

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDY WATTERSON and U.S. POSTAL SERVICE,
POST OFFICE, Lubbock, Tex.

*Docket No. 96-608; Submitted on the Record;
Issued April 21, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was at fault in the creation of an overpayment of compensation in the amount of \$14,564.82; and (2) whether the Office properly terminated appellant's compensation benefits effective November 11, 1995.

On September 29, 1989 appellant, then a 40-year-old mail clerk, sustained an injury while in the performance of duty. Her claim was accepted by the Office for torticollis of the right side of the neck.¹ On October 10, 1989 appellant returned to light-duty work as a clerk for four hours a day. She received continuation of pay for the period October 3 through November 16, 1989, followed by compensation for the hours she did not work. On December 18, 1989 she began working six hours a day and received appropriate compensation.

On March 25, 1991 appellant stopped work and underwent a psychiatric hospitalization from March 26 to May 3, 1991 for depression based on the referral of Dr. Carol Nati, a psychiatrist. The record indicates that appellant was released to return to duty on May 6, 1991 for four hours a day. Her discharge diagnosis listed major depression with psychotic features; anxiety disorder; alcohol abuse, in remission; and occupational problem (conflict with her supervisor).² Other diagnosis included obesity and cervical myositis with chronic pain. The record indicates appellant submitted a claim for compensation for the period March 26 to May 3, 1991. The record indicates appellant returned to part-time work on May 6, 1991 with outpatient therapy. She stopped work on May 11, 1991 and did not return.

¹ Torticollis is defined as wryneck, a contracted state of the cervical muscles. *DORLAND'S ILLUSTRATED Medical Dictionary*, p. 1734 (27th ed. 1988).

² Past psychiatric history was noted for a prior admission for a depressive disorder in 1988 and an admission for alcohol rehabilitation in 1982.

By decision dated May 8, 1991, the Office found that appellant's work as a clerk fairly and reasonably represented her wage-earning capacity and adjusted appellant's compensation effective April 7, 1991.

By letter dated June 5, 1991, the Office advised appellant that her emotional condition had not been accepted as related to her September 29, 1989 injury and that she could submit evidence in support of her claim.

In a report dated June 4, 1991, Dr. Nati, a psychiatrist, advised that appellant was seen for reevaluation of her psychiatric condition. Dr. Nati diagnosed major depression with psychotic features, noting appellant felt her condition deteriorated after an injury at the employing establishment. Dr. Nati also noted that appellant attributed her condition to harassment from her prior supervisor. Dr. Nati concluded that appellant was totally disabled for work.

The Office prepared a statement of accepted facts and referred the file to Dr. Elliot H. Snyder, a Board-certified psychiatrist and Office consultant, for review. In a July 1, 1991 report, Dr. Snyder noted that appellant's psychiatric history predated the 1989 employment injury, with prior admissions for substance abuse in 1979, alcohol abuse in October 1982, and in 1988 for treatment of depression. Dr. Snyder reviewed appellant's treatment and stated that her psychiatric problems were chronic, consisting of symptoms of anxiety, depression, substance abuse, delusional thinking and possible hallucinations over an 11-year period. He opined that appellant's emotional disorder was not causally related to the 1989 employment injury, noting an absence between the date of injury and onset of psychiatric symptoms. Dr. Snyder concluded that the medical evidence did not include any reasoned opinion relating the 1989 injury to appellant's psychiatric condition or addressing aggravation. He noted that, according to the statement of accepted facts, harassment by appellant's supervisor had not been proved or accepted as factual.

By decision dated September 27, 1991, the Office rejected appellant's emotional condition claim.

