

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

S.S., Appellant

and

**U.S. POSTAL SERVICE, EASTSIDE STATION,
Savannah, GA, Employer**

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**Docket No. 06-1264
Issued: February 20, 2007**

Appearances:

*Glenn Smith, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 24, 2006 appellant filed a timely appeal from a September 6, 2005 merit decision of the Office of Workers' Compensation Programs terminating her benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case. The Board also has jurisdiction to review the Office's January 20, 2006 nonmerit decision denying reconsideration.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's medical and wage-loss compensation benefits effective September 6, 2005, on the grounds that she had no further residuals due to her accepted March 1, 2004 employment injury; and (2) whether the refusal of the Office to reopen appellant's case for further reconsideration on the merits pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

FACTUAL HISTORY

On March 11, 2004 appellant, a 54-year-old casual letter carrier,¹ filed a traumatic injury claim alleging that she injured her knees on March 1, 2004 when she stepped in a gopher hole and fell over a tree stump.² The Office accepted the claim for bilateral knee sprain and authorized arthroscopic left knee surgery, which was performed on September 23, 2004. Appellant was placed on the periodic rolls for temporary total disability effective July 11, 2004.

In an October 8, 2004 report, Dr. Mark A. Winchell, a treating Board-certified orthopedic surgeon, opined that appellant was doing well following the arthroscopic surgery. A physical examination revealed no calf pain, no significant effusion or crepitants and “good range of motion with some minimal stiffness.” He reported appellant was healing well from the surgery and released her to return to work in early November. In an accompanying work capacity evaluation form (FORM OWCP-5c), Dr. Winchell released appellant to full duty effective November 1, 2004.

On December 8, 2004 the Office issued a notice of proposed termination of compensation benefits. The Office proposed to terminate appellant’s wage-loss and medical compensation benefits based on Dr. Winchell’s report.

In response, appellant submitted reports dated December 22, 2004 and March 18, 2005, by Dr. Winchell and a January 26, 2005 functional capacity evaluation (FCE). On December 22, 2004 Dr. Winchell noted a good range of motion in the knee with no instability or crepitants. Appellant reported leg pain and “her leg gives out on her fairly regularly.” Dr. Winchell diagnosed “[l]eft knee pain of unknown origin” post knee arthroscopy. On March 18, 2005 he diagnosed “left knee patellofemoral arthritis exacerbated by long distance walking and stress related to her [employing establishment] training.” A physical examination revealed good left knee “range of motion with some patellofemoral crepitants.” Dr. Winchell concluded that appellant was capable of working with restrictions including lifting no more than 56 pounds and limited stair climbing and walking.³ The latter restrictions on stair climbing and walking were to reduce “her likelihood of arthritis progression.”

In a July 11, 2005 report, Dr. Winchell concluded that appellant’s knee strain had resolved. He related that appellant “most likely had an underlying patellofemoral degenerative problem” which had been aggravated by activity required in her job training. Dr. Winchell stated that “[t]his would explain the synovitis, her intermittent stiffness and patellofemoral pain.” He opined that appellant was capable of performing her date-of-injury job with restrictions. Dr. Winchell noted that the physical restrictions were due to her preexisting arthritic condition and were unrelated to her accepted knee strain. He reported that appellant had been discharged from his care.

¹ Appellant had been in the position approximately three weeks prior to sustaining her injury.

² The employing establishment terminated appellant’s employment effective June 25, 2004.

³ On June 3, 2005 the employing establishment offered appellant a modified job based upon the restrictions set by Dr. Winchell. Appellant rejected the job offer.

In letters dated July 25 and August 1, 2005 appellant's counsel requested that the Office expand her claim to accept a consequential emotional condition.

On August 3, 2005 the Office issued notice of proposed termination of benefits. It proposed to terminate appellant's wage-loss and medical compensation benefits based on Dr. Winchell's July 11, 2005 report.

On August 3, 2005 the Office received a statement detailing her claim of a hostile work environment and discrimination by her supervisor. In a June 6, 2005 report, Dr. Daniel B. Nagelberg, Ph.D., a licensed clinical psychologist, opined that appellant's "emotional problems appear directly related to her work-related injury (left knee)." Dr. Nagelberg also attributed the emotional condition to alleged discrimination appellant suffered at the employing establishment before her termination by the employing establishment.

Appellant subsequently submitted additional factual and medical evidence. She attributed her depression to harassment and discrimination following her knee injury. In a May 12 2005 report, Dr. Nagelberg noted appellant's medical history, employment history and diagnosed depression.

In a letter dated August 11, 2005, the Office informed appellant that she must continue to pursue her emotional condition claim under the occupational disease claim she filed. In a letter dated August 29, 2005, appellant disagreed with the Office regarding her claim for a consequential injury and requested a hearing.

In a letter dated August 29, 2005, appellant disagreed with the proposal to terminate her compensation benefits. She submitted factual and medical evidence regarding her ability to work with restrictions.

By decision dated September 6, 2005, the Office finalized the termination of appellant's wage-loss and medical benefits compensation.⁴ With respect to her claim for compensation due to her emotional condition, the Office advised appellant to pursue this under the occupational disease claim she filed.

In a letter dated November 17, 2005, appellant's counsel requested reconsideration of the termination of her benefits.⁵ She submitted a March 18, 2005 report from Dr. Winchell and an August 31, 2005 statement regarding prior earnings.

