U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY MURPHY and U.S. POSTAL SERVICE,
SOUTH ST. CLAIR STREET POST OFFICE, Toledo, Ohio

Docket No. 95-2417; Submitted on the Record;
Issued October 7, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation, effective April 30, 1995, based on her ability to perform the duties of the selected position of full-time cashier; and (2) whether the Office properly denied appellant's request for a hearing on the grounds that it was untimely filed.

The Office accepted that on July 12, 1971 appellant, then a 29-year-old collection and delivery clerk, sustained neck, back, right shoulder, right hand, left arm, left leg, stomach and chest injuries when her postal vehicle was struck by a car.[1] The Office accepted a myofascial lumbosacral strain, hypertrophic osteosclerosis compressing the left nerve root at L4-5 requiring surgical decompression,[2] left wrist sprain, left knee sprain, cervical and thoracic strains, and deep thrombophlebitis of the left leg.[3]

In a January 10, 1984 report,[4] Dr. Joel P. Zrull, a Board-certified psychiatrist and neurologist of professorial rank, opined that appellant's "withdrawal and isolation," delusions concerning the birth of a stillborn child, a thought disorder evident on psychological testing, and

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[1] The record indicates that appellant was off work until July 15, 1971, when she returned to work for five hours per day, and was hospitalized from July 18 to August 18, 1971. Appellant was then off work through December 12, 1971, performed light duty from December 13 to 16, 1971, stopped work and did not return. She received compensation for total disability beginning December 17, 1971.

[2] The record indicates that the Office approved a January 26, 1972 L4-5 laminectomy, with postoperative diagnosis of "hypertrophic osteosclerosis (bony spur) compressing the nerve root L4-5 on the left, negative exploration L5-S1 on the left."

[3] Appellant required hospitalization in February 1979, August 1982, May and August 1985 for treatment of deep thrombophlebitis of the left leg.

[4] Dr. Zrull provided a detailed history of injury and social history in a December 5, 1983 report. Psychologic testing performed on December 20, 1983 showed a thought disorder marked by somatic delusions.

a "nearly delusional preoccupation with somatic complaints," supported a diagnosis of "borderline personality syndrome," with possible schizophreniform psychosis. He stated that appellant was not able to work without psychiatric intervention, and her prognosis was limited. Dr. Zrull explained in an April 30, 1984 report that the July 12, 1971 accident "was the precipitating event which allowed [appellant] to focus somatic concerns [and] develop somatic delusions … continu[ing] to the present time.… [H]er symptoms in this regard must be considered permanent.… [T]he somatic concern and delusions are those changes that would appear to be irreversible at the present time."

Based on Dr. Zrull's reports, in April 1984, the Office accepted psychogenic pain disorder and a borderline personality syndrome as related to the July 12, 1971 injuries.[5]

In an October 21, 1992 report, Dr. Paul S. Mitch, a psychiatrist and second opinion physician, reviewed the record and statement of accepted facts. Dr. Mitch stated that appellant required extensive help with activities of daily living. He noted that appellant had "severely garbled speech" such that a sister and the record were the primary sources of information.[6] Dr. Mitch found appellant oriented to time and place, no sign of anxiety or depression, no hallucinations, delusions or paranoia. He provided the psychiatric diagnosis of somatoform pain disorder (psychogenic pain disorder). Dr. Mitch opined that appellant was "not totally disabled for all work due to her psychogenic pain headache disorder and would have restrictions regarding tolerating only low stress and time pressure and limited contact with the public." In an attached work restriction evaluation, Dr. Mitch indicated that appellant must limit stress, but could not work due to several other medical problems compounding the situation.

In an October 27, 1992 report, Dr. Thomas H. Brown, an orthopedic surgeon and second opinion physician, reviewed the medical record. Dr. Brown noted that, as appellant was unable to speak, and that her sister, who accompanied appellant, was a poor historian, specific details of the July 12, 1971 injuries were unobtainable. Dr. Brown observed that appellant was morbidly obese, walked with a cane, had abnormal neurologic findings in both legs, and required assistance in arising from a chair, and getting on and off the examining table. He obtained x-rays revealing a right curvature at L1, osteophytes at L3-4, and a "possible laminar defect of L5 compatible with a history of prior surgery," findings largely unchanged from x-rays taken in 1980 to 1982. Regarding the July 12, 1971 injuries, Dr. Brown found no objective deficits involving the left wrist, left knee, left leg, cervical or thoracic areas, and no evidence of thrombophlebitis. He diagnosed status post 1977 lumbar laminectomy, with minimal residual impairments.[7] Dr. Brown stated that, although the history of injury and treatment contained in

[5] In a March 21, 1989 report, Dr. W. T. Jackson, a Board-certified orthopedist and second opinion physician, stated that appellant no longer exhibited residuals of the July 1971 accident which could be distinguished from her multiple medical problems. He opined that appellant had a psychiatric disability requiring evaluation. In a January 29, 1990 report, Dr. Richard J. Filippi, an attending internist, noted that appellant required anti-inflammatories twice a day for her "back injury disability," and related her symptoms of "extreme persistent recurrent pain in the left humerus head area."

