U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD M. WOLFF and U.S. POSTAL SERVICE,
POST OFFICE, Miami, FL

Docket No. 00-338; Submitted on the Record;
Issued August 27, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C § 8128(a).

On July 18, 1990 the Office accepted appellant's claim for depression and appellant was placed on the periodic rolls effective January 13, 1991.

In a report dated March 1, 1995, appellant's treating physician, Dr. Linda G. Hirsch, a psychologist, stated that appellant "must be returned to his usual job" but should be restricted to working from 3:00 p.m. to 6:00 p.m. four days a week.

In a report dated April 19, 1995, Dr. Hirsch emphasized that appellant must return to the exact position he had when he stopped working due to the circumstances of his injury.

By letter dated August 14, 1995, the Office explained that it might not always be possible for the employing establishment to restore appellant to his date-of-injury position.

The Office referred appellant to a second opinion physician, Dr. Irving L. Breakstone, a Board-certified psychiatrist and neurologist. On the Office's undated question form, he opined that, although appellant presented no physical signs as in slow movements, slow speech and depressed thoughts, he had dysthymia and could work without restriction. A work capacity evaluation form dated November 6, 1995 from Dr. Breakstone also stated that appellant could work without restriction.

In response to the Office's request for an explanation of his diagnosis of dysthymia in a report dated December 19, 1995, Dr. Breakstone stated that dysthymia, or "minor depression" is "a sometimes lifelong affliction, in which recurrent depression is the major, usually the sole, symptom." He stated that, since there was no evidence of active depression, Dr. Breakstone depended on appellant's own description and the reports of the therapists and based on

appellant's description of how he felt at the time of the examination, he believed appellant could work full time.

In a report dated January 11, 1995, Dr. Breakstone stated that a person suffering from "minor depression" shows no criteria of the diagnosis unless he is depressed at the time of the examination. He stated that, since there was no reason to doubt appellant's credibility or that of the two therapists, "a physician must be guided by what the patient says." Dr. Breakstone suggested that appellant have more visits to the previous therapists to ascertain that appellant "does, indeed, suffer from dysthymia (which [he] consider[ed] a lifetime illness) AND STILL SUFFERS MAY BE HELPFUL."

In a detailed report dated February 29, 1996, Dr. Hirsch cited problems in Dr. Breakstone's diagnosis, which she believed overlooked appellant's severe emotional symptoms and reiterated her diagnoses of major, recurrent depressive disorder and generalized anxiety disorder. Dr. Hirsch found no basis for a diagnosis of dysthymia and emphasized that appellant needed to return to full-time work gradually.

In a report dated March 1, 1996, Dr. Sherwood A. Cantor, a Board-certified psychiatrist and neurologist, diagnosed major affective disorder, depressed, recurrent and generalized anxiety disorder. He stated that appellant should be returned to his previous job description and his hours limited in order to carefully monitor his status.

In a memorandum to the file dated March 18, 1996, the Office stated that because Dr. Breakstone waffled in his reports as to the nature of appellant's condition, his opinion was "speculative, … equivocal, … and useless."

In a report dated October 24, 1996, Dr. Hirsch stated that, on September 13, 1996, when she called appellant to inform him that the rehabilitation counselor, Marsha Hajduk, told her that he would not be placed in his usual position, he "reacted extremely negatively to this news and in fact has had a complete relapse." Dr. Hirsch stated that, after several therapy sessions, she diagnosed major, recurrent depressive disorder, severe without psychotic features and without full interepisode recovery and generalized anxiety disorder. She felt that, because the employing establishment never gave appellant the opportunity to return to his preinjury job, she doubted he would ever fully recover. Dr. Hirsch believed that the Office's long delay in reaching a decision not to place appellant in his usual job, its action of approving and arranging for appellant to return to work and then, suddenly without explanation or justification, refusing to follow through aggravated appellant's condition to the extreme. She opined that appellant was unable to work.

In a report dated November 20, 1996, Dr. Hirsch stated that appellant would not benefit from rehabilitation efforts and the employing establishment was being deceitful in claiming it had no work available for appellant because appellant brought in his documentation, which showed that his exact preinjury position had been posted as a vacancy.

