

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

K.R., Appellant

and

**DEPARTMENT OF THE ARMY,
TANK-AUTOMOTIVE COMMAND,
Warren, MI, Employer**

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**Docket No. 11-264
Issued: October 6, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 5, 2010 appellant filed a timely appeal of the May 10, 2010 merit decision by the Office of Workers' Compensation Programs (OWCP) terminating appellant's compensation and medical benefits.¹ Appellant's appeal was also timely filed from the July 7, 2010 decision denying her request for an oral hearing. Pursuant to the Federal Employees' Compensation Act and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on May 10, 2010, the 180-day computation begins May 11, 2010. 180 days from May 11, 2010 was November 8, 2010. Since using November 10, 2010, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is November 5, 2010, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective May 10, 2010 as she had no further employment-related residuals; and (2) whether OWCP properly denied appellant's request for an oral hearing.

FACTUAL HISTORY

On August 16, 1989 appellant, then a 56-year-old secretary, filed a traumatic injury claim alleging that, on August 14, 1989, while walking through a freight loading zone, she slipped and fell on an oily patch and sustained a fracture of her right wrist. On December 7, 1989 OWCP accepted her claim for right wrist fracture and herniated disc at L4-5. It paid medical and compensation benefits.

On March 19, 2009 OWCP referred appellant to Dr. Norman L. Pollak, a Board-certified orthopedic surgeon, for a second opinion. In a medical opinion dated April 2, 2009, Dr. Pollak opined that there were no current objective findings to support the residuals of any of the accepted conditions including left ankle sprain, left ankle contusion, left knee medial meniscus tear with surgery, right wrist fracture, lumbar strain, herniated disc L4-5 and right elbow epicondylitis. He noted that there did not appear to be any medical connection between appellant's current complaints and the accepted work-related injuries. Dr. Pollak opined that the complaints were secondary to nonwork-related conditions, specifically, chronic pain syndrome. He stated "There are no apparent residuals of work[-]related conditions still active that would preclude [appellant] from performing duties of date[-]of[-]injury job as a secretary/stenographer."

On December 10, 2009 OWCP proposed terminating appellant's compensation and medical benefits for the reason that the weight of the medical evidence established that she was medically capable of working without restrictions as a secretary/stenographer and that no further treatment was necessary for the conditions of leg ankle sprain, left ankle contusion, left knee medial meniscus tear, with surgery, right wrist fracture, lumbar strain, herniated disc at L4-5 and right elbow epicondylitis.

In an August 19, 2008 report, Dr. Craig Watson, a Board-certified neurologist of professorial rank, indicated that appellant had been a patient of his for a long time, was being treated for epilepsy and has had a left anterior temporary lobectomy and lesionectomy in March 2000. He noted that he was currently treating her with anti-seizure medications, which can have sedating side effects but was still prone to breakthrough seizures.

In a December 18, 2009 report, Dr. Gerald Sherman, a Board-certified otolaryngologist, indicated that appellant had brain surgery approximately three years ago for right acoustic neuroma, which resulted in a complete hearing loss in her right ear with some accompanying vertigo. He noted that she walked with the assistance of a cane. Dr. Sherman stated that, because of her recent surgery, her epilepsy and vertigo, she was not a candidate for the workplace and that he did not believe that she was capable of any time of work activity.

In a December 30, 2009 report, Dr. David H. Mendelson, a Board-certified orthopedic surgeon, listed appellant's diagnoses as left knee arthritis, low back pain, right wrist history of Colles' fracture with underlying trigger finger and left foot and ankle arthritis. He noted that her main problem is buckling and catching. Dr. Mendleson also noted that appellant has significant arthritis and medial joint space loss. He noted that she is a candidate for a knee replacement, but that she is not interested in this option. In a February 10, 2010 report, Dr. Mendleson indicated that appellant is disabled as she has multiple issues with both upper and lower extremities. He noted that walking is a risk and that sitting is a problem due to lumbar spine. Dr. Mendleson noted that appellant's hands are a problem as they limit her as a stenographer.

At Dr. Mendelson's request, appellant was evaluated on February 9, 2010 by Dr. Martin B. Kornblum, a Board-certified orthopedic surgeon. He noted that she was very pleasant, but that the examination was difficult due to pain. Dr. Kornblum listed his impression as cervical, thoracic and lumbar pain and radiculopathy. He requested an updated magnetic resonance imaging (MRI) scan.

