

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case No. SBR 211058

WANDA FULLYLOVE,

Applicant,

vs.

CLINISHARE PRIVATE DUTY, and
UNIHEALTH AMERICA,

Defendants.

FINDINGS & ORDER

REPRESENTATIONS:

ROSE, KLEIN & MARIAS
By: GREGORY DORN
Attorney for Applicant

KEGEL, TOBIN, ET AL
By: W. JOSEPH TRUCE
Attorneys for Defendant

A Petition for Reconsideration from this decision shall be filed only at the San Bernardino District Office of the Workers' Compensation Appeals Board.

The above-entitled matter having been heard and regularly submitted, the Honorable David Bjelland, Workers' Compensation Judge, now finds and orders as follows:

FINDINGS

1. WANDA FULLYLOVE, born 12/27/54, while employed on 1/4/91, as a Home Health Aide, at Long Beach, California, by CLINISHARE PRIVATE DUTY, did sustain injury arising out of and occurring in the course of her employment, to her low back.
2. The stipulations in the Minutes of Hearing of 3/10/94, are true and are incorporated herein by reference.
3. There was no material change in circumstances between the 12/4/92 Decision & Order of the Rehabilitation Unit and the 8/23/93 Decision & Order. Nothing was done after the first Decision & Order that could not have been done before the first Decision & Order. The "other factors not capable of determination" contemplated by Labor Code § 5410 did not exist in August of 1993. The Rehabilitation Consultant had no authority to re-open the case in August of 1993 and re-decide his prior finding on the

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issue of qualified injured worker status. The 8/23/93 Decision & Order exceeded the authority of the Rehabilitation Consultant.

4. The applicant is not a qualified injured worker, in accordance with the 12/4/92 Decision & Order of the Rehabilitation Unit. There has been no timely appeal of that Decision & Order and the issue of qualified injured worker status is now *res judicata*.

ORDER

IT IS ORDERED that the 8/23/93 Decision & Order of the Rehabilitation Unit be and it is hereby vacated.

DATED: 8-16-94
Filed and Served by mail on
all parties on the Official Address Record.


DAVID BJELLAND
WORKERS' COMPENSATION JUDGE

Date: 8-18-94 By: D. Holden

WANDA FULLYLOVE

V. CLINISHARE PRIVATE
DUTY, and UNIHEALTH
AMERICA

SBR 211058

JUDGE : David Bjelland
DATE : August 16, 1994

OPINION OF JUDGE ON DECISION

Statement of Facts

On April 3, 1992, the applicant was examined by William Dorn, M.D., a Qualified Medical Examiner in the field of orthopedic surgery. Dr. Dorn found the applicant to be permanent and stationary, and he issued a final medical/legal report dated 4/27/92. In that report, Dr. Dorn expressed the opinion that the applicant is a qualified injured worker. Dr. Dorn relied upon the applicant's deposition testimony, wherein she stated that her job duties required her to lift patients weighing between 230 and 260 pounds. Dr. Dorn felt that the applicant's residual permanent disability precluded her from lifting more than 45 to 55 pounds.

In October of 1992, the applicant's former supervisor, Lois Cunningham, completed a DWC Form RU-91 "Description of Employee's Job Duties" and forwarded it to the carrier. Ms. Cunningham indicated on the RU-91 that the applicant was never required to lift or carry more than 25 pounds on the job. The carrier sent a copy of the RU-91 to Dr. Dorn, who reviewed it and issued a supplemental report dated 11/6/92. In that report, Dr. Dorn expressed the opinion that if the RU-91 is correct, then the applicant is not a qualified injured worker.

The parties were not able to resolve vocational rehabilitation issues without assistance, so the attorney for the applicant petitioned the Rehabilitation Unit for a determination as to whether or not the applicant was entitled to vocational rehabilitation services. On 12/4/92, the Rehabilitation Unit Consultant issued a Decision & Order, which found that the applicant is not a qualified injured worker. The Consultant based his opinion on the 11/6/92 medical report from Dr. Dorn.

In accordance with the 1992 version of Labor Code § 4645(d) and ADR § 10014(e), the Decision & Order from the Rehabilitation Unit contained the following language:

"THIS DETERMINATION IS FINAL. ANY AGGRIEVED PARTY MUST FILE AN APPEAL WITH THE WORKERS' COMPENSATION APPEALS BOARD WITHIN TWENTY (20) DAYS FROM THE DATE OF SERVICE OF THIS DETERMINATION."

The 12/4/92 Decision & Order was never appealed.

In May of 1993, another job analysis was sent to Dr. Dorn, who reviewed it and issued a second supplemental report dated 6/1/93. In that report, Dr. Dorn expresses the opinion that the applicant is a qualified injured worker.

In August of 1993, an amended job analysis was sent to Dr. Dorn. The amended job analysis was reviewed by Dr. Dorn, who issued a third supplemental report dated 8/24/94. In that third supplemental report, Dr. Dorn states that:

"If, indeed, the [applicant] is only required to assist the patient in transferring or changing a position in bed and there are no heavy lifting requirements, [the applicant] should be able to perform those activities. However, as noted previously, the [applicant] will not be able to assist or lift patients weighing 100 or more pounds."