In a report dated November 27, 1996, Dr. Hirsch stated that, since November 21, 1996, she had multiple emergency psychotherapy sessions with appellant and that he was expressing suicidal thought since his meeting with Ms. Hajduk on November 21, 1996. She emphasized

that appellant was not only incapable of a job search at the time but was "potentially self-destructive."

In a report dated December 31, 1996, the rehabilitation specialist indicated that the employing establishment was not going to rehire appellant and, therefore, the Office asked him to perform a labor market survey for entry level jobs in the open market with low levels of stress.

By letter dated January 10, 1997, the Office explained to Dr. Hirsch that the employing establishment had no work available for appellant and, therefore, the Office must assist him with finding employment outside the employing establishment. The Office informed her that, since she found appellant was unable to work and Dr. Breakstone opined that appellant could work, the case was being referred to an impartial medical specialist.

In a report dated February 7, 1997, Dr. Hirsch stated that she had documented appellant's relapse on September 13, 1996 in her October 24, 1996 letter to the Office. She challenged the Office's reliance on Dr. Breakstone's opinion because Dr. Breakstone did not know of appellant's relapse.

To resolve the conflict between Drs. Hirsch and Breakstone's opinions as to the nature of appellant's emotional condition and whether appellant could work, the Office referred appellant to an impartial medical specialist, Dr. Joel V. Klass, a Board-certified psychiatrist and neurologist. In his report dated March 6, 1997, Dr. Klass stated that, although appellant appeared to be experiencing a chronic mild to moderate depression and had complaints of anxiety, he had significant traits of a paranoid personality disorder. He stated that appellant could return to his usual job but appeared to be unmotivated to do so. Dr. Klass stated that appellant, whose mental status examination showed, *inter alia*, good powers of calculation, intellect and organization, could perform the job in the private sector. He believed appellant's crucial problem was that he had difficulty in handling "perceived injustices and in working with supervisory personnel." On the work capacity evaluation dated March 6, 1997, Dr. Klass indicated that appellant could work without restriction although he might have difficulty with certain people.

On July 10, 1997 the Office identified the position of accounting clerk as one appellant could perform. The job was described as sedentary with lifting up to 20 pounds.

On July 14, 1997 the Office issued a notice of proposed reduction of compensation, stating that the evidence of record established that the position of an accounting clerk represented appellant's wage-earning capacity. In the attached memorandum, the Office found that the opinion of Dr. Klass, as the impartial medical specialist, constituted the weight of the medical evidence. The Office found that the position of accounting clerk was suitable for appellant, both medically and vocationally.

By letter dated August 12, 1997, appellant's representative, Joseph J. Colligan, stated that appellant suffered a complete relapse as of September 13, 1996, as documented by Dr. Hirsch and was unable to participate in rehabilitation efforts. Mr. Colligan stated that until that relapse appellant had cooperated in every way with the Office's rehabilitation efforts. Further, Mr. Colligan contended that the Office erroneously referred appellant to an impartial medical

specialist because Dr. Breakstone did not know about appellant's relapse, which occurred 15 months (actually 20 months) after he gave his opinion and the Office relied on Dr. Hirsch's opinion, not Dr. Breakstone's, in attempting to place appellant in a job. Mr. Colligan, therefore, contended that Dr. Klass' opinion should have the status of a second opinion physician and the Office should refer appellant to an impartial medical specialist to resolve the conflict between Drs. Klass and Hirsch's opinions. Mr. Colligan contended that the Office violated appellant's due process rights by ignoring his June 2, 1997 requests he made for a copy of appellant's file and for information from the rehabilitation specialist failing to correct errors in fact and judgement he and Dr. Hirsch pointed out and ignoring his complaint that Dr. Klass has been improperly classified as an impartial medical specialist.

By letter dated June 19, 1997, the Office addressed the issue of the conflict between Drs. Breakstone and Hirsch, stating that it was appropriate to find there was a conflict between the two physicians and refer the case to an impartial medical specialist. The rehabilitation specialist responded to appellant's June 2, 1997 inquiries by letter dated June 6, 1997.