On March 3, 2010 OWCP referred appellant to Dr. Robert Levine, a Board-certified orthopedic surgeon, to resolve the conflict between Dr. Mendelson and Dr. Pollak with regard to whether her continuing disability was causally related to her employment and the extent of her work-related injury.

A March 5, 2010 MRI scan was interpreted by Dr. Vivke Sehgal, a Board-certified radiologist, for Dr. Kornblum, a Board-certified orthopedic surgeon, as evincing central disc protrusion at L5-S1 and left neural foraminal disc protrusion with left neural foraminal narrowing at L2-3. In a March 8, 2010 report, Dr. Kornblum stated that appellant's MRI scan did not show severe findings. He stated that at this point he was going to recommend a pain management program. Dr. Kornblum stated that he was not inclined to offer appellant surgery based on the MRI scan findings and would see her on an as needed basis.

On April 1, 2010, Dr. Sheila Simpson, a Board-certified physiatrist, interpreted an electromyogram and nerve conduction study as showing severe electrodiagnostic evidence of bilateral L4-S1 radiculopathy, right greater than left, with the majority of the abnormalities seen at the L5-S1 levels. The abnormalities are more prominent on the right and they appeared acute and chronic. Dr. Simpson also noted severe electrodiagnostic evidence of a sensory and motor peripheral neuropathy, myelinopathic and axonopathic involving both lower extremities and are likely due to both the bilateral radiculopathy and the peripheral neuropathy. She also noted abnormal nerve conduction studies of the bilateral peroneal, posterior tibial and sural nerves.

In an April 2, 2010 opinion by Dr. Levine, the impartial medical examiner, listed his diagnoses of nonwork-related conditions as degenerative spondylosis lumbar and cervical spine; degenerative arthrosis both knees; degenerative arthrosis left ankle, balance problems secondary to acoustic neuroma removal, obesity, history of trigger fingers right hand and probable psychological factors affecting physical condition. He noted a history of sprain in the left ankle that had resolved that was work related by history. Dr. Levine also noted a history of right wrist fracture without original documentation that would have been work related. He noted that based on x-rays there was no residual of the reported fracture and that therefore at most it would have caused a temporary aggravation of wrist pain. Dr. Levine opined that there were no objective

findings to support continued residuals of appellant's accepted condition, noting that her ankle sprain and contusion had healed, that her torn meniscus has been removed and the herniated disc is not the result of the fall rather it is a degenerative process associated with normal aging. He opined that her current problems were degenerative in nature and that the lumbar spondylosis and arthritis in her knees and ankle has been aggravated and accelerated because she is obese. Dr. Levine agreed with Dr. Pollak that there are no current objective findings to support the residuals of any of the accepted conditions. He noted that there are no objective findings that would indicate the presence of a work-related disease process that would preclude appellant's performing a sedentary job. Dr. Levine concluded that, as her accepted conditions have resolved, no further treatment was needed. He stated that appellant's work restrictions are not related to her work-related problems.

By decision dated May 10, 2010, OWCP terminated appellant's compensation and medical benefits effective that date for the reason that the medical evidence of record established that she no longer demonstrated residuals or required medical treatment for the accepted work-related conditions of left ankle sprain, left ankle contusion, left knee medial meniscus tear with surgery, right wrist fracture, lumbar strain, herniated disc at L4-5 and right elbow epicondylitis.

By form dated June 9, 2010 and post-marked June 10, 2010, appellant requested an oral hearing.

By decision dated July 7, 2010, OWCP denied appellant's request for a hearing as it was untimely filed. It further reviewed the request and denied it at its discretion as it found that the issue could equally well be addressed by requesting reconsideration and submitting evidence not previously considered that established continuing disability related to the work injury of August 14, 1989.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or was no longer related to the employment.² OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

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, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵

² *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *see also C.B.*, Docket No. 10-1623 (issued April 11, 2011).

