPARTMENT OF VETERANS AFFAIRS,)	
ALEXANDRIA, LOUISIANA HOSPITAL,)	
Alexandria, LA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 3, 2013 appellant filed a timely appeal from a February 28, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) and a May 30, 2013 nonmerit decision denying her request for a hearing before the Branch of Hearings and Review. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation benefits on the grounds that she no longer had any residuals or disability causally

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted additional evidence following the February 28, 2013 merit decision and May 30, 2013 nonmerit decision. The Board, however, may not consider new evidence for the first time on appeal which was not before OWCP at the time it issued its final decision. As the reports were not part of the record considered by OWCP in its February 28, 2013 decision, the Board may not consider this evidence for the first time on appeal. 20 C.F.R. § 501.2(c).

related to her accepted employment-related injuries; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely.

FACTUAL HISTORY

On August 2, 2007 appellant, then a 60-year-old nurse, sustained neck, back, shoulder and arm injuries from pushing and pulling a medication cart weighing up to 200 pounds over the course of three hours. She stopped work on August 8, 2007. On October 9, 2007 OWCP accepted the claim for sprain of neck and aggravation of brachial neuritis or radiculitis. Appellant returned to part-time light duty on December 3, 2007 and sought treatment with her physician, Dr. Gregory Bevels, Board-certified in family medicine.

On February 25, 2008 OWCP referred appellant to Dr. John Sandifer, a Board-certified orthopedic surgeon, for a second opinion regarding her current status and work ability.

In a March 17, 2008 report, Dr. Sandifer reported that appellant was pushing and pulling a heavy medicine cart on August 2, 2007 when she felt pain in her neck and shoulder blades. He obtained a history of an anterior cervical fusion in 2006 and that appellant had not worked since January 2008. Appellant complained of bilateral arm pain and numbness, noting that her symptoms were similar to those she had prior to her cervical spine surgery. Upon physical examination and review of medical reports and diagnostic testing, Dr. Sandifer diagnosed cervical strain with bilateral radiculopathies. He noted that there were no objective findings on examination. Objective testing revealed evidence of prior anterior fusion which was a preexisting problem that appellant had undergone surgery for.

On October 6, 2009 appellant initially elected Office of Personnel Management (OPM) benefits. On January 1, 2010 appellant elected FECA benefits, stopped work and was placed on the periodic rolls.

OWCP determined that a second opinion examination was warranted to confirm the extent and duration of appellant's accepted work injuries. It referred her, a statement of accepted facts, the case file and a series of questions to Dr. Austin Gleason, a Board-certified orthopedic surgeon.

In a February 23, 2010 report, Dr. Gleason noted by history that on October 12, 2006, appellant underwent a C5-6, C6-7 anterior cervical discectomy and fusion with plating as a result of a nonwork-related condition. Upon physical examination and review of prior medical reports, he diagnosed cervical sprain with residual pain in the thoracic spine, extreme weakness all over the body and status post anterior cervical discectomy and fusion at C5-6 and C6-7. Dr. Gleason reported that the only objective finding was surgery for cervical fusion. He noted that the functional capacity evaluation (FCE) failed to provide findings regarding any residuals to her cervical spine. Dr. Gleason noted that appellant's work injury was relatively minor which caused neck pain after pushing and pulling a cart over three hours. He noted that appellant was becoming weaker and weaker since the injury three and a half years ago. Dr. Gleason found no evidence of cervical radiculopathy or plexopathy and opined that there was no evidence to associate her current complaints to the August 2, 2007 incident of pushing and pulling a cart. He further stated that appellant also fell and injured her lumbar spine on August 17, 2008 which was not a compensable injury. While it was unclear what caused appellant's weakness all over her body, he recommended a complete neurological evaluation to rule out a stroke or other

underlying debilitating neurological problems. In a Form OWCP-5c, he noted that appellant was not capable of performing her usual job until she obtained a neurological/psychological evaluation.

By letter dated July 14, 2011, OWCP informed appellant that it had not received current medical documentation pertaining to her treatment. It requested that she provide a report from a physician addressing her work-related injury and current physical restrictions. No medical reports were received.