[6] On December 17, 1990 appellant granted a durable power of attorney to her sister, Ella L. Murchison.

[7] Dr. Brown diagnosed nonwork-related impairments of status post multiple vascular and abdominal surgeries, thrombophlebitis and morbid obesity.

the record was incomplete and appellant was unable to provide further details, the record suggested that appellant's low back problems resolved "following the surgery for about six years but since then there has been some recurrence … any residual impairment from that original injury would be very minimal." Dr. Brown opined that appellant had reached maximum medical improvement, and concluded she was not totally disabled for all work due solely to the residuals of the work related injury of 1971.

Appellant submitted reports from Dr. Charles E. Rowan, an attending orthopedic surgeon and internist. In an April 8, 1993 report, Dr. Rowan limited appellant to sitting four hours and walking one hour per day, and proscribed all other activities. He noted that appellant had a personality disorder which made her "belligerent" and unable to "follow orders." He indicated that appellant was totally disabled for work. In an October 27, 1993 report, Dr. Rowan renewed previous restrictions, noted that appellant was unable to speak and had difficulty walking, and had a psychiatric impairment making her "unable to take orders or supervision, very combative." He indicated that appellant could work one to four hours per day, and had reached maximum medical improvement.

Based on the reports of Dr. Brown and Dr. Mitch, the Office referred appellant for vocational rehabilitation services.

In a January 13, 1994 report, an Office vocational rehabilitation specialist noted that, based on Dr. Brown's October 27, 1992 report, appellant was totally disabled for work due to nonoccupational conditions, but did not mention Dr. Mitch's report. The rehabilitation specialist therefore determined that an employment offer from the employing establishment would be invalid, but that appellant's case was in posture for a constructed loss of wage-earning capacity determination. He stated that "full-time unskilled work [was] available" in appellant's commuting area. The rehabilitation specialist then forwarded a position description for cashier, DOT (Department of Labor, *Dictionary of Occupational Titles*) #211.462-010, and a labor market survey to the Office. The cashier position required receiving payments from customers, making change, describing the features and value of item purchased, performing mathematical calculations and keeping financial records, with lifting up to 20 pounds. A 1995 labor market survey of appellant's commuting area showed that more than 200 cashier positions were available.

By notice dated March 15, 1995, the Office proposed to reduce appellant's wage-loss compensation on the grounds that she was no longer totally disabled due to residuals of the July 12, 1971 injuries, and was capable of performing the selected position of full-time cashier. The Office noted that this determination was based on Dr. Brown's October 27, 1992 report, and the final report of the vocational rehabilitation specialist. The Office found that cashier positions were reasonably available within appellant's commuting area, with average earnings of $170.00 per week. Using the formula set forth in *Albert C. Shadrick*,[8] the Office determined appellant had a 34 percent loss of wage-earning capacity, enabling her to earn $98.10 per week. Adding applicable cost-of-living and other increases, appellant's new weekly compensation rate was $222.25, equivalent to $889.00 every four weeks.

[8] *Albert C. Shadrick*, 5 ECAB 376 (1953).

In a March 30, 1995 report, Dr. Rowan stated that appellant was unable to handle "any type of job," as she was "unable to sustain concentration," had poor memory, understanding and comprehension, and an uncontrolled seizure disorder. Dr. Rowan noted that appellant had "poor ability to interact with people or adapt to changing conditions," was unable to express herself other than by writing due to aphasia, and required assistance in walking.

By decision dated April 18, 1995, the Office reduced appellant's wage-loss compensation, effective April 30, 1995, based on her ability to perform the selected position of a full-time cashier. The Office found that Dr. Rowan's March 30, 1995 report was of diminished probative value as it did not present new evidence or contain medical rationale explaining how and why the accepted injuries would prevent her from performing the cashier position.

