

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DINIA L. MATLOCK and DEPARTMENT OF JUSTICE,
METROPOLITAN DETENTION CENTER, Los Angeles, CA

*Docket No. 00-277; Submitted on the Record;
Issued March 20, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On January 24, 1996 appellant, then a 36-year-old correctional officer, filed an occupational disease claim alleging that, on January 15, 1996, while in the performance of duty, she sustained injuries to her left leg, hip and lower back when she slipped on a stairway, wedging her left foot between the metal steps, and fell backwards down the steps. The Office accepted the claim for a left ankle sprain, multiple contusions and low back sprain. Appellant was released for light-duty work, six hours a day, on March 10, 1996 and received appropriate compensation for intermittent periods of disability. She resigned on April 13, 1996.

In a report dated November 4, 1996, appellant's treating physician, Dr. Bruce E. Fishman, an orthopedic surgeon, diagnosed chronic lumbosacral myoligamentous sprain and strain, chronic left sacroiliac and left lumbar facet dysfunction and grade one medial collateral ligament strain and medial capsular ligament sprain of the left knee. He concluded that appellant was temporarily partially disabled and could work with restrictions on lifting, bending and stooping.

In a report dated November 18, 1996, Dr. Marvin Frieder, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, examined appellant and noted multiple inappropriate and internally inconsistent findings. He opined that appellant had no believable subjective or reliable objective residual factors of disability due to the January 15, 1996 injury and could return to her usual work without the need for further treatment.

By letter dated March 4, 1997, the Office asked Dr. Fishman to review Dr. Frieder's report and provide his comments. In a report dated March 18, 1997, Dr. Fishman concurred with Dr. Frieder's conclusion that appellant's symptoms were most probably not related to the January 15, 1996 work injury, but were probably secondary to psychiatric problems and

symptom magnification. He concluded that appellant had no disabling residuals of her injury and needed no further medical care.

Appellant subsequently submitted additional medical evidence from her new treating physicians, Drs. Milton E. Ashby and John Kayvanfar. In a report dated June 9, 1997, Dr. Ashby, a Board-certified orthopedic surgeon, noted that appellant continued to complain of pain in her lower back, left ankle and hip and that on examination her left foot was completely pronated onto the medial aspect of the left ankle. He suspected that she had ruptured her posterior tibial tendon, but examination revealed full integrity to all of the musculature about the ankle and good quality in all the everters and inverters of the ankle.

Dr. Ashby stated that, despite her normal x-rays and magnetic resonance imaging (MRI) scans, which he was at a loss to explain, he did not feel appellant was a psychiatric patient. Rather, she had some significant tendinous disruption related to her work injury that had not been diagnosed. He concluded that she needed further medical care and diagnostic efforts before her symptoms could be ascribed to a psychiatric condition.

In a report dated June 18, 1997, Dr. Kayvanfar, an orthopedic surgeon, listed his findings on physical examination, noting that appellant had marked tenderness over the gluteus maximus and gluteus medius origins, as well as over the greater trochanteric area on the left side, the anterior superior iliac spine and the left ischial bursa. Although the MRI scan and bone scan yielded mostly normal results, examination of the left ankle revealed marked tenderness over the anterior talar-fibular ligament and the anterior draw test was positive at 3+, both in plantar flexion, neutral and dorsiflexion. Dr. Kayvanfar diagnosed bursitis of the ischial spine, anterior superior iliac spine and greater trochanteric area, with performis syndrome present. In addition, he diagnosed left ankle instability and adductor tendinitis.

Dr. Kayvanfar stated that the mechanism of appellant's January 15, 1996 injury, twisting the entire body with the foot caught while her body was going down, resulted in the left ankle instability because the weight of her entire body had been held against the soft tissue of her ankle. He added that the diagnosed multiple sites of bursitis and tendinitis also corresponded with appellant having hung by her foot and ankle on the stairway. Dr. Kayvanfar stated that appellant would require left ankle instability correction, but that her prognosis was good and full recovery was anticipated.

On July 1, 1997 the Office issued a notice of proposed termination of compensation and by decision dated September 2, 1997 terminated appellant's entitlement to wage loss and medical benefits effective August 29, 1997. The Office found that the opinions of Drs. Frieder and Fishman represented the weight of the medical evidence.

Appellant requested an oral hearing and submitted additional medical evidence in support of her claim, including a November 13, 1997 operative report from Dr. Kayvanfar documenting his discovery on surgical exploration that appellant's calcaneal fibular ligament was not attached and that her anterior fibular ligament was stretched out completely.

In a decision dated June 30, 1998, an Office hearing representative found the additional medical evidence was insufficiently rationalized to be of convincing quality and affirmed the Office's decision terminating compensation benefits.