⁴ On October 5, 2005 appellant filed a claim for a schedule award. In a letter dated November 1, 2005, informed appellant that she was not entitled to a schedule award due to the decision terminating her benefits on September 6, 2005. She was advised to follow the appeal rights to the September 6, 2005 decision terminating her compensation benefits.

⁵ In a separate letter dated November 17, 2005, appellant's counsel requested the Office adjudicate the issue of appellant's pay rate. As the Office did not issue a final decision with regard to the pay rate issue, the Board does not have jurisdiction over the matter. *See* 20 C.F.R. § 501.2(c); *see also Karen L. Yaeger*, 54 ECAB 323 (2003). (The Board's jurisdiction is limited to reviewing final decisions of the Office).

By nonmerit decision dated January 20, 2006, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁶ After it has determined that an employee has disability causally related to 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.⁷ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

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 appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁹

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a bilateral knee sprain and authorized left knee arthroscopic surgery, which was performed on September 23, 2004. It based its decision to terminate her benefits upon medical evidence from Dr. Winchell, a treating physician.

The Board finds that the medical evidence of record supports the termination of appellant's medical and wage-loss compensation benefits. The medical evidence consists of reports from Dr. Winchell, a treating physician. He found that she has no ongoing residuals of her accepted bilateral knee sprain. Dr. Winchell reported normal range of motion in the knee. He provided physical restrictions for appellant in a March 18, 2005 report. However, in a July 11, 2005 report, Dr. Winchell concluded that any restrictions he set were due to appellant's preexisting arthritic condition and not her accepted employment injury. In support of this conclusion, he stated that her employment job training after her return to work, most likely aggravated an underlying patellofemoral degenerative problem. Dr. Winchell opined: "[t]his would explain the synovitis, her intermittent stiffness and patellofemoral pain." He concluded that her employment-related condition had resolved. The Board finds that Dr. Winchell's opinion establishes that appellant has no residuals or continuing disability due to her accepted bilateral knee sprain. The record is devoid of any medical evidence supporting that appellant continues to suffer from an employment-related knee condition.

⁶ *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ *Elsie L. Price*, 54 ECAB 734 (2003).

⁸ *See Del K. Rykert*, 40 ECAB 284 (1988).

⁹ *James F. Weikel*, 54 ECAB 660 (2003).

The record contains reports from Dr. Nagelberg diagnosing depression. He attributed her condition to her left knee injury and work harassment and discrimination. This condition has not been accepted by the Office. Dr. Nagelberg's reports contain insufficient medical reasoning explaining how appellant's depression was caused or aggravated by the accepted employment injury. In addition, Dr. Nagelberg attributed her condition to harassment and discrimination, employment factors which were not part of her original traumatic injury claim. His opinion that appellant's depression was employment related is conclusory and contains no medical reasoning explaining the causal relationship between appellant's condition and the accepted knee condition. The Board has held that a medical opinion not fortified by medical rationale is of diminished probative value.¹⁰ Dr. Nagelberg's opinion is insufficient to support any continuing residuals from appellant's accepted bilateral knee injury.

The Board finds that Dr. Winchell's opinion that appellant's employment-related conditions had resolved constitutes the weight of the medical evidence. Accordingly, the Office met its burden of proof to justify termination of compensation benefits.

LEGAL PRECEDENT -- ISSUE 2

The Federal Employees' Compensation Act¹¹ under section 8128(a) provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.¹² The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.¹³

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹⁴

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.¹⁵ A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on

¹⁰ *Cecelia M. Corley*, 56 ECAB ____ (Docket No. 05-324, issued August 16, 2005).

¹¹ 5 U.S.C. §§ 8101 *et seq.*

¹² 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB ____ (Docket No. 06-121, issued June 6, 2006).

¹³ 20 C.F.R. § 10.605.

¹⁴ *Id.* at § 10.606. *See Susan A. Filkins*, 57 ECAB ____ (Docket No. 06-868, issued June 16, 2006).

¹⁵ *Id.* at § 10.607(a). *See Joseph R. Santos*, 57 ECAB ____ (Docket No. 06-452, issued May 3, 2006).

its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁶

ANALYSIS -- ISSUE 2

Appellant's November 17, 2005 request for reconsideration neither alleged, nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office.

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted a March 18, 2005 report by Dr. Winchell and an August 31, 2005 statement regarding her prior earnings. The Board finds that Dr. Winchell's report is duplicative of those previously considered. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing the claim and does not constitute a basis for reopening a case for further merit review.¹⁷ While the statement regarding appellant's prior earnings is new, it is not relevant to the issue at hand. The issue is whether the Office properly terminated appellant's compensations benefits since her accepted bilateral knee sprain had resolved. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.¹⁸

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her November 17, 2005 request for reconsideration.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's medical and wage-loss compensation benefits. The Board further finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁶ *Id.* at § 10.608(b). See *Candace A. Karkoff*, 56 ECAB ____ (Docket No. 05-677, issued July 13, 2005).

¹⁷ *Betty A. Butler*, 56 ECAB ____ (Docket No. 04-2044, issued May 16, 2005); *Daniel M. Dupor*, 51 ECAB 482 (2000).

¹⁸ *D'Wayne Avila*, 57 ECAB ____ (Docket No. 06-366, issued June 21, 2006).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 20, 2006 and September 6, 2005 are affirmed.

Issued: February 20, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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