

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA WILES and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, FL

*Docket No. 01-1652; Submitted on the Record;
Issued March 11, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has any continuing disability or residuals on or after September 23, 2000, the date the Office of Workers' Compensation Programs terminated her compensation benefits; and (2) whether the Office properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Appellant, a 34-year-old letter carrier, filed a notice on traumatic injury on October 29, 1996, alleging that she sustained an injury to her back in the performance of duty. The Office accepted appellant's claim for lumbar and cervical strain.¹ Appellant stopped work on October 30, 1996 and returned to light duty on November 4, 1996.

In an October 30, 1996 report, appellant's treating physician, Dr. Edward N. Feldman, an orthopedic surgeon, stated that she sustained injury on October 29, 1996. Dr. Feldman noted that appellant picked up a tray of mail weighing approximately 60 to 65 pounds and immediately experienced a sharp pain in her lower back and pain radiating down the right leg to the foot. He noted that appellant also experienced pain in the right hip, and neck. Dr. Feldman noted that, at age eleven, appellant suffered a fractured ankle that healed without complications. He noted further that, in 1983,² appellant was involved in a motor vehicle accident and sustained a fractured pelvis, along with injuries to both knees. Dr. Feldman noted surgery was required on the right knee and later the left wrist. He also stated that, in October 29, 1996, appellant sustained an injury to her lumbar spine due to a work-related accident, which was resolved. Dr. Feldman stated that appellant was in a motor vehicle accident in 1996, when she sustained injuries to the neck, mid and lower back. He stated that these injuries remained "unresolved." Dr. Feldman stated further that, as a result of the accident of April 1996, appellant had bulging discs at L1-2, L2-3 and L3-4, and was under the care of an anesthesiologist. He diagnosed acute lumbosacral sprain, lumbar radiculopathy and trochanteric bursitis in the right hip. Dr. Feldman

¹ The record reflects that appellant had a nonemployment-related motor vehicle accident in April 1996 and a motorcycle accident in 1983.

² The report states 1893, however, this is an obvious typographical error.

further found that the objective findings and subjective complaints were causally related to the work-related accident of October 29, 1996.

Appellant submitted numerous reports, treatment notes and disability certificates, dated November 4, 1996 to September 1, 1998 from Dr. Feldman.

On October 2, 1998 Dr. Gregory T. Flynn, Board-certified in emergency medicine, stated that appellant had bulging discs in the lumbar spine. Dr. Flynn noted that, at L2-3, she had a bulging disc to the right into the neural foramen. He stated that she also had bulging disc at L3-4 and L4-5. Dr. Flynn also indicated that appellant was involved in the same motorcycle accident with her husband. He further assessed degenerative spine disease, bulging disc and previous acetabular and pelvis fractures/injury with diastasis of the pelvis and recommended percutaneous laser discectomy.

By memorandum dated October 16, 1998, the Office medical adviser advised that a second opinion was warranted.

In a November 10, 1998 progress report, Dr. Feldman diagnosed: chronic cervical sprain; chronic lumbosacral sprain; trochanteric bursitis on the right; herniated lumbar disc; L2-3, extending to the right; central herniated disc; L1-2 right facet irritation, L5; facet arthroscopy, L5-S1; spinal stenosis, L1-2; lumbar radiculopathy; post-traumatic stress disorder; depression. He further stated that all of these conditions were causally related to the work-related accident of November 29, 1996 and were permanent.

On November 17, 1998 the Office referred appellant along with a statement of accepted facts and a copy of the case record, to Dr. Donald Sullivan, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a December 16, 1998 report, Dr. Sullivan examined appellant and noted her history of injury and treatment. He stated that appellant's past history was important because in April 1996 she was involved in an automobile accident. Dr. Sullivan noted at that time that she was told that she had a "slipped disc" in her back and was treated for four to five months. He indicated that appellant stated her pain "got better." Dr. Sullivan noted that, prior to 1996, appellant injured her back in 1992 while working for the employing establishment. He was informed that appellant was on permanent duty limitations with no lifting over 40 pounds and that appellant stated that she had "pain on and off" since then. Dr. Sullivan found that, in 1983, appellant was involved in a motorcycle accident and injured her pelvis and left arm. He noted that she was not having complaints in relation to her wrist or pelvis. Dr. Sullivan further noted that several sets of x-rays were taken, as indicated by appellant and that those x-rays were normal.