By letter dated November 6, 1998, appellant, through counsel, requested reconsideration and submitted additional medical evidence from Dr. Kayvanfar, including an August 14, 1998 operative report documenting his repair of appellant's gluteus maximus to increase the extensor, and an October 2, 1998 report in which he reiterated his earlier conclusion that appellant's diagnosed conditions corresponded with the mechanism of the January 15, 1996 injury.

By letter dated November 19, 1998, the Office forwarded a statement of accepted facts and copies of the medical evidence of record to Dr. Leonard A. Simpson, an orthopedic surgeon and Office medical adviser, for his review. He was asked to describe any injury-related factors of disability and any nonindustrial or preexisting disability noted in the record and to comment on whether the August 14, 1988 gluteus maximus surgery performed by Dr. Kayvanfar was employment related and warranted.

In a report dated November 23, 1998, Dr. Simpson reviewed the relevant medical evidence and concluded that the record supported an established diagnosis of "left lateral ankle sprain/strain with a specific diagnoses of a tear of the calcaneal fibular ligament" as established by "the documentation of left ankle pain, an antalgic gait, instability noted on clinical examination and the surgical findings" of November 1997. Dr. Simpson concluded that another established diagnosis is chronic low back pain with some left lower extremity radicular symptoms, established by the description of consistent low back pain with some left buttock radiation with decreased lumbosacral motion noted on examination, palpable tenderness and the absence of positive neurologic findings. He stated that the possibility of a tear of the gluteus maximus muscle had been suggested, but that this diagnosis had not yet been established. Dr. Simpson concluded that the left ankle and low back conditions were directly related to the January 15, 1996 injury, but that further medical development was required before any conclusions could be reached regarding the cause of the gluteus maximum tear and the necessity for the August 14, 1998 surgery.

By decision dated February 8, 1999, the Office found the additional arguments and medical evidence submitted by appellant to be cumulative, being essentially similar to those already contained in the record, and therefore declined to reopen the claim for further merit review.

By letter dated April 20, 1999, appellant, through her counsel, requested reconsideration of the June 30, 1998 decision and submitted a March 25, 1999 report from Dr. Kayvanfar, who again stated that appellant's signs and symptoms corresponded to the mechanism of the injury.

In a decision dated July 7, 1999, the Office found the additional arguments and medical evidence submitted by appellant to be repetitious and essentially similar to evidence and arguments already contained in the record and therefore declined to reopen the claim for further merit review.

The Board finds that the Office abused its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

The only decisions before the Board on this appeal are the February 8 and July 7, 1999 Office decisions which found that appellant, in her request for reconsideration, had not submitted sufficient evidence to warrant a merit review of the June 30, 1998 decision affirming the Office's termination of appellant's benefits, effective August 29, 1997. As more than one year has elapsed between the issuance of the June 30, 1998 decision and September 21, 1999, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the June 30, 1998 decision.¹

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; or (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.³ Section 10.608 provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim. When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁴

The Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.⁵ Since the Board's jurisdiction of a case is limited to reviewing that evidence which is before the Office at the time of its decision,⁶ it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its decision. As the Board's decisions are final as to the subject matter appealed,⁷ it is crucial that all evidence relevant to that subject matter, which was properly submitted to the Office prior to the time of issuance of its decision, be addressed by the Office.⁸

¹ 20 C.F.R. § 501.3(d)(2).

² 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b).

⁴ *Carol Cherry*, 47 ECAB 658 (1996).

⁵ 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.125.

⁶ *See* 20 C.F.R. § 501.2(c).

⁷ 20 C.F.R. § 501.6(c).

⁸ *William A. Couch*, 41 ECAB 548, 553 (1990).

On June 30, 1998 an Office hearing representative affirmed the Office's September 2, 1997 decision terminating appellant's compensation benefits effective August 29, 1997. However, following issuance of the June 30, 1998 decision, the Office received additional medical and factual evidence into the record and conducted further development on the merits of appellant's claim by forwarding the case record to Dr. Simpson for evaluation. In so doing, the Office proceeded to exercise its discretionary authority under 5 U.S.C. § 8128. As the record currently stands, however, the Office has never issued a merit decision evaluating the evidence it obtained from Dr. Simpson.

Exercising its discretionary authority, the Office solicited and received relevant pertinent evidence not previously considered. Therefore, the Office must conduct an appropriate review of the evidence under section 8128(a). Following such a review and any development which the Office deems necessary, the Office shall issue an appropriate decision in this case.

The decisions of the Office of Workers' Compensation Programs dated July 7 and February 8, 1999 are set aside, and the case is remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
March 20, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member