U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPHINE M. COCHRAN and U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Phoenix, AZ

Docket No. 03-629; Submitted on the Record;
Issued June 5, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review.

Appellant's claims filed on March 25, 1994, November 22, 1996 and June 11, 1997 was accepted for bilateral epicondylitis, tendinitis, carpal tunnel syndrome and right shoulder impingement. Appellant, a distribution clerk, initially returned to full duty with no automation tasks or overhead lifting, but her symptoms worsened and she worked part-time intermittently.

Appellant had surgery on her right shoulder on November 26, 1997. On December 5, 1997 appellant accepted a permanent rehabilitation assignment as a maintenance support clerk, which was approved by her treating physician, Dr. Jan M. Willcox, an osteopathic practitioner, as within appellant's physical restrictions. Appellant had surgery on her left shoulder on March 6, 1998 and returned to half-time work on June 13, 1998. She underwent left carpal tunnel release and left ulnar nerve decompression on December 11, 1998 and the same operation on her right arm on March 6, 1999.

Appellant returned to her rehabilitation position half time on July 8, 1999. On March 7, 2000 the Office referred appellant for a second opinion evaluation to Dr. Borislav Stojic, a Board-certified orthopedic surgeon. The Office asked appellant's treating physician, Dr. Francis K. Tindall, also a Board-certified orthopedic surgeon, to comment on Dr. Stojic's opinion that appellant could work full time.

On May 9, 2000 Dr. Tindall stated that appellant could not work full time because she would experience too much pain. He related that she had had extensive surgical repairs to both upper extremities and opined that it was "reasonable at this time to leave well enough alone" and continue her 20-hour week. Dr. Tindall noted that appellant was caring for her husband who had cancer and was in a wheelchair.

The Office found a conflict in the medical opinion evidence and referred appellant to an impartial medical examiner to resolve the issue of whether appellant could work four hours a day or full-time.[1] Based on the August 17, 2000 report of Dr. Ronald D. Suiter, a Board-certified orthopedic surgeon, the Office determined that appellant's modified clerk position was suitable and provided her 30 days to accept the job full time or explain her reasons for refusing.

On September 27, 2000 appellant informed the Office that Dr. Tindall had released her to full time work, but that she might request a transfer to a less stressful facility. In an October 26, 2000 report, Dr. Tindall stated that he agreed that appellant could return to full-time work gradually, although she was probably not going to tolerate working an eight-hour day particularly well. He recommended no overtime or holiday work and physical restrictions.

Appellant stated on October 2, 2000 that she was "rescinding her acceptance" of full-time work and would submit evidence showing that the position was not suitable. She submitted an October 2, 2000 letter from Dr. Jan D. Zieren, an osteopathic practitioner, who stated that she had reviewed the job offer made to appellant on April 28, 2000. Dr. Zieren concluded that appellant had "severe depression" which precluded her from working more than four hours a day.

Appellant also submitted an October 4, 2000 letter from a nurse practitioner in psychology, Kathe L. Reitman, who stated that appellant was currently being treated for major depression disorder and was unable to work more than four hours a day. Anticipated return to work full time was unknown at this time.

In an October 11, 2000 letter, Ms. Reitman stated that appellant had been seen "by the undersigned for evaluation and treatment of major depressive disorder" following the death of her husband in June 2000 and the requirement that she return to work full time. Ms. Reitman added that appellant felt abandoned by her employer and was unable to function and concentrate.

On November 3, 2000 the Office terminated appellant's compensation on the grounds that she had refused an offer of suitable work. The Office noted that the evidence appellant submitted regarding her depression was insufficient to establish that such an emotional condition existed because the nurse practitioner was not considered a physician[2] and Dr. Zieren offered no medical rationale for her conclusion that appellant's depression prevented her from working.[3]

Appellant requested a hearing, which was held on April 18, 2001. On July 18, 2001 the hearing representative denied appellant's claim on the grounds that she refused an offer of suitable work. The hearing representative found that the weight of the medical opinion evidence

[1] 5 U.S.C. § 8123(a) states in pertinent part: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

[2] *See Linda Thompson*, 51 ECAB 694, 696 (2000) (finding that form reports submitted by a chiropractor had no probative value in establishing appellant's entitlement to disability compensation).

[3] In an October 5, 2000 letter, the Office informed appellant that she should file a new claim if she believed that her emotional condition was work related and disabled her from performing the duties of the modified position.

rested with the impartial medical examiner, Dr. Suiter and established that appellant was physically capable of working in the modified clerk position full time.

On May 21, 2002 appellant requested reconsideration and submitted additional evidence. On August 21, 2002 the Office denied appellant's request on the grounds that the evidence submitted was repetitious and irrelevant and, therefore, insufficient to warrant merit review.

The Board finds that the Office acted within its discretion in refusing to reopen appellant's claim for merit review.