Appellant requested a hearing before an Office hearing representative which was held on May 19, 1991. Appellant submitted the April 15, 1992 report of Dr. Richard Lee Wall, a clinical psychologist, who noted he had previously treated appellant in March 1989 and obtained a history of stress due to conflicts with her supervisor. Dr. Wall appeared at the hearing and testified that three months prior to the 1989 employment injury, he had released appellant from psychological treatment and that she was able to cope with her supervisor's harassment and general job stress. Dr. Wall opined that, after the 1989 employment injury, he commenced psychotherapy with appellant in October 1990. He stated that her pain reduced her ability to cope with the personality conflicts with her supervisor and resulted, over time, in the deterioration of her emotional status necessitating her hospitalization in 1991, where Dr. Wall served as her case manager. Following her hospitalization, Dr. Wall continued to work with appellant on a weekly basis in conjunction with Dr. Nati. He said they were in agreement that appellant could not return to work and that her current emotional condition was the direct result of the 1989 employment injury.

By decision dated September 15, 1992, the Office hearing representative set aside the September 27, 1991 decision, finding that a conflict in medical opinion existed between Dr. Wall and Dr. Snyder as to whether the September 29, 1989 employment injury caused or aggravated appellant's emotional condition.

The Office prepared a statement of accepted facts and referred appellant to Dr. Thomas Gore, a Board-certified psychiatrist selected as the impartial medical specialist. The Office also referred appellant to Dr. Richard Blide, an orthopedic surgeon, for a second opinion evaluation as to the nature and extent of any disability due to appellant's accepted torticollis condition.

In a report dated January 5, 1993, Dr. Blide reviewed appellant's history of injury and medical treatment. He noted that she complained of pain at the base of the neck posteriorly, greater on the right side. Dr. Blide set forth his findings on physical examination and reviewed prior diagnostic testing which revealed degenerative disc disease at C5-6. He diagnosed chronic degenerative disc disease of C5-6, chronic lumbosacral strain, diabetes mellitus and chronic depressive reaction. Based on his examination, Dr. Blide found no evidence of a right torticollis, indicating that appellant did not have much in the way of any functional orthopedic limitation. He noted that appellant expressed that she would never return to work under her former supervisor, but was disposed towards returning to work under a more favorable situation. Dr. Blide concluded that appellant's neck and back conditions were stable and that she could return to work, specifically the light duty she had been performing. He noted that no additional orthopedic treatment was recommended.

In an undated report, Dr. Gore set forth his findings from his January 29, 1993 psychiatric evaluation. He reviewed appellant's history of injury, and medical treatment under Drs. Nati and Wall. Dr. Gore noted that on mental status examination, appellant was cooperative and showed no evidence of emotional lability. He stated that her mood showed a fair amount of anxiety, which was thought to be situational, with no evidence of any severe depression at the time of his evaluation. Dr. Gore diagnosed major depression with psychotic features, in remission with appellant on medication and in weekly psychotherapy. He also noted that appellant exhibited a dependent personality, which probably led to her not dealing with job stress very effectively. Dr. Gore stated that appellant did not claim that her work injury caused her major depression, rather that she received increasing criticism and abuse from her supervisor following the injury. He found appellant to be totally disabled due to her psychiatric condition and recommended continuing treatment by Drs. Nati and Wall.

By decision dated February 17, 1993, the Office rejected appellant's claim for an employment-related emotional condition. Following review by an Office hearing representative, the February 17, 1993 decision was set aside on July 23, 1993. The hearing representative found that Dr. Gore's medical opinion required further clarification on the issue of causal relationship. The hearing representative also found a conflict in medical opinion as to whether appellant remained disabled due to the September 29, 1989 employment injury.

In an August 17, 1993 letter, the Office requested Dr. Gore to clarify his medical opinion as to whether appellant's psychiatric condition resulted from the September 29, 1989 employment injury. In an August 30, 1993 report, Dr. Gore noted that appellant's psychiatric history from 1979 to 1988, prior to the 1989 employment injury, revealed treatment for major

depression and anxiety disorder which were not employment related. He opined that these were preexisting conditions which may have made appellant more prone to recurrent episodes of depression and anxiety, such as she experienced following the 1989 injury. Dr. Gore concluded that the accepted facts of her psychiatric condition did not support the sole attribution of her mental problems to the work injury.