By decision dated December 8, 1997, the Office finalized the proposed notice of reduction of compensation, stating that it found that the position of accounting clerk was within appellant's physical restrictions and vocational experience and represented appellant's wage-earning capacity. In the attached memorandum, the Office noted that Mr. Colligan stated that appellant had a complete relapse as of September 13, 1996, which was supported by Dr. Hirsch. The Office stated that the information "was previously reviewed" and it was determined that Dr. Klass' opinion constituted the weight of the evidence. The Office found that appellant did not submit new or additional information which would change the notice of proposed decision.

By letter dated June 14, 1999, appellant requested reconsideration of the Office's decision and submitted 14 exhibits. These included the Office's March 18, 1996 memorandum to the file stating that Dr. Breakstone's opinion was useless the December 11, 1995 letter from the Office to Dr. Breakstone requesting clarification of his opinion and Dr. Breakstone's December 19, 1995 and January 11, 1996 reports. Appellant also submitted Dr. Hirsch's reports dated February 29, 1996, February 7, 1997 and a portion of Dr. Hirsch's October 24, 1996 report and he submitted Dr. Cantor's report dated March 1, 1996. Further, appellant submitted the December 2, 1996 letter from Mr. Colligan documenting a telephone conference between him, Dr. Hirsch and the rehabilitation counselor, Ms. Hajduk. All of this evidence was previously in the record. Appellant additionally submitted excerpts from the Federal Employees' Compensation Act procedure manual addressing the procedure for obtaining medical reports and the criteria for evaluating an impartialist medical specialist's opinion.

In his request for reconsideration, appellant reiterated some arguments he had previously made, stating that Dr. Klass' opinion should not have been given the status of an impartial medical specialist because Dr. Breakstone's report, which was written 15 months prior to appellant's relapse on September 13, 1996, was incomplete and, therefore, his opinion as a second opinion physician was invalid. Appellant reiterated that he had cooperated in rehabilitation efforts until he had his relapse. Appellant additionally contended that Dr. Breakstone's opinion was not probative because, as stated in the Office's own words in the March 18, 1996 memorandum to the file, his report was equivocal and speculative and, therefore, useless. Appellant noted how in Dr. Breakstone's January 11, 1996 letter, he stated that it was

necessary for appellant to have more visits to therapists to ascertain whether he suffers from dysthymia. Appellant contended that, since Dr. Breakstone's opinion was not entitled to any weight, the case should not have been referred to an impartial medical specialist and, therefore, Drs. Breakstone's and Klass' opinions are invalid. Appellant also contended that the statement of accepted facts was not complete or accurate, in part, because it did not contain any recent medical history as it had not been updated since April 1, 1991, that it did not mention appellant's relapses and appellant's "own subjective evidence about anything."

By decision dated June 21, 1999, the Office denied appellant's request for reconsideration.

The Board finds that the Office did not abuse its discretion in denying appellant's request for reconsideration under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[1] A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or arguments that meets at least one of the standards described in section 10.606(b)(2).[2]

All the evidence appellant submitted with his request for reconsideration, with the exception of the excerpts from the procedure manual had been previously submitted and, therefore, does not constitute relevant and pertinent new evidence. The procedure manual excerpts do not add any new argument to appellant's claim and, therefore, they do not meet any of the above-mentioned criteria. Further, the Office previously considered the legal arguments appellant made. Appellant argued that the Office erred in finding that a conflict existed in the medical evidence and in referring him to an impartial medical specialist because the referral physician's opinion, Dr. Breakstone's, was incomplete, vague and speculative. Appellant's argument is not a new legal argument, however, because the Office, in determining that a conflict in the medical evidence existed, previously considered the weight to be given Dr. Breakstone's opinion.

Inasmuch as appellant did not show that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument or present relevant and pertinent new evidence not previously considered by the Office, he has failed to show that the Office abused its discretion in denying his request for reconsideration.

[1] Section 10.606(b)(2)(i-iii).

[2] Section 10.608(a).

The decision of the Office of Workers' Compensation Programs dated June 21, 1999 is hereby affirmed.

Dated, Washington, DC
August 27, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member