On July 23, 2012 OWCP referred appellant, a statement of accepted facts, the case file and a series of questions to Dr. Robert Holladay, IV, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In an August 14, 2012 report, Dr. Holladay provided a detailed medical history and summary of appellant's prior medical treatment. On August 2, 2007 appellant pushed and pulled a very heavy medicine cart which weighed up to 200 pounds when she began having pain in her neck radiating between her shoulder blades. Upon physical examination and review of the diagnostic testing, Dr. Holladay diagnosed neck pain, diabetes mellitus, diabetic neuropathy, anxiety, depression, mild-to-moderate obesity and postoperative anterior cervical disc and fusion C5-6, C6-7 on October 12, 2006. He stated that appellant had no objective physical examination findings to account for her consistent complaints of pain. Dr. Holladay further noted that Dr. Gleason also found no objective evidence of residuals from the August 2, 2007 employment incident. He advised that soft tissue sprains/strains resolve in a matter of a few months. Based upon the reported mechanism of injury and the accepted condition of a soft tissue strain/sprain, appellant's condition had long since resolved and she was physically capable of resuming her full-time unrestricted work activities as a nurse. He concluded that appellant's wide and varied subjective complaints were more likely related to co-morbid nonwork-related medical conditions.

By letter dated October 12, 2012, OWCP forwarded Dr. Holladay's report to Dr. Bevels, appellant's treating physician, for review and comments. No response was received.

On January 25, 2013 OWCP notified appellant of a proposal to terminate her compensation benefits based on Dr. Holladay's opinion that she no longer had residuals or disability connected to her August 2, 2007 employment injury. It provided her 30 days to submit additional information. No additional evidence was received.

By decision dated February 28, 2013, OWCP terminated appellant's compensation benefits effective March 10, 2013. It found that the weight of the medical evidence rested with Dr. Holladay who determined that appellant did not have residuals of her work-related injury.

On April 29, 2013 appellant requested review of the written record before the Branch of Hearings and Review. The appeal was postmarked on April 30, 2013.

By decision dated May 30, 2013, the Branch of Hearings and Review denied appellant's request finding that it was not made within 30 days of the February 28, 2013 OWCP decision. The Branch of Hearings and Review further determined that the issue in the case could equally

well be addressed by requesting reconsideration before OWCP and submitting evidence not previously considered addressing residuals of her August 2, 2007 injury.³

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁴ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁵ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁸

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for sprain of neck and aggravation of brachial neuritis or radiculitis due to an August 2, 2007 employment incident. On December 3, 2007 appellant returned to a part-time limited-duty position. She stopped work on January 1, 2010 and was placed on the periodic rolls.

OWCP requested medical evidence from appellant regarding her accepted conditions, noting that it had been an extended period of time since medical documentation had been received. As no new medical evidence was received, it referred appellant for a second opinion examination with Dr. Holladay.

Dr. Holladay found that appellant had no residuals of her accepted sprain of neck and that her condition had resolved. He based his opinion on examination findings and review of the medical records, which substantiated that appellant had received appropriate treatment and negative diagnostic testing. Based upon the reported mechanism of injury and the accepted condition of a soft tissue strain/sprain, appellant's work-related condition had resolved. He

³ The Board notes that appellant submitted additional evidence after OWCP rendered its May 30, 2013 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

⁴ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁵ *Id.*

⁶ *See Del K. Rykert*, 40 ECAB 284 (1988).

⁷ *Roger G. Payne*, 55 ECAB 535 (2004).

⁸ *Pamela K. Guesford*, 53 ECAB 726 (2002).

found that she was no longer disabled and was capable of performing her full-time unrestricted work activities as a nurse. OWCP relied on Dr. Holladay's opinion in its February 28, 2013 decision, finding that appellant had no residuals or disability causally related to her neck sprain.

The Board finds that Dr. Holladay's opinion is well rationalized and based on an accurate history, a review of the medical records and findings from physical examination. Dr. Holladay reviewed the statement of accepted facts and provided detailed findings regarding appellant's prior medical treatment and test results. He related his comprehensive examination findings in support of his opinions. Moreover, Dr. Holladay found no objective basis for residuals from the condition of neck sprain, which was also supported by the reports of Dr. Sandifer and Dr. Gleason. As there were no objective findings related to appellant's neck sprain condition, he opined that her wide and varied subjective complaints were more likely related to co-morbid nonwork-related medical conditions. Dr. Holladay noted that, based on the mechanism of injury from pushing and pulling a cart, the sprain would have resolved within a matter of months and was not the cause of her current condition more than five years later. Thus, he concluded that appellant did not have any work limitations as a result of the accepted August 2, 2007 employment incident and could resume her full-time unrestricted work activities as a nurse. Dr. Holladay's opinion is sufficiently probative, rationalized and based upon a proper factual background.⁹ The medical evidence establishes that appellant no longer has any residuals of her accepted neck sprain.