Appellant was referred to Dr. Willis J. Bray, a Board-certified orthopedic surgeon, selected as an impartial medical specialist to determine the nature and extent of disability due to the accepted torticollis condition. In a report dated September 13, 1993, Dr. Bray set forth appellant's history of injury and medical treatment. He reviewed appellant's treatment for mental problems, noting that there had been no prior history of any musculoskeletal symptoms prior to 1989. Dr. Bray noted that appellant complained of some neck and right arm pain, causing difficulty with sleep at night. He set forth his findings on physical examination and noted that x-rays of the cervical spine revealed complete degeneration of the C5-6, C6-7 disc spaces with anterior and posterior spurring at C5-6, with the C4 slipped forward very slightly on C5 in the neutral position. He diagnosed idiopathic scoliosis and degenerative arthritis of the cervical spine. Dr. Bray also listed depressive type of mental disorder; gross exogenous obesity; diabetes mellitus; moderate to moderately severe idiopathic kyphoscoliosis, in the cervical region with secondary moderately severe degenerative arthritis changes in the disc and facets of the mid to lower cervical spine; and a congenital anomaly of the cervical ribs. Dr. Bray stated that he did not find any disability secondary to the 1989 injury, but noted that appellant was disabled from ever lifting 70 pounds due to her build, arthritis and scoliosis.

By decision dated October 20, 1993, the Office rejected appellant's claim for an employment-related emotional condition, finding that Dr. Gore did not support a causal relationship between appellant's employment and her psychiatric condition.

On October 20, 1993, the Office also issued a preliminary determination of an overpayment of compensation in the amount of \$14,564.82. The Office found that appellant received compensation for total disability for the period November 17, 1991 through March 6, 1993 when she was only entitled to compensation based on the 1991 wage-earning capacity determination. The Office found appellant at fault in the creation of the overpayment, finding that she accepted payments which she knew or should have known to be were incorrect.

On November 9, 1993 appellant requested a prerecoupment hearing on the overpayment of compensation. In a decision dated September 6, 1994 the Office found that appellant abandoned her request for a hearing as she failed to appear for the hearing set for August 23, 1994. Appellant requested reconsideration, contending that she had not received notice of the August 23, 1994 prerecoupment hearing. On December 14, 1994 the Office found that appellant abandoned her request as the notice of hearing had been properly addressed to appellant and sent in the ordinary course of business.

By decision dated November 8, 1995, the Office terminated appellant's compensation benefits effective November 11, 1995 on the grounds that the report of Dr. Bray established that the accepted torticollis condition had resolved.³

In a decision dated November 14, 1995, the Office found that appellant received an overpayment in the amount of \$14,564.82 and that she was at fault in the creation of the overpayment.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability casually related to his or 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.

In the present case, appellant sustained an injury on September 29, 1989. Her claim was accepted by the Office for torticollis of the right side of the neck and she received appropriate compensation for her intermittent disability for work. The Office found a conflict in medical opinion on whether appellant continued to be disabled due to the accepted condition of torticollis of the neck.⁴ Based on this conflict, appellant was referred for examination by Dr. Bray, a Board-certified orthopedic surgeon. In situations where there are opposing medical reports of virtually equal weight, 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, will be given special weight.⁵

In a September 13, 1993 report, Dr. Bray provided a review of appellant's employment injury, including discussion of appellant's treatment for her emotional condition. He provided his findings on physical examination of the cervical spine and diagnosed idiopathic scoliosis with degenerative arthritis of the cervical spine. Dr. Bray noted that x-rays of appellant's cervical spine revealed complete degeneration of the C5-6, C6-7 disc spaces with spurring at C5-6. He also found the C4 slipped forward slightly on C5 in a neutral position. Dr. Bray opined that appellant's x-rays revealed moderate to moderately severe degenerative arthritis in the discs and facets of the lower cervical spine. He did not attribute appellant's continuing disability to the accepted condition of torticollis. Rather, Dr. Bray opined that appellant was disabled for work due to the combination of her build, arthritis and scoliosis. The Board finds that Dr. Bray's opinion is entitled to special weight and is sufficiently rationalized to support the Office's determination that appellant's disability is not causally related to torticollis due to the 1989

³ The District Office noted that the case file had been transferred to the Branch of Hearings and Review for adjudication in 1993 and remained with that office until November 1994.

