

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ETOLIA C. WHITE and FEDERAL AVIATION ADMINISTRATION,
FEDERAL AVIATION ADMINISTRATION, Jamaica, New York

*Docket No. 96-360; Submitted on the Record;
Issued June 17, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

On May 15, 1978 appellant, a 36-year-old air control specialist, tripped over a cord and fell to the floor, twisting her left ankle and low back. Appellant filed a Form CA-1 claim for benefits based on traumatic injury on May 18, 1978, which the Office accepted in a letter dated August 3, 1978. Appellant has not returned to gainful employment since the date of her injury.

Appellant was treated by Dr. George P. Glenn, Jr. a Board-certified orthopedic surgeon, who indicated in a Form CA-20 dated June 6, 1978, that appellant had a low and high back sprain on her right side and that she was totally disabled. In his final report dated November 10, 1978, Dr. Glenn stated that appellant had failed to respond to all forms of conservative outpatient treatment and had reached her plateau of recovery and he referred her to Dr. Erwin Schmidt, a Board-certified orthopedic surgeon. Dr. Schmidt stated in his October 25, 1978 report, that his examination was essentially negative except for her gross obesity. Dr. Schmidt also stated that he assumed her disability was temporary and believed that a strenuous exercise program offered her the best chance for her condition to resolve.

Appellant received compensation intermittently until May 23, 1979, when the Office issued a decision terminating compensation based on its finding that any residual disability causally related to the May 15, 1978 employment injury had ceased as of April 3, 1979. Appellant requested a hearing in letters dated June 21 and August 8, 1979, which the Office scheduled for November 15, 1979 in a letter dated October 10, 1979. In a decision dated January 31, 1980, an Office hearing representative vacated the Office's May 23, 1979 decision and remanded the case for further development of the medical evidence.

In letters dated May 7, 1980, the Office referred appellant to Dr. Gerald S. Packman, a Board-certified orthopedic surgeon, for an independent medical examination scheduled for July 1, 1980. In a report dated July 1, 1980, Dr. Packman stated that appellant had chronic

lumbosacral strain aggravated by massive obesity with attendant mechanical and postural aggravation, which was caused by the May 15, 1978 employment injury.

In a letter dated August 15, 1980, the Office requested that Dr. Packman specify appellant's work limitations so it could ascertain whether she retained any residual disability from her May 15, 1978 employment injury and indicate the effect of her non-work-related obesity on her current ability to perform work.

In response, Dr. Packman submitted a follow-up report to the Office dated August 19, 1980, wherein he stated that appellant had severe pain, which prevented her from remaining in any one position for a significant period of time and that this pain added greatly to her disability. Dr. Packman further stated that:

“It is also true that pain is quite subjective and her pain is far more than one would expect from these orthopedic diagnoses. While I note that she is in fact completely disabled by her orthopedic ailments and her pain, your feeling that her disability ‘should have resolved to the point where she could have returned to ... work’ is a statistically true statement that has not been borne out in this patient.... This lady is presumably having increased disability because these diagnoses are superimposed on her underlying obesity and also because her pain seems to be much more than most people have.”

Based on Dr. Packman's August 19, 1980 report, the Office issued a decision terminating appellant's compensation on October 14, 1980.

Appellant appealed to the Board in a letter dated January 21, 1981 and in a decision dated August 11, 1981, the Board set aside the Office's October 14, 1980 decision terminating benefits and remanded for further development of the medical evidence and a *de novo* decision.

In a letter dated February 1, 1982, the Office recontacted Dr. Packman and requested that he determine whether appellant could perform her regular work duties and, if so, to indicate the date when she would be able to begin performing these duties. In a report dated February 26, 1982, Dr. Packman reiterated that appellant was totally disabled by pain, although the pain attributed to chronic lumbosacral strain would have been expected to have resolved by November 1978. Dr. Packman found that, in other words, appellant had been totally disabled by pain far out of proportion to her identifiable diagnoses.

In a letter to the Office dated November 3, 1988, Dr. Schmidt, who had continued to treat appellant since her initial examination in 1978, noted that appellant had been seen on November 3, 1988 without change in her symptomatology. Dr. Schmidt reiterated his belief that obesity was the major factor in producing her symptoms and referred appellant to Dr. Ernest F. Rosato, a Board-certified surgeon specializing in gastrointestinal surgery, who in a January 3, 1989 treatment note stated that appellant's morbid obesity aggravated her chronic back condition.

Dr. Schmidt subsequently submitted to the Office treatment notes dated December 21 and 28, 1989, March 30 and May 10, 1990 and a December 6, 1990 letter, in which he indicated that appellant continued to be totally disabled due to a low back condition, but that she was morbidly obese, rendering surgery a poor remedial option. Neither Dr. Schmidt nor Dr. Rosato provided

an opinion as to whether appellant's complaints of back pain were causally related to the May 15, 1978 employment injury.

