

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSA SHEVLIN and U.S. POSTAL SERVICE,
MAIN SERVICE CENTER, Van Nuys, Calif.

*Docket No. 97-931; Submitted on the Record;
Issued June 23, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by denying appellant's request to reopen the case for a merit review.

This is the second appeal before the Board in this case. By decision and order issued September 11, 1995,¹ the Board affirmed March 31 and May 26, 1994 decisions of the Office finding that the Office properly terminated appellant's compensation effective April 1, 1994 under section 8106(c)(2) of the Act on the grounds that she neglected to work after suitable work was procured, approved by Dr. Armen J. Dumas, an attending Board-certified physiatrist, properly offered to and accepted by her. The Board found that the Office properly advised appellant of the penalty for refusing or neglecting suitable work under the Act, that the suitable work position remained available to her, and that appellant did not provide a justifiable reason for refusing to work. The Board also affirmed December 13, 1993 and March 10, 1994 decisions of the Office, finding that appellant had submitted insufficient medical evidence to establish that she sustained recurrences of total disability during the period May 10, 1993 to January 28, 1994, causally related to an accepted February 6, 1986 acute lumbosacral strain requiring October 30, 1986 spinal surgery. The Board found that Dr. Dumas' reports, and those of Dr. Wallace W. Korbin, an attending Board-certified neurosurgeon, contained insufficient medical rationale supporting a causal relationship between the accepted February 6, 1986 injury and its sequelae and the claimed periods of total disability from May 10, 1993 to January 28, 1994. The law and facts of the case as set forth in the prior decision and order are incorporated by reference.

¹ Docket No. 95-201.

On recommendation from Dr. Dumas, appellant participated in a pain management program from June to August 1994 with L5-S1 bilateral nerve root blocks and epidural steroids and was released to return to sedentary work eight hours a day.² Appellant accepted an offered sedentary-duty general clerk position approved by her pain clinic physician,³ and returned to work for four hours per day at the employing establishment on September 12, 1994, increasing to six hours per day as of October 8, 1994.⁴

On November 1, 1994 appellant filed a notice of traumatic injury alleging that on October 28, 1994 she injured her low back when she twisted to place a magazine in a discard bin after processing an address change. On the reverse of the form, Mr. Kyle A. Smith, an employing establishment supervisor, controverted appellant's claim as the "discard bin [was] next to [appellant's] arm. No reason to twist at all."⁵

In a November 10, 1994 report, Dr. Hagun Lee, a Board-certified orthopedic surgeon, related appellant's account of the October 28, 1994 twisting incident and diagnosed "acute recurrent low back pain with left sciatica," degenerative disc disease at L5-S1, status post L5-S1 laminectomy, chronic low back pain syndrome and depression. He found appellant disabled for work.⁶

In a January 26, 1995 report, Dr. Dumas diagnosed fibromyalgia and depression. He submitted periodic progress reports through August 31, 1995.

² In a pain clinic exit interview, Dr. Jeffrey B. Olsen, a physician specializing in pain management, approved an offered sedentary-duty position but recommended a duty shift earlier than 12:30 to 8:00 p.m. as appellant's pain level was "lowest ... in the morning." However, Dr. Olsen did not mention that appellant's objective, accepted conditions would be organically worsened by any specific duty shift.

³ In an August 11, 1994 report, Dr. Dumas approved appellant for 8 hours a day sedentary work, with lifting less than 10 pounds, 20 minutes standing at a time, and twisting limited to 10 times an hour, no more than 30 degrees to the left or right.

⁴ In an October 13, 1994 letter, Ms. Jennie Stevens, an employing establishment official, noted that on September 13, 1994 appellant was assigned to answer telephones as she asserted she was unable to do any of her other assigned tasks. In a December 13, 1994 report, Ms. Oonagh M. Burke, a rehabilitation nurse specialist assigned to appellant, noted observing appellant for several hours on October 4, 1994. Appellant performed sedentary clerical work, computer data entry, answered the telephone, and was assigned to make photocopies. When appellant refused to lift the copier lid, Ms. Burke suggested that a paper lid be used instead, but appellant still declined photocopying even with that modification. Ms. Burke concluded that appellant was "trying her best to do as little as possible and to not assist in offering suggestions which may make her work easier." In a November 3, 1994 letter, Tyrone Washington, an employing establishment supervisor, stated that appellant had returned to work following her original February 6, 1986 injury on September 4, 1987, but limited herself to answering telephones. Mr. Washington asserted that appellant "refused to do any requirements from the job offer" through November 1, 1994. In a November 4, 1994 letter, Kyle A. Smith, an employing establishment supervisor, stated that appellant had refused to make photocopies as assigned in her approved position description, even when the photocopier was modified with a lightweight, cardboard cover within her 10-pound lifting restriction. Mr. Smith concluded that appellant was uncooperative in performing any of her assigned duties.