Section 8128(a) of the Federal Employees' Compensation Act[4] vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[5]

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[6] The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.[7] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.[8]

In this case, appellant submitted three letters dated January 2, 2002, August 13 and April 30, 2001 from Dr. Mary M. Desch, a Board-certified psychiatrist and neurologist, an April 19, 2001 letter from Ms. Reitman and a May 10, 2002 report from Dr. Tindall with her request for reconsideration.

The May 10, 2002 report from Dr. Tindall indicated that appellant was not working because of depression but that she was able to function from an orthopedic standpoint. She added that appellant "could probably continue" as was indicated on September 5, 2000, being limited to a four-hour workday.[9] Dr. Tindall was on one side of the conflict that Dr. Suiter

[4] 5 U.S.C. § 8101-93.

[5] 5 U.S.C. § 8128(a). ("The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.").

[6] 20 C.F.R. § 10.608(a)(1999).

[7] 20 C.F.R. § 10.606(b)(1)-(2)(1999).

[8] 20 C.F.R. § 10.608(b)(1999).

[9] Dr. Tindall stated on September 5, 2000 that appellant was "probably not ever going to be able to resume full eight-hour shifts" because the combination of her numerous injuries and residual problems was simply going to be too much for her. Appellant should be allowed to continue on a four-hour workday indefinitely.

resolved in finding that appellant was capable of an eight-hour workday. Therefore, his opinion does not require further consideration of the merits of the issue.[10]

The April 19, 2001 report from Ms. Reitman and the handwritten note dated April 30, 2001 from Dr. Desch confirming her agreement with Ms. Reitman that appellant was disabled were considered by the hearing representative. He found these reports insufficient to establish that appellant was not capable of performing the duties of the modified position due to a nonwork-related condition. Therefore, this evidence is repetitious and insufficient to require merit review.

In her August 13, 2001 letter, Dr. Desch stated that she had first evaluated appellant on November 1, 2000 and followed along with her care by Ms. Reitman, seeing appellant on subsequent visits on March 26, April 30, July 24 and August 13, 2001. Appellant's diagnosis was major affective disorder-depression, severe and she was totally disabled from this illness. Dr. Desch concluded that she hoped "this letter serves to clarify [appellant's] medical condition and communicate her complete inability to perform gainful employment of any kind, in any capacity, with any schedule, at this time."

Dr. Desch's conclusion is immaterial to the issue in this case, whether appellant was capable of performing the duties of the modified position in November 2000. In fact, she did not address appellant's work capacity at that time.

In a follow-up letter dated January 2, 2002, Dr. Desch attempted to clarify her opinion, noting that she concluded in November 2000 that appellant was totally disabled due to her psychiatric condition, despite working for four hours a day. Dr. Desch stated that advancing appellant's work hours to eight was not suitable, "given her status of total disability." She added that the medical rationale for her conclusion was the specific symptoms of depression that rendered appellant disabled, such as impaired concentration and sleep disturbance.

The Board finds that Dr. Desch's reports are cumulative of the handwritten opinion that she provided on the October 11, 2000 report from Ms. Reitman. Dr. Desch stated then that she had completed a psychiatric evaluation on November 1, 2000 and "agreed with the above diagnosis, treatment plan and recommendations regarding the workplace" outlined by the nurse practitioner. Dr. Desch provided no new rationale or explanation of how appellant's depression prevented her from working in November 2000 beyond reiterating that appellant was totally disabled. Therefore, this evidence is insufficient to require the Office to reopen the record for merit review.[11] Because appellant has failed to submit relevant and pertinent new evidence on

[10] *See Barbara J. Warren*, 51 ECAB 413, 416 (2000) (finding that because appellant's physician had been on one side of the conflict to be resolved, subsequent reports from her regarding appellant's lumbar condition were insufficient to overcome the special weight accorded the opinion of the referee specialist).

[11] *See Kevin M. Fatzer*, 51 ECAB 407, 412 (2000) (finding that a medical report containing a vague and unrationalized opinion on appellant's disability was insufficient to require reopening of appellant's case because it failed to address his physical condition at the relevant time).

the issue of her ability to work, she has not met the requirement of subsection (iii) of section 10.606(b)(2).[12]

Appellant has not shown that the Office erred or incorrectly applied the law. Nor has she raised any point of law not previously considered by the Office. Inasmuch as appellant has failed to meet any of the requirements for reopening her claim for merit review, the Board finds that the Office acted within its discretion in denying her request for reconsideration.[13]

The August 21, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 5, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[12] *See Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that appellant's failure to submit new and relevant evidence on reconsideration justified the Office's refusal to reopen his case for merit review).

[13] *See Khambandith Vorapanya*, 50 ECAB 490, 492 (1999) (finding that appellant failed to demonstrate that the Office abused its discretion in denying his request for reconsideration).