

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE HOLLISTER and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 01-1527; Submitted on the Record;
Issued August 16, 2002*

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 refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

This is the third appeal in the present case.¹ In a July 31, 1986 decision, the Board affirmed the Office's decisions dated October 24, 1985 and April 17, 1986. The Board found that the Office did not abuse its discretion by denying appellant's application for a lump-sum payment. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.²

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians and to several district medical advisers.³

Appellant was referred for vocational rehabilitation in 1988, 1993 and in 1999. In a rehabilitation closure report dated October 1, 1999, the counselor indicated that appellant made some effort in the job placement process but did not show diligent follow through on the provided job leads. She indicated that there were a number of jobs available in appellant's area of residence, which were suitable to her diagnosis and functional capacity level.

¹ Appellant's claim was accepted for a head contusion, concussion, post-traumatic anxiety neurosis and schizophrenic reaction. Appellant stopped work on August 29, 1975 and did not return. The record reflects that she was terminated from the employing establishment on May 15, 1977.

² Docket No. 86-1354 (issued July 31, 1986).

³ On January 24, 1995 the Office made a preliminary determination that appellant received an overpayment of compensation and that she was at fault for causing the overpayment. Appellant requested an oral hearing, which was held on January 26, 1996. In a decision dated March 25, 1996, the hearing representative determined that appellant was overpaid compensation and was at fault in causing the overpayment.

Thereafter, appellant submitted treatment notes from Dr. Jeffrey H. Klopper, a Board-certified psychiatrist, dated December 21, 1996 to March 31, 1997. In his work capacity evaluation of December 21, 1996, Dr. Klopper indicated that appellant reached maximum medical improvement. He noted that appellant could work in her usual workplace as long as there was a lower stress level. Dr. Klopper's note of March 31, 1997 indicated that appellant had been under his care since 1991 for post-traumatic anxiety neurosis and schizophrenic reaction, chronic and undifferentiated. He noted that appellant continued to have residual disabilities related to this diagnosis. Dr. Klopper diagnosed appellant with depressive disorder NOS and post-traumatic stress disorder with continued symptoms of anxiety and depression. He noted that appellant's symptoms included distressing recollections of the feelings associated with the trauma; detachment or estrangement from others; difficulty sleeping; irritability; and outbursts of anger. Dr. Klopper noted that these symptoms were residuals of appellant's work-related-injury of August 29, 1975. He noted that these residuals did prohibit appellant from obtaining usual full-time employment such as high stress high volume work, but did not prevent her from a low stress, low volume job situation. Dr. Klopper indicated that the district medical adviser in 1986 determined appellant was 50 percent disabled due to a permanent condition of schizophrenia. He indicated that appellant had periods of improvement and periods of decompensation. Dr. Klopper noted that the magnetic resonance imaging scan and neurological examinations were normal. He noted that appellant also experienced significant headaches and has been treated with various medications. Dr. Klopper determined that appellant was 35 percent impaired. He noted that appellant would benefit from ongoing supportive psychotherapy in her efforts to return to work.

On October 13, 1999 the Office issued a notice of proposed reduction of compensation, finding that appellant was no longer totally disabled. The Office noted that appellant had the capacity to earn wages as a receptionist at the rate of \$360.00 a week. The Office noted that this position was in compliance with Dr. Klopper's restrictions that appellant work in a low stress position.

Appellant submitted a letter dated November 12, 1999, indicating that she disagreed with the Office's decision. She indicated that the prevocational plan was not enforced. Appellant noted that no assistance was provided to test her job readiness and her ability to seek actual employment. She further noted that additional occupational and rehabilitation counseling was not made available within a reasonable time frame after the injury.

By decision dated November 19, 1999, the Office adjusted appellant's compensation benefits to reflect her wage-earning capacity as a receptionist. The wage-earning capacity determination took into consideration such factors as appellant's disability, training, experience, age and the availability of such work in the commuting area in which she lived. Attached to the decision was a notice of appeal rights, specifying the procedures necessary for reconsideration, a hearing before the Office, or an appeal to the Board.