Dr. Sullivan reviewed an October 30, 1996 ultrasound of the spine and the facet irritation at L5. He noted that this type of examination did not afford much credibility in evaluating back problems. Dr. Sullivan reviewed a December 5, 1996 magnetic resonance imaging (MRI) scan of the cervical and lumbar spine and observed that the cervical spine MRI scan was within normal limits. He noted that the lumbar spine MRI scan showed "canal stenosis at L1-2 due to calcified spondylitic bulge." Dr. Sullivan also noted that it showed "slightly moderate" disc bulges at L2-3 with some facet osteoarthropathy" at L4-5 and L5-S1. He also reviewed the 1997 MRI scan, which showed "herniation of disc at L2-3" and "central disc herniation of the disc at L1-2." With respect to the MRI scans, Dr. Sullivan stated that the lesion at L1-2 appeared to be

an old lesion, which was more consistent with the motorcycle accident of 1983 than with the recent injury. He observed that the changes in the ligamentous structures between L1 and L3 were circumferential around the body of the vertebra and appeared to have preexisted the accident of October 1996 and were likely the result of old trauma. Dr. Sullivan noted mild spinal stenosis at L1-2 as a result of the above changes. He further noted that the body of the vertebra at L3 appeared to be distorted, consistent with an old healed fracture and that there was some distortion of L2 as well. The remainder of the films showed no significant disc bulging, although there was some mild spurring and changes that appeared to be present as of October 30, 1996. Dr. Sullivan noted that there were no distinct changes that would indicate an overall change in appellant's condition.

Dr. Sullivan stated that, on examination, appellant was a very heavy lady, whose straight leg raising test was negative in both legs and her reflexes were symmetrical. He stated that internal/external rotation caused her to complain of pain in her right back. Dr. Sullivan indicated that when asked to describe the area of pain involving her foot, appellant bent forward from the waist and outlined the areas of pain in her foot. He also observed that she also straightened up without any apparent difficulty and climbed on and off the examining table without any difficulty. With respect to whether appellant would obtain relief from laser surgery, he opined that she was not a candidate for any further surgical procedures or injections into her back. Dr. Sullivan stated that he did not believe that there were any objective findings to indicate an additional injury as of the accident of October 29, 1996. He stated further that it would be difficult to determine whether her current low back complaints were related to her previous back problems or to the incident of October 29, 1996. Dr. Sullivan opined that any causal relationship was based upon her subjective complaints of pain and that she had reached maximum medical improvement and she was not a candidate for any further treatments.

On December 31, 1998 the Office medical adviser reviewed the second opinion report and concluded that the issues were addressed.

By decision dated June 3, 1999, a hearing representative determined that the case was not in a posture for decision, as clarification was needed with respect to whether appellant was entitled to continuing treatment.³

By letter dated July 2, 1999, the Office requested clarification from Dr. Sullivan. The Office specifically requested whether there were any objective findings to support ongoing treatment as a result of the October 29, 1996 injury and if so, what residuals remained.

On July 6, 1999 Dr. Sullivan advised that there were no objective findings to support ongoing treatment and no residuals that remained as a result of the October 29, 1996 injury.

In an August 25, 1999 decision, the Office determined that appellant's claim for compensation was disallowed as the evidence did not indicate that appellant had continuing residuals as a result of the October 29, 1996 work injury.

³ The hearing representative also noted that the Office referred to Dr. Sullivan as an impartial medical examiner physician when he was actually a second opinion physician. The hearing representative noted that the decision was essentially correct, but further clarification was necessary.

