U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BILLIE SUE KING and DEPARTMENT OF THE ARMY, McALESTER ARMY AMMUNITION PLANT, McAlester, Okla.

Docket No. 96-1809; Submitted on the Record;
Issued July 28, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for a second back surgery; (2) whether the Office properly denied appellant's request for reconsideration of the denial of surgery decision on its merits under 5 U.S.C. § 8128; and (3) whether the Office properly terminated appellant's entitlement to continuing compensation on the grounds that she refused an offer of suitable work.

On March 8, 1994 the Office accepted that appellant, a 50-year-old munitions handler, sustained a lumbar strain on October 19, 1993 after pulling 500 to 2,000-pound bombs.

A June 6, 1994 discographic study revealed a herniated nucleus pulposus at L4-5, degenerative disc disease at L4-5, and a central posterior annular tear at L4-5 which caused severe back pain with right buttock radiation. Post-discogram computerized tomography (CT) demonstrated degeneration of both the L4-5 and L5-S1 discs. Slight bulging of the L4-5 disc annulus in the midline was also noted.

The Office medical adviser, Dr. Don W. Vanderpool, a Board-certified orthopedic surgeon, recommended an L4-5 discectomy, indicated that the recommended surgical procedure was related to the "accepted work-related condition," and noted that the "diagnosed condition, (degenerative disc disease, L4-5, with central disc protrusion)" warranted surgical intervention.

On November 16, 1994 appellant underwent a L4-5 discectomy, bilateral transverse fusions and pedicle screw fixation for an L4-5 degenerative disc with midline protrusion. About a month after her discectomy and fusion, while recouperating at home appellant became dizzy, fainted and fell backwards, causing further back pain, sustaining multiple annular tears at L5-S1.

A December 8, 1994 x-ray of the lumbar spine noted post-surgical changes at the L4-5 level with good alignment, and a suspicious rounded osteoblastic lesion present in the right

pelvis superior to the acetabulum.[1] January 31, 1995 x-rays provided the same impression. An April 13, 1995 x-ray was reported as showing pedicle screw fixation of L4 to L5 with lateral graft material in place, and with no real change from the January 31, 1995 films.

Dr. Christopher G. Covington, appellant's Board-certified operating neurosurgeon, noted on May 16, 1995 that appellant's low back pain was getting much worse, noted that she had experienced a downhill course over the preceding several months despite the fact that her x-rays looked very good, and opined that further diagnostic studies were necessary at L3-4, L4-5, and L5-S1. Dr. Covington explained that if those tests were normal, he would proceed with surgical exploration of the fusion and removal of the instrumentation, speculating that perhaps it was the instruments themselves that were causing appellant's discomfort.

On June 14, 1995 appellant was evaluated by Dr. Frank J. Tomecek, a Board-certified neurosurgeon, who noted her history of an L4-5 fusion with fixation, her postoperative fall, and her subsequently worsening back pain. He noted that upon x-ray, the fusion appeared to be "slowly healing but certainly not yet completely intact," with the instrumentation solid and in normal position. Dr. Tomecek noted that the discogram showed a fairly normal L3-4 level with very little pain response, a very degenerative disc pattern at L4-5 with much greater pain, and multiple annular tears and pain at L5-S1. He recommended that appellant undergo a fusion exploration and that, if healed, she should have a fusion with discectomy at L5-S1. Dr. Tomecek opined that, if the fusion was not healed, appellant should undergo an L4 to the sacrum decompression and fusion. He renewed her narcotic prescription because "she is still in considerable pain."

On August 23, 1995 the Office prepared a statement of accepted facts, noting that the condition of degenerative disc disease was not accepted as being work related, and requested that Dr. Vanderpool opine whether the proposed second surgery was related to the accepted work-related condition. The Office indicated that the accepted condition as "lumbar strain," and that it later "upgraded" it to L4-5 disc protrusion. It did not include any information on appellant's subsequently sustained postoperative fall and resultant L5-S1 multiple annular tears, or on the osteoblastoma detected in December 1994.

On August 24, 1995 Dr. Vanderpool opined that the degenerative disc disease at L5-S1 was not related to the accepted condition of L4-5 disc protrusion. He further noted that appellant had a postoperative fall which increased her low back pain, and stated that evaluation showed a good fusion at L4-5 but degenerative disc disease at L5-S1.

On September 14, 1995 the Office referred appellant, with the statement of accepted facts, to Dr. Karl F. Sauer, a Board-certified orthopedic surgeon, with a request that he evaluate whether the proposed surgery was related to the October 19, 1993 injury.

[1] Osteoblastic lesion (osteoblastoma) is a benign, painful, rather vascular tumor of bone characterized by the formation of osteoid tissue and primitive bone; *see* Dorland's Illustrated *Medical Dictionary*, 27th edition, p. 1197-98.