In letters dated April 1, 1991, the Office referred appellant to Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, to determine the cause and extent of her current condition and/or disability and to evaluate whether her current symptomatology constituted residual disability causally related to the May 15, 1978 employment injury.

Dr. Mattei examined appellant on April 30, 1991 and stated in a report dated May 3, 1991 that appellant had degenerative arthritis of the lumbosacral spine affecting L3-4, L4-5, L5-S1 with severe spinal stenosis and radiculopathy at L4-5 and a herniated disc at L5-S1. Dr. Mattei found, however, that these current complaints could not be attributed to her work injury as described in the statement of facts. Dr. Mattei stated that "a diagnosis could be established that the severe obesity has contributed to this condition and that the final diagnosis as stated above would be one of degeneration and accident. Also one must take into consideration that [appellant] did have an auto accident on January 15, 1979, which was a serious head-on collision and I am quite sure even though [appellant] denies that it had any impact on her back, that this could add to the precipitation of degenerative changes and eventual breakdown that we now see.... Therefore, I would state that [appellant] is disabled not because of the injuries that she sustained in 1978 when she tripped over the cord but because of her weight problem with resulting changes of degeneration as supported by the records."

In a letters dated October 25 and 29, 1991, the Office referred appellant, her medical records and the statement of facts to Dr. Herbert Stein, a Board-certified orthopedic surgeon, for an independent medical examination scheduled for December 16, 1991.

In reports dated December 26, 1991 and March 10, 1992, Dr. Stein indicated that appellant had degenerative disc disease and spinal stenosis at L4-5 and L5-S1 with exogenous obesity. In his March 10, 1992 report, Dr. Stein stated that appellant's diagnosis was a degenerative process, which certainly can occur and progress without any necessary evidence of injury. Dr. Stein felt that her symptoms far outweighed any objective findings and opined that her symptoms of back pain and disability from back pain that one would expect from degenerative disc disease would be compatible with just a progressive degenerative process and not necessarily a work injury.

On April 10, 1992 the Office issued a notice of proposed termination of compensation to appellant. In an April 7, 1992 memorandum accompanying the notice of proposed termination, the claims examiner stated that Dr. Stein, the referee physician, represented the weight of medical evidence in the case and that he had indicated that the current back condition was not due to residuals of the work injury, but was progressive in nature and due to appellant's obesity. The claims examiner noted that every physician of record had indicated that appellant's obesity was the cause of her present back condition and had recommended a weight loss program. The claims examiner found that all of the physicians of record have noted the lack of objective findings and indicated that appellant's disability continued to be supported on the basis of subjective complaints alone. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

Appellant did not respond to the Office's request for additional medical evidence, but submitted a May 6, 1992 letter objecting to the proposed termination.

By decision dated May 11, 1992, the Office terminated appellant's compensation. In the memorandum incorporated by reference in the May 11, 1992 decision, the Office noted that no additional medical evidence was submitted to support appellant's entitlement to continued compensation.

Appellant requested reconsideration of the Office's May 11, 1992 decision, in a letter dated May 17, 1992.

By decision dated August 27, 1992, the Office denied appellant's application for review on the ground that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

In a letter dated August 9, 1993, appellant requested reconsideration of the Office's August 27, 1992 decision. Accompanying the request were treatment notes from several physicians, dated November 23, 1992, January 29, March 4, April 6 and July 27, 1993, indicating that appellant remained disabled due to her low back condition. None of these notes, however, provided a rationalized, probative medical opinion indicating that her current condition was causally related to her May 15, 1978 employment injury.

By decision dated October 27, 1993, the Office denied appellant's application for review on the ground that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

In a letter dated July 26, 1994, appellant requested reconsideration of the Office's October 27, 1993 decision. Appellant did not submit any new medical evidence in support of her request.

By decision dated October 11, 1994, the Office denied appellant's application for review on the ground that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

The only decision before the Board on this appeal is the October 11, 1994 Office decision, which found that the letter submitted in support of appellant's request for reconsideration was insufficient to warrant review of its prior decision. Since the October 11, 1994 decision, is the only decision issued within one year of the date that appellant filed her appeal with the Board, October 6, 1995, this is the only decision over which the Board has jurisdiction.¹

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law; by advancing

¹ See 20 C.F.R. § 501.3(d)(2).

a point of law or fact not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.² 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.³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁴

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law and has not advanced a point of law or fact not previously considered by the Office. Appellant, as noted above, did not submit any new medical evidence in support of her request for reconsideration. All the medical evidence previously submitted by appellant had previously been considered by the Office in reaching prior decisions. Appellant generally contended in her July 26, 1994 letter, that she still suffered from residuals of her May 15, 1978 employment injury, but failed to support this contention with rationalized, probative medical evidence. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

The October 11, 1994 Office of Workers' Compensation Programs' decision is affirmed.

Dated, Washington, D.C.
June 17, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

² 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.138(b)(2).

⁴ *Howard A. Williams*, 45 ECAB 853 (1994).