

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANNA STAMATIOU and U.S. POSTAL SERVICE,
POST OFFICE, Tampa, FL

*Docket No. 03-1190; Submitted on the Record;
Issued October 15, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

The Board's jurisdiction to consider and decide appeals from a final decision of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ As appellant filed her appeal with the Board on April 3, 2003, the only decision before the Board is the Office's January 8, 2003 decision denying appellant's request for reconsideration.

The Office accepted appellant's claim for lumbar strain, herniated nucleus pulposus at L4-5 and a discectomy and laminectomy at the L4-5 level. In a report dated August 18, 1998, the referral physician, Dr. James D. Shortt, a Board-certified orthopedic surgeon, opined that appellant could not perform the work of a security guard but could work 4 hours a day with restrictions including no lifting more than 10 pounds and no walking more than 15 minutes an hour. In a note dated March 30, 2001, appellant's treating physician, Dr. Dennis M. Lox, a Board-certified physiatrist, stated that appellant was totally disabled. The Office determined that a conflict in medical opinion existed between Dr. Shortt and Dr. Lox regarding appellant's ability to work and it referred appellant to an impartial medical specialist, Dr. Joseph M. Sena, a Board-certified orthopedic surgeon. In reports dated November 10 and 17, 1999, Dr. Sena opined that appellant could work 8 hours a day with restrictions including no lifting greater than 20 pounds and no repetitive bending of the low back and that she could perform the duties of a security guard.

By decision dated January 5, 2001, the Office adjusted appellant's compensation to reflect her wage-earning capacity in the position of a gate guard.

¹ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

By letter dated January 23, 2001, appellant requested an oral hearing before an Office hearing representative which was held on June 28, 2001. At the hearing, appellant described her symptoms, stating that she could not sit for a half hour, could not squat, could not walk half a block and could not mow lawns or sweep gate areas. She stated that she could not perform many of the job requirements of the gate guard.

By decision dated November 28, 2001, the Office hearing representative affirmed the Office's January 5, 2001 decision.

By letter dated November 26, 2002, appellant requested reconsideration of the Office's decision and submitted additional evidence including reports from Dr. Lox dated from January 11 through December 18, 2002 and two medical reports from Dr. Stephen Wood, an osteopath. Dr. Lox addressed his ongoing treatment of appellant. He noted that appellant complained of increasing back pain, that she had a normal bone biopsy, he prescribed medication, and stated that appellant was undergoing chemotherapy for breast cancer. Dr. Lox also stated that appellant was having a lot of spasms in her neck and back since the motor vehicle accident and diagnosed cervical strain and right L4-5 disc herniation. On May 9, 2002 Dr. Lox stated that appellant was unfit to sit for jury duty because sitting for any length of time was extremely painful for her. He also had appellant undergo injections for treatment.

In his report dated September 13, 2002, Dr. Wood described appellant's ongoing symptoms of pain in her back and legs and performed a physical examination. He reviewed the most recent magnetic resonance imaging (MRI) scan dated July 2002 which showed a left lateral disc herniation at L3-4 with foraminal stenosis, more pronounced at L4-5 bilaterally than at L3-4, and a Grade 0-1 degenerative spondi at L4-5. Dr. Wood diagnosed low back pain, lumbar radiculopathy, left greater than right, status post lumbar laminectomy at L4-5 by history, lateral disc herniation at L3-4, foraminal stenosis at L3-4 and L4-5 bilaterally, Grade 0-1 spondylolisthesis -- degenerative at L4-5, and left L5-S1 herniated nucleus pulposus. He stated that appellant required a lumbar myelogram and postmyelogram computerized tomography (CT) scan.

In a report dated October 14, 2002, Dr. Wood stated that the myelogram CT scan on September 30, 2002 showed no evidence of disc herniations at L1-2, L2-3 or L5-S1, and L4-5, and that at L3-4 there were small calcifications. Dr. Wood diagnosed chronic low back pain, lumbar radiculopathy, left greater than the right, status post lumbar laminectomy at L4-5 and failed back syndrome. Dr. Wood stated that, because the MRI scan results showed significantly more problems than the myelogram (CT) scan, he recommended pain management, and if that did not work, another evaluation by a spine surgeon.

By decision dated January 8, 2003, the Office denied appellant's request for reconsideration. The Office found the evidence to be irrelevant.

The Board finds that the Office properly refused to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation 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.² 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).³

In this case, the reports from Dr. Lox dated from January 11 through December 18, 2002 document that appellant had increased back pain, had spasms in her neck and back, and had a cervical strain and a right L4-5 disc herniation. They also document that appellant could not sit for jury duty, and describe Dr. Lox's medical treatment of appellant including injections and medication he prescribed. In his reports dated September 13 and October 14, 2002, Dr. Wood described the results of the July 2002 MRI scan and the myelogram CT scan performed on September 30, 2002. In addition to the accepted conditions of a lumbar strain and a herniated nucleus pulposus at L4-5, he diagnosed foraminal stenosis at L3-4 and L4-5 bilaterally, degenerative spondylolisthesis at L4-5, and a herniated nucleus pulposus at L5-S1. Dr. Wood prescribed pain management.

These reports, however, are not relevant to the issue of whether appellant could perform the position of gate guard, or whether the Office properly adjusted appellant's compensation to reflect his wage-earning capacity in that position.⁴ Dr. Wood did not address the selected position or appellant's ability to work. Other than stating that appellant was unable to sit for jury duty due to her extreme back pain, Dr. Lox did not address appellant's physical restrictions or her ability to work. He did not discuss the selected position or otherwise provide new and relevant evidence with respect to the underlying issues. Appellant has therefore not presented relevant and pertinent evidence not previously considered by the Office. She has not shown that the Office erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by the Office. She has therefore failed to meet the requirements of section 10.606(b)(2), and the Office properly denied appellant's request for reconsideration without reopening the claim for merit review.

² Section 10.606(b)(2)(i-iii).

³ Section 10.608(a).

⁴ See *William H. Woods*, 51 ECAB 619, 620 (2000); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

The January 8, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 15, 2003

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member