By report dated October 16, 1995, Dr. Sauer reviewed appellant's factual and medical history, conducted a physical examination, and noted some tenderness to palpation along the right sciatic nerve pathway and some minimal weakness bilaterally in the extensor hallucis longus tendons, with positive straight leg raising on the right in both the sitting and supine positions. Dr. Sauer noted that x-rays taken in his office demonstrated what appeared to be a good bony fusion at L4-5 with an L4-5 pedicle screw fixation. He opined that as a result of her employment injuries appellant aggravated a preexisting degenerative lumbar disc problem which was "operated," and that since the surgery there had been progression of her degenerative disc disease with a question of L5 being the pain generator at that time. Dr. Sauer opined that the May 22, 1995 discogram results were equivocal and he recommended that appellant have further discograms performed at the L3, L4 and L5 levels. He opined that appellant's L5 disc problem was not related to her work injury but was related to the fall that occurred one month after surgery, and therefore the proposed surgery aimed at L5 was not related to the October 19, 1993 work injury. Dr. Sauer further opined that appellant's condition had reached the baseline of pathology of her preexisting degenerative condition, and indicated that appellant could work 8 hours a day with a lifting limit of 10 pounds. He further indicated that she should avoid standing, bending, twisting, reaching and lifting for more than 10 minutes per hour and should not perform kneeling. Dr. Sauer opined that appellant had limitations due to a nonwork-related problem which he described as "a suspected L5 disc problem secondary to a fall four weeks following surgery." He indicated that appellant's work restrictions were permanent and opined that he was unable to state when maximum medical improvement would be reached "because of the superimposed suspected L5 disc problem on the work-related L4 problem."

By decision dated November 21, 1995, the Office denied appellant's request for an L5-S1 discectomy and fusion surgery finding that the weight of the medical opinion evidence was established by the concurring opinions of Dr. Vanderpool and Dr. Sauer which indicated that the proposed surgery was not warranted as a result of the October 19, 1993 injury.

By letter dated November 28, 1995, Dr. Covington responded to Dr. Sauer's report, noting that although the original injury did not rupture the L5 disc, it disrupted the L4-5 disc further leading to chronic intractable low back pain. He argued that appellant might not have fallen subsequent to surgery if she had not had the surgery, that because of the surgery she fell and reinjured her back, that it is impossible to say whether the L4-5 level has actually fused, and that it was possible that appellant had L4-5 nonunion despite the instrumentation and the fact that the plain films looked adequate. Dr. Covington opined that appellant was not capable of working at any level because of her level of discomfort.

On December 19, 1995 the Office referred appellant to a Board-certified neurologist, Dr. Daniel R. Stough, with the statement of accepted facts, to resolve a conflict concerning continued work-related disability and work restrictions. The Office specifically asked Dr. Stough whether appellant's condition reached the baseline of pathology of her preexisting degenerative condition and to provide her injury-related work restrictions.

By report dated January 5, 1996, Dr. Stough reviewed appellant's factual and medical history, examined appellant, and noted that forward bending to 15 to 20 degrees elicited complaints of lumbosacral pain. He noted that a postoperative CT scan revealed what appeared

to be excellent bone formation from the fusion and x-rays showed good placement of the hardware, but he noted that a more recent discogram showed marked internal derangement of the L4-5 disc where she exhibited back pain. He noted that the architecture of the L5 disc was altered with slight extravasation of contrast from the L5 disc to below the L4 disc. Dr. Stough opined that the L5 disc change seen was not related to her initial injury, and that with the pain at the L4 disc, which had already been operated and stabilized, further surgery would not be warranted. He opined that appellant had received maximum benefit of surgery at that time and that appellant had obtained a good fusion and stabilization at the originally injured L4-5 disc level.

An Office work capacity evaluation form was completed by Dr. Stough, indicating that appellant should limit bending, climbing, crawling, repeated twisting and lifting below upper thigh and above mid chest, that she had a weight restriction of 15 to 20 pounds 4 to 6 times per hour, 4 hours per day, and that she could work 6 hours per day. Dr. Stough indicated that these restrictions were permanent and that appellant had reached maximum medical improvement on January 5, 1996.

By report dated February 15, 1996, Dr. Stough opined that appellant could return to sedentary work, restated his restrictions, and explained that these restrictions were secondary to the fact that she has had persisting pain prior to and subsequent to her surgical procedure and continued pain by discogram at the L4-5 previously operated level and pain due to derangement of the L5 disc level. He explained that she had reached maximum medical improvement from her work-related injury, the L4-5 herniated disc with discectomy and fusion.

On March 7, 1996 the Office issued appellant a letter stating that she was offered a position as a file clerk which had been found to be suitable to her work capabilities and that she had 30 days in which to accept the position, and that if she failed to accept the position or provide justifiable reasons for refusing, her compensation would be terminated.

By response sent through her Congressional representative dated March 13, 1996, appellant replied to the Office's job offer, stating that on November 30, 1993 Dr. Covington said that x-rays showed an annular tear with disc protrusion, that she was told she needed surgery, and that three weeks after her November 16, 1994 surgery she passed out and fell on her back. She claimed that after her fall she started having a lot of pain and doctors could not tell if it was coming from the L4-5 fusion or from L5-S1. Appellant claimed that she took narcotic medication for pain up to 10 times a day. She claimed that Dr. Stough was very rude, would not recommend surgery, and told her to stay on pain medication the rest of her life. Appellant stated that she stayed on the floor with pillows under her knees for about 18 hours a day and could not work. She restated that she was 52 years old, was never free of pain, got hurt on the job, needed the proposed surgery, and wanted the employing establishment to fix her back.