⁵ The record indicates that appellant stopped work on October 28, 1994 and that her pay stopped on March 28, 1995.

⁶ A November 1, 1994 lumbar magnetic resonance imaging (MRI) scan showed no significant change since a February 17, 1994 study, degenerative disc disease and an L5-S1 disc bulge.

In a February 2, 1995 report, Dr. Korbin related appellant's account of the October 28, 1994 twisting incident and diagnosed an exacerbation of low back problems with tenderness and decreased range of motion, with nonorganic weakness and sensory changes of the left lower extremity.

On July 3, 1995 appellant filed a notice alleging a recurrence of disability beginning October 28, 1994, including increased low back and left leg pain, due to the alleged twisting incident.⁷

By decision dated October 11, 1995, the Office denied appellant's claim for an October 28, 1994 recurrence of disability on the grounds that she was barred from receiving further compensation, after the Office's April 1, 1994 termination of compensation, on the grounds that she had refused suitable work.

In a September 8, 1996 letter, appellant requested reconsideration of the Office's October 11, 1995 denial of her claim for recurrence of disability. Appellant asserted that she had never failed or refused to work, and that therefore the Office's termination of compensation effective April 1, 1994 on those grounds was improper. She stated that Dr. Dumas did not approve the offered light-duty position, that employing establishment officials did not accurately demonstrate the requirements of her position to Dr. Dumas when he visited her work site on January 31, 1994, and that she stopped work on Dr. Dumas' instructions and was therefore justified in doing so. Appellant asserted that subsequent light-duty positions required her to work beyond her physical capacity, which caused pain and depression such that she attempted suicide in August 1995.⁸ She submitted additional medical evidence.⁹

Dr. Dumas submitted October 12 and 16, 1995 reports finding appellant disabled for work due to "severe pain." In a November 7, 1995 report, Dr. Dumas described a "generalized post-traumatic fibromyalgia pain syndrome spreading from her back to her neck and throughout her body at times to the point of incapacitation." He opined that this syndrome, coupled with "recurring psychological depression," were "work related starting with original injury and subsequent injury." Dr. Dumas restricted lifting to less than 10 pounds, sitting to no more than 20 minutes at a time, no twisting, turning or overhead reaching, and noted that appellant's pain

⁷ On the reverse of the form, the employing establishment noted that appellant had not returned to work although medically released to do so, and her modified general clerk position remained open and available.

⁸ Appellant submitted an August 29, 1995 report from Dr. Hassan Farrag, a psychiatrist, who diagnosed major depression, single episode, severe, chronic back pain and "severe" stressors. Dr. Farrag related appellant's accounts of being made to work beyond her medical limitations and difficulties with her compensation claim.

⁹ Appellant also submitted copies of her employing establishment time and attendance records from approximately 1993 onward.

caused “mental distraction” that could endanger herself or others. Dr. Dumas submitted periodic reports through July 1996 finding continued disability for work due to pain and depression.¹⁰ In a September 3, 1996 report, Dr. Dumas stated that appellant had chronic back pain and radiculopathy due to “an original work-related injury and failed spine surgery.” He advised appellant “to stay as active as possible but try not to reagravate the pain symptoms.” Dr. Dumas opined that appellant was disabled for work due to chronic pain and “physical limitations caused by pain.”

In a January 22, 1996 report, Dr. Korbin noted last examining appellant on March 2, 1995. He related appellant’s account that “constant pain ... prevent[ed] [appellant] from doing any ... activity ... sit, stand, walk, etc. She is unable to perform the work activities her job requires.” On examination, Dr. Korbin found “pain between the scapulae, low back pain into the buttocks and hips, increased areas of pain and positive Lasegue’s and Patrick’s signs bilaterally. Dr. Korbin diagnosed chronic pain syndrome secondary to her original injury and surgery “as well as subsequent injuries.” He described “[o]bjective tenderness throughout the spinal axis” at the mid-thoracic area and below, decreased lumbar range of motion and “mild diffuse weakness and sensory changes” in the left lower extremity. Dr. Korbin found appellant totally disabled for work, and recommended epidural and nerve block injections.