On September 27, 1999 appellant enclosed a letter from a doctor whom she stated treated her in 1983. She stated that she did not hurt her back in the 1983 incident. In an August 10, 1999 statement, a physician, whose signature is illegible,⁴ stated that he had reviewed the hospitalization records of 1983 and noted that there was no problem with the lumbar spine or low back.

By letter dated September 21, 1999, appellant, through her representative, requested a hearing.

By decision dated July 13, 2000, the hearing representative found that the August 25, 1999 decision was premature as appellant was not afforded 30 days to provide evidence supporting treatment necessary due to the effects of the accepted injury and remanded the case for further action consistent with his decision.

On August 23, 2000 the Office issued a proposed notice of termination of compensation. The Office advised appellant that her compensation for wage-loss and medical benefits was being terminated because she no longer had any continuing injury-related disability. The Office indicated that the weight of the medical evidence, as demonstrated by the opinion of Dr. Sullivan, demonstrated that appellant's work injury had resolved. Appellant was given 30 days to submit additional evidence or argument.

By decision dated September 23, 2000, the Office finalized its proposed termination of benefits. The Office indicated that Dr. Sullivan's opinion remained the weight of the medical evidence.

On March 1, 2001 appellant, through her representative, requested reconsideration. Additional evidence followed, including a duplicate of Dr. Feldman's October 30, 1996 report.

In a November 10, 1998⁵ report, Dr. Feldman advised that appellant had a herniated lumbar disc which was permanent and appellant was to remain on limited duty. In reports dated May 2, October 3 and 31, 2000, Dr. Feldman diagnosed: spinal stenosis L1-2; central herniated disc L1-2; facet irritation at L5-S1; lumbar radiculopathy; post-traumatic stress disorder; chronic cervical sprain; trochanteric bursitis on the right. He stated that the objective findings and subjective complaints were causally related to the accident on the job of October 29, 1996 and were permanent. He also requested surgery and epidural blocks.

⁴ The letterhead states David J. Schulak, orthopedic surgery.

⁵ The date of examination is November 10, 1998 and a signature is signed for January 4, 2001.

In a decision dated April 27, 2001, the Office denied modification of the September 23, 2000 decision.⁶

By letter dated May 2, 2001, appellant requested reconsideration. In support of her request, she stated that the last letter she received from the Office was the July 13, 2000 decision overturning the previous decision. Appellant stated that the information was sent to her old address of the past three and a half years. She also noted that she had sent her change of address in writing to the Office. Appellant stated that she was enclosing a report from her physician advising continued treatment. She enclosed a copy of an April 12, 2001 report, from her treating physician, Dr. Feldman.

In his April 12, 2001 report, Dr. Feldman diagnosed: spinal stenosis L1-2; central herniated disc L1-2; facet irritation at L5-S1; lumbar radiculopathy; post-traumatic stress disorder; chronic cervical sprain; trochanteric bursitis on the right. He stated that the objective findings and subjective complaints were causally related to the accident on the job of October 29, 1996 and were permanent. Dr. Feldman also requested surgery and epidural blocks.

By decision dated May 10, 2001, the Office denied reconsideration finding that the evidence was similar to Dr. Feldman's previous reports and was, therefore, cumulative.

The Board finds that appellant has no continuing disability or medical residuals on or after September 23, 2000, the date by which the Office terminated appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁷ After it has determined that an employee has disability causally 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.⁸ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁹ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹⁰

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested, and the medical rationale expressed in

⁶ The Office noted that a recent telephone call was made to the Office regarding appellant's moving three and half years ago with a change of address. However, the Office noted that the file did not contain any record of that notice.

⁷ *Lawrence D. Price*, 47 ECAB 120 (1995).

⁸ *Id.*; see *Patricia A. Keller*, 45 ECAB 278 (1993).