The Board finds that Dr. Holladay's opinion represents the weight of the medical evidence regarding appellant's accepted conditions. The Board also notes that there are no current reports from appellant's treating physicians establishing employment-related disability or supporting any continuing residuals of the accepted conditions.¹⁰ Because appellant no longer has residuals or disability related to her accepted employment conditions, OWCP properly terminated entitlement to wage-loss compensation and medical benefits effective March 10, 2013.¹¹ Accordingly, OWCP's met its burden of proof and its decision to terminate appellant's compensation and medical benefits shall be affirmed.¹²

On appeal, appellant argues that she is still under the care of Dr. Bevels as a result of her August 2, 2007 injury and that he is willing to provide any additional information needed. As noted, the issue of whether appellant has continuing disability causally related to her August 2, 2007 work injury is a medical issue which must be addressed by a physician. Appellant did not submit additional medical evidence prior to the February 28, 2013 merit decision terminating her benefits.¹³ OWCP contacted Dr. Bevels on October 12, 2012 to review and comment on the findings by Dr. Holladay but he did not respond.

⁹ *L.S.*, Docket No. 13-716 (issued June 4, 2013).

¹⁰ Following a proper termination of compensation benefits, the burden of proof shifts back to the claimant to establish continuing employment-related disability. *John F. Glynn*, 53 ECAB 562 (2002).

¹¹ *G.I.*, Docket No. 13-19 (issued April 2, 2013).

¹² *L.C.*, Docket No. 12-1177 (issued August 19, 2013).

¹³ *J.M.*, Docket No. 13-27 (issued April 11, 2013).

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

LEGAL PRECEDENT -- ISSUE 2

A claimant for compensation not satisfied with a decision by OWCP 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.¹⁴ According to 20 C.F.R. § 10.615, a claimant shall be afforded a choice of an oral hearing or a review of the written record.¹⁵ The regulations provide that a request for a hearing or review of the written record must be made within 30 days as determined by the postmark or other carrier's date marking, of the date of the decision.¹⁶ A claimant is not entitled to a hearing or a review of the written record as a matter of right if the request is not made within 30 days of the date of OWCP's decision.¹⁷ OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.¹⁸ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.¹⁹

ANALYSIS -- ISSUE 2

In the present case, appellant requested review of the written record on April 29, 2013 and OWCP found that the reconsideration request was postmarked on April 30, 2013. Appellant's request was made more than 30 days after the date of issuance of OWCP's prior decision dated February 28, 2013. Therefore, OWCP properly found in its May 30, 2013 decision that appellant was not entitled to an oral hearing or examination of the written record as a matter of right because her request for an oral hearing was not made within 30 days of its February 28, 2013 decision.²⁰

OWCP has the discretionary authority to grant a hearing if the request was not timely filed. In its May 30, 2013 decision, it considered the issue involved and properly exercised its discretion when it denied appellant's hearing request and determined that she could equally well address the issue of the termination of her benefits by requesting reconsideration and submitting evidence not previously considered which establishes that she continues to suffer residuals from her August 2, 2007 injury. The Board has held that the only limitation on OWCP'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

¹⁴ 5 U.S.C. § 8124(b)(1).

¹⁵ 20 C.F.R. § 10.615.

¹⁶ *Id.* at § 10.616(a).

¹⁷ *See James Smith*, 53 ECAB 188 (2001).

¹⁸ *Herbert C. Holley*, 33 ECAB 140 (1981).

¹⁹ *Id.*

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602 (May 1991).

deduction from established facts.²¹ In the present case, OWCP did not abuse its discretion in denying a discretionary hearing and properly denied appellant's request for an oral hearing under section 8124 of FECA.²²

CONCLUSION

The Board finds that OWCP met its burden of proof in terminating appellant's benefits effective March 10, 2013. The Board also finds that OWCP properly denied her request for review of the written record as untimely.

ORDER

IT IS HEREBY ORDERED THAT the February 28 and May 30, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 24, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

²¹ *Teresa M. Valle*, 57 ECAB 542 (2006); *Daniel J. Perea*, 42 ECAB 214 (1990).

²² *See Hubert Jones, Jr.*, 57 ECAB 467 (2006); *D.F.*, Docket No. 11-42 (issued August 1, 2011).