After the time for appeal of the original 12/4/92 Decision & Order had expired, applicant's attorney petitioned the Rehabilitation Unit a second time for a determination as to whether or not the applicant is entitled to vocational rehabilitation services. On 8/23/93, the Rehabilitation Unit Consultant issued a second Decision & Order. This second Decision & Order contained a finding that the applicant is a qualified injured worker. The defendants have filed a timely appeal to this second Decision & Order.

On 3/10/94, a trial was held in this case, on the Appeal by defendants from the 8/23/94 Decision & Order. By agreement of the parties, the only issue submitted for decision was "the *res judicata* effect, if any, of the

Decision & Order of the Rehabilitation Unit issued on December 4, 1992 finding that the Applicant is not a Qualified Injured Worker."

Statement of the Law - Labor Code § 5410

The power of a Rehabilitation Consultant to re-open a final Order has been limited by the legislature in Labor Code § 5410. That power can only be exercised, when one of the following conditions exist:

- (1) The original injury has caused new and further disability; or
- (2) The provision of vocational rehabilitation services has become feasible because the employee's medical condition has improved; or
- (3) There exists "other factors not capable of determination at the time the employer's liability for vocational rehabilitation services otherwise terminated."

In the instant case, it is clear that neither condition (1) nor condition (2) existed in August of 1993, when the Rehabilitation Consultant issued the second Decision & Order. That is, in August of 1993, there was no allegation of new and further disability and feasibility was not in issue.

As concerns condition number (3) above, it is not entirely clear what constitutes "other factors not capable of determination at the time [the original Decision & Order was issued]. This language evidently contemplates a material change in circumstances, whereby the parties become capable of doing something that they were previously incapable of doing. In other words, the requirement means something more than mere neglect or inaction. Evidence obtained after the final order is issued, cannot be the basis for re-opening the case, if the parties made no efforts to obtain that evidence, prior to submitting the matter to the Rehabilitation Unit for a determination.

In the instant case, there was no material change in circumstances between the first Decision & Order and the second Decision & Order. Nothing was done after the first Decision & Order that could not have been done before the first Decision & Order. In the opinion of the WCJ, the "other factors not capable of determination" contemplated by Labor Code § 5410 did not exist in August of 1993. Consequently, the Rehabilitation

Consultant had no authority to re-open the case in August of 1993 and re-decide his prior finding on the issue of qualified injured worker status. His 8/23/93 Decision & Order exceeded his authority and must be and is hereby declared null and void.

It is worth noting here that although in the instant case, the Court's enforcement of the original Decision & Order operates as a bar to this particular applicant's right to benefits, the same principles are just as likely to protect an applicant's rights to benefits, in other cases. That is, the instant case could just as easily have involved an original Decision & Order finding that the applicant is a qualified injured worker and ordering the employer to provide benefits. There is no principled reason to differentiate between the finality of a Decision & Order awarding vocational rehabilitation benefits as compared to one denying benefits. If an employer fails to file a timely appeal to a final Decision & Order awarding benefits, the employee's rights to benefits should not continue to be in jeopardy, by permitting the employer to escape the *res judicata* effect of such an Order, and continue to litigate the issue, merely by obtaining a second job analysis and a supplemental medical report, and then waiting for a second Decision & Order, which the employer can appeal to a WCAB WCJ, for a *trial de novo*.

Administrative Guideline § 8-60-06 of the Rehabilitation Unit states that "Bureau determinations shall be written in clear, succinct, simple English." If the Rehabilitation Unit does not consider a Decision & Order to be final, then they should not use the word "final" to describe their determination. If what they really mean is that this is my decision right now, but come back later and I might say the opposite, then that should be spelled out clearly in the Decision & Order. The Rehabilitation Unit's arbitrary stances of treating some Orders as more final than other Orders is bad policy and invites, abets and encourages abuse and gamesmanship by the employer, the applicant, and even by the Rehabilitation Consultant. Neither the employer nor the employee should be permitted to re-open a final determination, short of satisfying the restrictions contained in Labor Code § 5410.

In conclusion, it is the opinion of the WCJ, that the original 12/4/92 Decision & Order of the Rehabilitation Unit is *res judicata* on the issue of qualified injured worker status, and that the 8/23/93 Decision & Order of

the Rehabilitation Unit exceeded the Consultant's authority under Labor Code § 5410 and is hereby vacated.

Estoppel/Detrimental Reliance

The original 12/4/92 Decision & Order of the Rehabilitation Unit became final in January of 1993. There has been no showing that the defendants in any way induced the applicant to forego an appeal of the original Decision & Order. There has been no behavior or misconduct by the defendants that might support the application of general equitable principles of estoppel or detrimental reliance. *See also* Labor Code § 4909.

DATED: 8-16-94

David Bjelland

David Bjelland
Workers' Compensation Judge

Service made on parties as listed on the
Official Address record.

Date: 3/18/94 By: D. Holder