In a letter postmarked June 16, 1995 and received by the Office on June 19, 1995, appellant, through her authorized representative, requested an oral hearing before a representative of the Office's Branch of Hearings and Review.

By decision dated July 14, 1995, the Office denied appellant's request for a hearing on the grounds that it was untimely filed. The Office found that appellant's request for a hearing was postmarked June 16, 1995, more than 30 days after the Office's April 18, 1995 decision. The Office noted that the issue in appellant's case could be equally well "resolved by requesting reconsideration and submitting evidence establishing that the position of full-time cashier [did] not fairly and reasonably represent [her] wage-earning capacity arising from [the] work-related injury."

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation, effective April 30, 1995, based on her ability to perform the duties of the selected position of full-time cashier.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[9] In this case, the medical reports on which the Office relied in determining appellant's wage-earning capacity are insufficient to establish that appellant is capable of performing the selected position of full-time cashier.

The Office relied on Dr. Brown's October 27, 1992 report. Dr. Brown, a Board-certified orthopedist and second opinion physician, stated that appellant did have residuals of the July 12, 1971 injury causing some degree of disability for work, but that she was "not totally disabled for all work due *solely* to the residuals of the work-related injury of 1971." (Emphasis added.) This is an incorrect legal standard. Under the Federal Employees' Compensation Act, an appellant is not required to prove that work factors are the sole cause of her claimed condition.[10] Dr. Brown noted that specific details of the July 12, 1971 injuries were unobtainable due to appellant's inability to speak, her sister's poor reporting, and a lack of detail in the record, which included a statement of accepted facts. Dr. Brown indicated that the history of injury and treatment

[9] *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[10] *Beth P. Chaput*, 37 ECAB 158 (1985).

contained in the record was incomplete. Yet, despite these significant deficiencies in the medical information available to him, Dr. Brown made medical judgments regarding appellant's degree of occupationally-related disability. The Board has held that medical opinions based on an incomplete factual and medical history are of diminished probative value.[11]

Also, Dr. Brown's October 27, 1992 report was prepared almost two-and-a-half years prior to the Office's March 1995 determination of appellant's wage-earning capacity. It was inappropriate for the Office to rely on this report in determining appellant's ability to perform the cashier position, as it was not sufficiently contemporaneous to the Office's determination.[12]

For this reason, the Board finds that the Office did not have reliable medical evidence demonstrating that the orthopedic residuals of the July 12, 1971 injuries would not prevent appellant from performing the cashier position.

Similarly, the Office has not established that appellant was no longer totally disabled for work due to the accepted psychiatric conditions of somatoform pain disorder and borderline personality disorder.

The conditions of somatoform pain disorder and borderline personality disorder were initially diagnosed by Dr. Zrull, a Board-certified psychiatrist and second opinion physician. Dr. Zrull explained in an April 30, 1984 report that the July 12, 1971 accident precipitated permanent and irreversible somatic concerns and delusions. The conditions of somatoform pain disorder and borderline personality disorder were accepted as employment related and bear on the capacity of appellant for employment.

In an October 21, 1992 report, Dr. Mitch, a psychiatrist and second opinion physician, described appellant's speech as severely garbled such that he was forced to rely on appellant's sister and the record for information regarding appellant's psychiatric status. Yet, he opined that appellant had no deficit other than the somatoform pain disorder, which did not totally disable her for all work. Dr. Mitch restricted appellant from working in stressful environments, under time pressure, or in "contact with the public." However, the cashier position selected required frequent, if not constant, public contact, as well as working under time pressure. The Board notes that the vocational rehabilitation specialist's January 13, 1994 report, which contained the cashier position description, does not address Dr. Mitch's October 21, 1992 report or the accepted emotional conditions.

The Board finds that the Office has not established that the cashier position is within the restrictions prescribed by Dr. Mitch, and it was thus in error for the Office to reduce appellant's wage-loss compensation benefits on the basis of her ability to perform the duties of that position. The Office's April 18, 1995 decision will be reversed

[11] *Gary R. Sieber*, 46 ECAB 215 (1994); *see Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history or which are speculative or equivocal in character have little probative value).

[12] *See Barbara J. Hines*, 37 ECAB 445 (1986).

As the Office's decision concerning appellant's loss of wage-earning capacity is reversed, the second issue regarding the Office's denial of appellant's hearing request is moot.

The decision of the Office of Workers' Compensation Programs dated July 14, 1995 is set aside, and the April 18, 1995 decision is reversed.

Dated, Washington, D.C
October 7, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member