⁹ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

¹⁰ *Id.*

support of the physician's opinion are facts which determine the weight to be given each individual report.¹¹

The record contains numerous reports from appellant's treating physician, Dr. Feldman. In his initial report, on October 30, 1996 he noted that appellant had sustained injuries to her neck and mid and lower back due to an April 1996 motor vehicle accident, which remained unresolved. Dr. Feldman referred to bulging discs at L1-2, L2-3 and L3-4 and was under the care of an anesthesiologist for these conditions. On November 10, 1998 he made diagnoses of: chronic cervical sprain; chronic lumbosacral sprain; trochanteric bursitis on the right; herniated lumbar disc, L2-3, extending to the right; central herniated disc, L1-2; right facet irritation, L5; facet arthroscopy, L5-S1; spinal stenosis, L1-2; lumbar radiculopathy; post-traumatic stress disorder and depression. Dr. Feldman further stated that all of these conditions were causally related to the work-related accident of November 29, 1996 and were permanent. He did not provide any explanation or rationale for his change in position that the lumbar conditions were no longer related to the April 1996 motor vehicle accident or how bursitis and post-traumatic stress disorder or depression were related to the October 29, 1996 incident.¹²

In an October 2, 1998 report, Dr. Flynn advised that appellant had bulging discs in her lumbar spine and referred to a motorcycle accident with appellant's husband. He did not reference the October 29, 1996 injury or even indicate that he was aware that a subsequent injury had occurred.

In this case, the Office accepted that appellant sustained lumbar and cervical strains. The Office paid appropriate medical benefits and subsequently referred appellant to Dr. Sullivan for a second opinion evaluation. The Board finds that at the time the Office terminated medical benefits, the weight of the medical evidence rested with Dr. Sullivan who submitted a thorough medical opinion based upon a complete and accurate factual and medical history. He performed a complete examination, reviewed the record and advised that appellant had no continued disability from her accepted employment injury and that further medical treatment was unnecessary. Dr. Sullivan noted that appellant had several injuries prior to her accepted October 29, 1996 injury, including an automobile injury in 1996 involving a slipped disc and a back injury in 1992 while working for the employing establishment. He also noted that appellant was on permanent duty limitations with a no lifting restriction over 40 pounds. Dr. Sullivan noted a prior motorcycle injury. He reviewed an October 30, 1996 ultrasound of the spine with a facet irritation, but explained in reference to evaluating back conditions, they were not very useful. Dr. Sullivan reviewed the December 5, 1996 MRI scan of the lumbar and cervical spine, noting that the cervical spine was within normal limits and that there was "canal stenosis at L1-2 due to calcified spondylitic bulge" and that it showed "slightly moderate" disc bulges at L2-3 with some "facet osteoarthopathy" at L4-5 and L5-S1. He also reviewed a 1997 MRI scan, which showed "herniation of disc at L2-3" and "central disc herniation of the disc at L1-2." Dr. Sullivan explained that the lesion at L1-2 appeared to be an old lesion, more consistent with the motorcycle accident of 1983, other than the recent injury. He also noted changes in the structures between L1 and L3 were circumferential around the body of the vertebra and appeared

¹¹ See *Connie Johns*, 44 ECAB 560 (1993).

¹² See *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.)

to have preexisted the accident of October 1996 and were likely the result of old trauma. The remaining changes he noted appeared to be distorted and consistent with an old healed fracture. Dr. Sullivan also observed that there was no significant disc bulging although some spurring and changes appeared that were present as of October 30, 1996. He also observed appellant during straight leg raising and her test was negative and her reflexes were symmetrical. Dr. Sullivan noted that, when he conducted external and internal rotation, it caused her to complain of pain in her back, however, when he asked her to describe the pain in her foot, she bent forward from the waist without any apparent difficulty and then climbed on and off the examining table without any difficulty. He also stated there were no positive objective findings to substantiate appellant's complaints. Dr. Sullivan concluded his report by stating that appellant had reached maximum medical improvement and was not a candidate for further treatments. In response to questions from the Office, Dr. Sullivan further indicated that there were no objective findings to support ongoing treatment and no residuals remained as a result of the October 29, 1996 injury. Because he provided the only rationalized medical opinion of record addressing whether appellant continued to suffer residuals of her accepted employment injury, his opinion constitutes the weight of the medical evidence.¹³

The Board therefore finds that Dr. Sullivan's report established, at that time, that appellant ceased to have any disability or condition causally related to her employment injuries, thereby justifying the Office's September 23, 2000 final termination of medical benefits.