In an October 3, 2000 letter, appellant requested reconsideration of her claim. Appellant noted a history of her case and indicated that an immediate structured rehabilitation plan was not provided to her. She noted that the labor market survey determined the availability of jobs but did not guarantee jobs for individuals such as herself. She further indicated that the counselor did not find an employer willing to hire her. Appellant also submitted a report from

Dr. Fiona Hill, a psychologist dated April 13, 2000 and a report from Dr. Klopper dated June 13, 2000. Dr. Hill indicated that she performed various tests to determine appellant's neuropsychological status. She determined that appellant demonstrated divergent intellectual abilities suggestive of brain dysfunction. Dr. Hill noted that language abilities were intact; and there were significant deficits in attention, visual/spatial processing, delayed memory and processing speed. She noted that these deficits would likely impair appellant's functioning to the point that managing a simple job would be difficult. Dr. Hill noted that cognitive deficits were more likely secondary to a brain injury than to a thought disorder such as schizophrenia. She indicated that appellant's anxiety and depression further impaired her functioning by limiting her ability to handle the usual interpersonal and situation stressors encountered in everyday life. Dr. Hill diagnosed appellant with major depressive disorder, recurrent and severe; cognitive disorder DOS; schizoid personality traits; headaches and problems with her primary support group. The report from Dr. Klopper noted that he was treating appellant for post-traumatic anxiety neurosis, schizophrenic reaction chronic and undifferentiated. Dr. Klopper noted that his current diagnosis for appellant was depressive disorder NOS and post-traumatic stress disorder. He indicated that the district medical adviser in 1986 determined that appellant was 50 percent disabled due to a permanent condition of schizophrenia. Dr. Klopper indicated that appellant had periods of improvement and periods of decompensation. He noted that appellant's medical issues relating to the schizophrenic reaction undifferentiated are a determining factors that would contribute to appellant's ability to maintain any job. Dr. Klopper indicated that the residuals from appellant's injury are extensive and have interfered with her rehabilitation process. He noted that appellant's residuals have not permitted her to hold a job.

By decision dated February 8, 2001, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of the prior decision.

The only decision before the Board on this appeal is the Office decision dated February 8, 2001. Since more than one year elapsed from the date of issuance of the Office's November 19, 1999 merit decision to the date of the filing of appellant's appeal, May 7, 2001, the Board lacks jurisdiction to review this decision.⁴

The Board finds that the Office improperly denied merit review of appellant's case under 5 U.S.C. § 8128(a) constituted an abuse of discretion.⁵

Under section 8128(a) of the Federal Employees' Compensation Act,⁶ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁷ which provides that a claimant may obtain review of the merits if her written

⁴ See 20 C.F.R. § 501.3(d).

⁵ See 20 C.F.R. § 10.606(b)(2) (i-iii).

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b) (1999).

application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁸

In the present case, the Office denied appellant’s claim without conducting a merit review on the grounds that the evidence submitted was cumulative and insufficient to warrant review. However, appellant submitted relevant and pertinent evidence not previously considered by the Office. After the November 19, 1999 decision, appellant submitted a new medical report from Dr. Hill dated April 13, 2000. Dr. Hill’s report noted that appellant demonstrated divergent intellectual abilities suggestive of brain dysfunction. She indicated that appellant’s language abilities were intact, however, there were significant deficits in attention, visual/spatial processing, delayed memory and processing speed. Dr. Hill noted that these deficits would likely impair appellant’s functioning to the point that managing a simple job would be difficult. She noted that cognitive deficits were more likely secondary to a brain injury than to a thought disorder such as schizophrenia. Dr. Hill indicated that appellant’s anxiety and depression further impaired her functioning by limiting her ability to handle the usual interpersonal and situation stressors encountered in everyday life. Dr. Hill diagnosed appellant with major depressive disorder, recurrent and severe; cognitive disorder DOS; schizoid personality traits; headaches and problems with her primary support group. This particular medical evidence is relevant as it addressed causal relationship of appellant’s current condition to the original work-related injury by noting appellant sustained residuals of her accepted head injury, which affected her ability to perform even a simple job. Dr. Hill further noted that appellant also had residual anxiety and schizophrenic traits, which were also accepted conditions which affected her ability to function in everyday life and to hold a job. These residuals were directly related to the original work-related injury of August 29, 1975 and bear on her ability to perform the position of receptionist, which the Office determined reflected her wage-earning capacity. This evidence was not previously considered by the Office in rendering a decision. While this evidence may be of limited probative value, the Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to

⁸ 20 C.F.R. § 10.608(b).

the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.⁹

Therefore, the Office abused its discretion in refusing to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case must be remanded for the Office to reopen appellant's claim for a merit review. Following this and such other development as deemed necessary, the Office shall issue an appropriate merit decision on appellant's claim.

Accordingly, February 8, 2001 the decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded to the Office for further development in accordance with this decision.

Dated, Washington, DC
August 16, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁹ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).