By decision dated September 26, 1996, the Office denied appellant’s September 8, 1996 reconsideration request on the grounds that the evidence submitted in support thereof was “irrelevant and immaterial.” The Office found that the relevant issues were whether the modified position offered appellant in December 1993 was suitable work, whether the Office properly warned appellant of the consequences of refusing suitable work, whether appellant demonstrated that her refusal to perform the offered position was justified under the Act or its regulations, and whether the Office properly found that she was barred from receiving compensation after April 1, 1994 under section 8106(c)(2) of the Act and section 10.124(e) of its implementing regulations.¹¹ The Office further found that appellant’s September 8, 1996 letter and the accompanying medical reports and attendance records were not relevant to the issues in dispute and were generally repetitive of evidence previously considered by the Office.

The Board finds that the Office properly refused to reopen appellant’s case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on December 24, 1996, the only decision properly

¹⁰ In an April 2, 1996 report, Dr. Julian Stanley, a physician specializing in emergency medicine, diagnosed fractures of the right sixth and seventh ribs due to coughing, with a history of similar rib fractures in 1993 and 1994. He found appellant disabled for work. In an April 3, 1996 report, Dr. Dumas noted that the Office had accepted the rib fractures as work related, as they were secondary to “cough and pulmonary complications of aspirin.” The record does not indicate, however, that the Office accepted the rib fractures as work related. Also, there is no claim for rib fractures before the Board on the present appeal.

¹¹ 5 U.S.C. § 8106(c)(2), 20 C.F.R. § 10.124(e).

before the Board is the September 26, 1996 decision denying appellant's request for a merit review.¹²

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”¹³

Section 10.328(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.¹⁴

The critical issues in this case are whether appellant has established that the position offered her in December 1993 was not suitable work, or alternatively, that the position was suitable work but Office did not properly advise her of the consequences of refusing suitable work, that her refusal to work fell under a justifiable exception, and that the Office improperly found her claim for an October 28, 1994 recurrence of disability barred by the penalty provisions of section 8106(c). Therefore, the evidence submitted in support of her September 8, 1996 request for reconsideration must be evaluated as to whether it constitutes new, relevant and pertinent evidence on these issues.¹⁵

Appellant's September 8, 1996 letter does not demonstrate that the Office erred in interpreting a point of law, or advance a relevant point of law or fact not previously considered by the Office. Appellant does not allege that the Office did not adequately advise her of the penalties for refusing suitable work, including the termination of compensation. Appellant's somewhat conflicting contentions that Dr. Dumas did not approve the offered December 1993 position, and that she never refused to work, were considered and refuted by the Board in issuing its September 11, 1995 decision and order, as well as by the Office in its March 31 and May 26, 1994 decisions. Appellant's allegations regarding the suitability of light-duty positions offered after the April 1, 1994 termination of compensation, and the cause of a psychiatric condition manifesting in August 1995, are not relevant on the present appeal as they pertain to time periods after the April 1, 1994 termination. Moreover, the Office has not accepted any emotional condition pertaining to the accepted February 6, 1986 lumbar injury.

¹² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

¹³ 20 C.F.R. § 10.138(b)(1).

¹⁴ 20 C.F.R. § 10.138(b)(2).

¹⁵ The time and attendance records and Dr. Farrag's August 29, 1995 psychiatric report constitute new evidence. However, they are not relevant to the critical issues.

In his January 22, 1996 report, Dr. Korbin diagnosed chronic pain syndrome secondary to appellant's original February 8, 1986 lumbar injury. However, Dr. Korbin also attributed appellant's condition to unspecified "subsequent injuries," and did not opine that there was an unbroken chain of causation from the February 8, 1986 injury onward. Thus, his report cannot be interpreted as justification for appellant's refusal to perform the suitable work position beginning in December 1993. Also, Dr. Korbin did not explicitly state that appellant was totally disabled for work in December 1993, or that the December 1993 position was not suitable work. Although this report is new evidence, it is highly repetitive of his reports previously of record.

Dr. Dumas submitted reports from October 12, 1995 to September 3, 1996, finding appellant totally disabled for work due to chronic back pain, "generalized post-traumatic fibromyalgia ... throughout her body," and depression. However, the Office has not accepted these conditions as related to the accepted February 8, 1986 lumbar injury. Also, Dr. Dumas did not specifically state that the December 1993 job offer was not suitable work, or provide sufficient medical rationale explaining how and why appellant remained disabled for the offered light-duty position in December 1993 causally related to the February 8, 1986 injury. Thus, his opinion is of little relevance to the critical issues on appeal.

Therefore, the evidence submitted by appellant is insufficient to warrant reopening her case for further review on the merits, and the Office properly exercised its discretion in denying a merit review.

The decision of the Office of Workers' Compensation Programs dated September 26, 1996 is hereby affirmed.

Dated, Washington, D.C.
June 23, 1999

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member