After termination or modification of benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish, by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.¹⁴

Subsequent to the termination of September 23, 2000, appellant submitted several reports from her treating physician, Dr. Feldman.

Dr. Feldman, indicated in his reports from November 10, 1998 to October 31, 2000, that appellant remained disabled from work with the exception of various light-duty restrictions. He listed nine diagnoses of spinal stenosis L1-2, central herniated disc L1-2, facet irritation at L5-S1, lumbar radiculopathy, post-traumatic stress disorder, chronic cervical sprain and trochanteric bursitis on the right. Dr. Feldman stated that the objective findings and subjective complaints were causally related to the accident on the job of October 29, 1996 and were permanent. He also requested surgery and epidural blocks. Dr. Feldman also discussed appellant's back and degenerative disc problems but did not distinguish the degenerative problems from her accepted injury for lumbar and cervical strain as opposed to the motor vehicle accident of 1996, the 1983 motorcycle accident or her preexisting degenerative conditions. Additionally, he failed to discuss how or why appellant continued to be disabled due to her October 29, 1996 accepted employment injury. Dr. Feldman made a blanket statement that all of appellant's conditions were related to her accepted employment injury, when previously he had attributed her lumbar condition to the 1996 motor vehicle accident. Additionally, he did not

¹³ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹⁴ *Talmdage Miller*, 47 ECAB 673 (1996).

explain the process of how a lumbar and cervical strain could cause disability for more than three years.¹⁵ Absent a rationalized medical opinion in support of their conclusions, the reports are of limited probative value.¹⁶

For these reasons, the Office properly found that appellant has no continuing condition or disability causally related to her October 29, 1996 employment injury.

The Board further finds that the Office properly denied merit review of appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

Under 20 C.F.R. § 10.606(b)(2) (1999), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b) (1999) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2) (1999), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁷

In the present case, appellant filed a request for reconsideration on May 2, 2001. Additional evidence followed the April 27, 2001 decision denying appellant's claim. The new evidence included a report from Dr. Feldman dated April 12, 2001.

In the present case, relevant and pertinent new medical evidence did not accompany appellant's request for reconsideration. This is important since the underlying issue in the claim, whether appellant has a work-related disability, is essentially medical in nature.

In its May 10, 2001 decision, the Office correctly noted that appellant did not submit relevant and pertinent new evidence not previously considered by the Office. The report

¹⁵ See *Leon Harris Ford*, *supra* note 12 (finding that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

¹⁶ See *Connie Johns*, *supra* note 11, citing *Philip J. Deroo*, 39 ECAB 1294, 1298 (1988) (finding a physician's opinion on causal relationship must be one of reasonable medical certainty, supported by affirmative evidence, explained by medical rationale and based on a complete and accurate medical and factual background).

¹⁷ 20 C.F.R. § 10.608(b) (1999).

provided by Dr. Feldman did not provide a definitive diagnosis nor did he specifically address causal relationship in a manner different than addressed in prior reports.¹⁸ In fact, other than the date, it was substantially similar to the May 2, October 3 and 31, 2000 reports. Appellant did not provide relevant or pertinent new evidence, nor did she advance a relevant legal argument that had not been previously considered by the Office. She did not argue that the Office erroneously applied or interpreted a specific point of law. Consequently, appellant is not entitled to a merit review of the merits of the claim based upon any of the above-noted requirements under 10.606(b)(2) (1999). Accordingly, the Board finds that the Office properly denied appellant's May 2, 2001 request for reconsideration.

The May 10 and April 27, 2001 and September 23, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
March 11, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

¹⁸ The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case. *Robert P. Mitchell*, 52 ECAB __ (Docket No. 97-2145, issued October 13, 2000); *Jacqueline M. Nixon-Steward*, 52 ECAB __ (Docket No. 99-1345, issued November 3, 2000).