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁴ *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

⁵ *Id.*

Section 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁶ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that, as a result of her federal duties, appellant sustained a fracture of part of the right radius and an ulnar sprain of lumbosacral joint ligament, displacement of lumbar intervertebral disc without myelopathy and right later epicondylitis. It paid wage-loss compensation and medical benefits. OWCP may not terminate compensation without establishing that appellant's disability ceased or was no longer related to her employment.⁸ It may not terminate medical benefits without showing that she no longer has residuals from the accepted injury that require further treatment.⁹

The Board finds that OWCP properly found a conflict in medical opinion arose between Dr. Mendelson, appellant's treating physician, and Dr. Pollak, the second opinion physician with regard to whether she still had residuals from her accepted employment injuries. Dr. Mendelson opined that appellant was still disabled as she had multiple issues with both her upper and lower extremities. Dr. Pollak opined that there did not appear to be any medical connection between her current complaints and the accepted work-related injuries and declared that there were no apparent residuals for work-related conditions that would preclude her from performing the duties of her date of employment position. In order to resolve the conflict, OWCP referred appellant to Dr. Levine for an impartial medical examination.

In a well-rationalized opinion, Dr. Levine opined that appellant's accepted conditions had resolved and that no further treatment was needed. He stated that her work restrictions are not related to her work problems. In reaching this conclusion, Dr. Levine noted that x-rays showed that there is no residuals of the reported fracture of appellant's right wrist and that at most the work injury resulted in a temporary aggravation of wrist pain. He noted that her ankle sprain and contusion had healed and that her torn meniscus had been removed. Dr. Levine opined that appellant's current problems were the result of normal aging and her obesity. Accordingly, he provided a well-rationalized opinion finding that she no longer had residuals as a result of her accepted work condition.

⁶ 5 U.S.C. § 8123(a).

⁷ *R.C.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, *supra* note 4.

⁸ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁹ *T.P.*, *supra* note 4.

The remaining medical reports are not sufficient to overcome the weight accorded the opinion of the impartial medical specialist. Drs. Watson and Sherman addressed appellant's ability to work with regard to the nonwork-related issues of epilepsy, hearing loss and vertigo; these physicians did not find that she had any disability or residuals with regard to her accepted conditions. Drs. Kornblum and Simpson also did not provide an opinion with regard to continuing residuals from her employment injury. Accordingly, as the case was referred to Dr. Levine as an impartial medical examination to resolve the conflict in the medical evidence, his well-rationalized opinion represents the special weight of the medical evidence and the Board find that OWCP properly terminated appellant's compensation benefits.¹⁰

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.¹¹

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.¹² 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.¹³ 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.¹⁴ 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.¹⁵ OWCP as discretion, however, to grant or deny a request that is made after this 30-day-period.¹⁶ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.¹⁷

¹⁰ *R.C., supra* note 7.

¹¹ The Board notes that appellant submitted additional evidence after OWCP rendered its May 10, 2010 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision and therefore this additional evidence cannot be considered on appeal. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 35 ECAB 36 n.2 (1952).

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. § 10.615.

¹⁴ *Id.* at § 10.616(a).

¹⁵ *See James Smith*, 53 ECAB 188 (2001).

¹⁶ *Herbert C. Holey*, 33 ECAB 140 (1981).

¹⁷ *Id.*

ANALYSIS -- ISSUE 2

In the present case, OWCP issued its decision terminating appellant's compensation and medical benefits on May 10, 2010. The postmark for her request for an oral hearing is June 10, 2010. As appellant's request was made more than 30 days after the date of issuance of OWCP's decision, OWCP properly found in its July 7, 2010 decision that she was not entitled to an oral hearing as a matter of right because her request for an oral hearing was not made within 30 days of its May 10, 2010 decision.¹⁸

Although appellant's request for a review of the written record was untimely, OWCP has the discretionary authority and it must exercise such discretion.¹⁹ In its July 7, 2010 decision, OWCP reviewed her request and denied it at its discretion as it found that the issue could equally well be addressed by requesting reconsideration and submitting evidence not previously considered that established continued disability related to the work injury of August 14, 1989. The Board has held that the only limitation on OWCP's authority is reasonableness and an abuse of discretion that 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.²⁰ In this case, the Board finds that the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request for an oral hearing.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective May 10, 2010 as she had no further employment-related residuals. The Board further finds that OWCP properly denied her request for an oral hearing.

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602 (May 1991).

¹⁹ See *Cora L. Falcon*, 43 ECAB 915 (1992).

²⁰ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 7 and May 10, 2010 are affirmed.

Issued: October 6, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board