On April 3, 1996 the Office denied reconsideration of the case finding that her request neither raised substantive legal questions nor included new and relevant evidence.

On April 9, 1996 the Office reviewed appellant's March 13, 1996 response to the proposed job offer and found her stated reasons for refusing the position unacceptable. It

advised her that she had an additional 15 days within which to accept the offered position before a final decision would be issued in this matter.

By decision dated April 25, 1996, the Office terminated appellant's entitlement to monetary compensation effective April 28, 1996 finding that she had refused an offer of suitable work. The Office claimed that Dr. Stough's opinion represented the weight of the medical opinion evidence and established that appellant was "fit for light duty."

The Board finds that the Office's November 21, 1995 denial of a second back surgery did not constitute an abuse of discretion.

The Office has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing the means to achieve this goal. The only limitation on the Office's authority is that of reasonableness.[2] As the only limitation on the Office'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 deductions from known facts.[3]

Although appellant submitted medical opinion evidence from Dr. Covington requesting authorization to reexplore the L4-5 fusion and remove the back instrumentation, the Office obtained rationalized medical opinion evidence from Dr. Stough which supported the presence of excellent bone fusion and proper placement of instrumentation, and which supported that further surgery at that level would not be warranted.

As the Office obtained rationalized medical evidence establishing that further surgery at the L4-5 level would not be warranted, it was not unreasonable, illogical or error for the Office to determine that further surgery at that level should not be authorized.

Although appellant submitted medical opinion evidence from Drs. Covington, Tomecek and Sauer which supported that exploratory surgery at the L5-S1 level might be necessary, the Office obtained rationalized medical opinion evidence from Drs. Vanderpool, Sauer, and Stough which supported that the condition at the L5-S1 level for which surgery was sought, was not related to the October 19, 1993 employment injury or the resulting accepted conditions.

As the Office obtained rationalized medical evidence supporting that the condition at L5-S1 was not causally related to the October 19, 1993 employment injury or the accepted resulting conditions, it was not unreasonable for the Office to determine that additional surgery at that level should not be authorized.

The Board also finds that the Office did not abuse its discretion in denying appellant's request for reconsideration of the surgery denial.

[2] *Marla Davis*, 45 ECAB 823 (1994); *Billy Ware Forbess*, 45 ECAB 157 (1993).

[3] *Daniel J. Perea*, 42 ECAB 214 (1990).

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.[4] Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[5] Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.[6] Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.[7]

In the instant case, appellant submitted no new evidence, and merely reargued her previously advanced contentions. As these arguments were previously made, they are repetitious and do not constitute a basis upon which to reopen the case for further consideration on its merits. The Office properly denied appellant's request for reconsideration.

However, the Board finds that the Office did not meet its burden of proof to terminate appellant's compensation for refusal of suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[8] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[9] To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[10]

In this case, the Office did not meet this burden to prove that the selected position was suitable.

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[4] 20 C.F.R. § 10.138(b)(1).

[5] *Id.* § 10.138(b)(2).

[6] *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[7] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[8] 5 U.S.C. § 8106(c)(2).

[9] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[10] *Glen L. Sinclair*, 36 ECAB 664 (1985).

The Office's Procedure Manual states in Chapter 2.814.4(b)(4) on assessing whether a position is suitable to an employee's partially disabled condition:

> "If medical reports in file document a condition which has arisen since the compensable injury, and this condition disables the claimant from the offered job, the job will be considered unsuitable (even if the subsequently-acquired condition is not work-related).[11]

In the instant case, the record supports that following appellant's October 19, 1993 injury and November 16, 1994 surgery, she fell at home, sustaining "multiple annular tears at L5-S1." As a result appellant developed increasing back pain and the opinions of Drs. Covington, Tomecek and Sauer support that she had limitations due to this injury and required surgical intervention to decompress and stabilize this vertebral level. The Office, however, omitted any mention of this subsequent injury in the statement of accepted facts that it provided Dr. Stough, and therefore this injury was not considered by Dr. Stough in his opinion or in his recommended work restrictions. In his February 15, 1996 clarification letter, Dr. Stough clearly qualified that his finding of the date of maximum medical improvement pertained to her L4-5 work injury only, and not to her entire clinical presentation.

As Dr. Stough was not provided with a complete description of appellant's L5-S1 injury, multiple annular tears, and as there is no evidence that he considered it in addition to the limitations due to her accepted L4-5 fusion, his work restrictions were not based upon a complete clinical picture of appellant.[12] Therefore, the offered position, based upon Dr. Stough's work restrictions, cannot be found to be suitable.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4(b)(4) (December 1993).

[12] As the statement of accepted facts also omitted any mention of the osteoblastoma diagnosed in 1994, Dr. Stough's formulation of work restrictions did not include contemplation of this condition either.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated April 3, 1996 and November 21, 1995 are hereby affirmed, but the decision of the Office dated April 25, 1996 is reversed.

Dated, Washington, D.C.
July 28, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member