⁴ See 5 U.S.C. § 8123(a); *Kathryn Haggerty*, 45 ECAB 383 (1994).

⁵ *Jane B. Roanhaus*, 42 ECAB 288 (1990).

employment injury. For this reason, the Office properly terminated compensation benefits effective November 11, 1995.

The Board also finds, however, that the case is not in posture for decision on whether appellant received a \$14,564.82 overpayment of compensation benefits for the period November 17, 1991 through March 6, 1993.

With regard to fact of overpayment, the Office premised its overpayment determination on the 1991 wage-earning capacity determination. The record establishes that appellant's claim was accepted for torticollis for which she received compensation for intermittent disability. Appellant returned to limited-duty work on November 17, 1989 for four hours a day. On December 18, 1989 her work was increased to six hours a day under the physical restrictions imposed by her attending physicians. On March 26, 1991 appellant stopped work due to her psychiatric condition and underwent hospitalization. On May 8, 1991 the Office found that appellant's work as a clerk fairly and reasonably represented her wage-earning capacity and adjusted her compensation "effective April 7, 1991." However, when making the wage-earning capacity determination, it does not appear that the Office took into consideration the fact that appellant was not performing the position at the time the rating was done.⁶ The overpayment memorandum notes only that "[a]lthough she stopped work in March 1991, no adjustment was made to the loss of wage-earning capacity decision." Other than the fact that appellant had performed in the position for over 90 days, the Office did not explain its finding that the clerk position fairly and reasonably represented her wage-earning capacity.

With regard to the amount of overpayment, the Office noted that appellant received compensation for loss of two hours of work through November 16, 1991, when she was placed on the automatic roll[s] and compensation erroneously processed for total disability. The overpayment memorandum notes that appellant "was paid compensation for the period of November 17, 1991 through January 11, 1992 by the Branch of Hearings and Review and reinstated to the periodic roll effective January 12, 1992." The memorandum goes on to note that appellant continued to receive compensation for temporary total disability from November 17, 1991 to November 14, 1992, when her entitlement to compensation under the wage-earning capacity was reinstated, "however, at that time the wrong figure was input as the amount of her wage-earning capacity, causing her to be underpaid from November 15, 1992 through October 16, 1993." The memorandum states that, effective October 17, 1993, appellant's compensation was adjusted "to reflect the correct entitlement for her loss of wage-earning capacity."

It is well established that the Office reasons for finding an overpayment must be clearly stated.⁷ In the present case, the Office noted that the "amount of \$14,564.82 represented the difference between appellant's correct entitlement to compensation for the period November 17, 1991 through October 16, 1993, based on the correct loss of wage-earning capacity amount, and the amount she was actually paid for this period. This takes into account the amount she was

⁶ See *Mary Jo Colvert*, 45 ECAB 575 (1994); *Daycon C. Houge*, 39 ECAB 1162 (1988).

⁷ See *Norman F. Bligh*, 41 ECAB 230 (1989).

overpaid for the difference between total disability and loss of wage-earning capacity from November 17, 1991 through November 14, 1992 and the amount she was underpaid for her loss of wage-earning capacity from November 15, 1992 through October 16, 1993.” The Board notes that this purported explanation does not address the discrepancy in the Office’s finding of overpayment for the period of November 17, 1991 through “March 6, 1993.” Nor does the memorandum contain any explanation clearly setting forth the amounts by which appellant was found to be overpaid or underpaid compensation benefits. In view of these deficiencies, the Board is unable to render a fully informed determination as to whether appellant owes the \$14,564.82 the Office seeks to recoup or is at fault in the matter of the creation of any overpayment.

For this reason, the Board will set aside the November 14, 1995 decision and remand the case for further development on the issues of fact and amount of overpayment. The November 8, 1995 decision terminating appellant’s compensation for the accepted torticollis condition is affirmed.

Dated, Washington, D.C.
April 21, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member