IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SHARON L. FLOOD,	)	
	)	
Appellant,	)	
	)	**C.A. No. 00A-06-002 WCC**
	)	
v.	)	
	)	
VIOLENT CRIMES COMPENSATION BOARD,	)	
	)	
Appellee.	)	

Submitted: January 17, 2001
Decided: May 31, 2001

O R D E R

Appellant Sharon L. Flood's Appeal from Decision of the Violent Crimes Compensation Board.
Reversed and Remanded.

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Rosemary K. Killian, Esquire, Deputy Attorney General, 820 N. French Street, Wilmington, Delaware 19801. Attorney for Appellee.

CARPENTER, J.

This 31st day of May, 2001, after considering Sharon L. Flood's ("Appellant") appeal from a decision of the Violent Crimes Compensation Board ("VCCB" or the "Board"), it appears that:

1. On January 4, 1999, the Appellant applied to the VCCB for compensation as a result of an assault by her live-in boyfriend, which took place on August 10, 1998 ("August 1998 assault").[1] According to the police report and the Appellant's account, her assailant, in an effort to push her out of the house, shoved her up against the door jam causing anal injuries. The Appellant had previously suffered vaginal and rectal injuries from an unrelated assault, which occurred on November 24, 1996 ("November 1996 assault"). But, she never applied for loss through the VCCB after that incident because she was unaware of the availability of compensation.

In an order dated May 7, 1999, the VCCB awarded the Appellant compensation for lost wages totaling $4,081.94, for the period of August 30, 1998 to March 24, 1999. After the Appellant twice requested a reopening of her case for additional lost wages, by orders dated May 28, 1999 and August 19, 1999, the VCCB awarded additional lost wages for the periods of March 26, 1999 through May 7, 1999 and May 10, 1999 through August 1, 1999 respectively.

[1] While there is some confusion about the date of the assault, the Court will use the date

of August 10, 1998 because it appears to be the correct one based on the police report.

When the Appellant made another request to reopen her case for additional lost wages, by order dated March 16, 2000, the VCCB denied the request without a hearing,[2] finding that the Appellant's disability was a result of a subsequent assault that occurred on August 1, 1999 ("August 1, 1999 assault") in Maryland.[3] Pursuant to 11 *Del. C.* §9008, the Appellant timely requested a hearing, and one was held on May 4, 2000. The VCCB again denied compensation but found that after reviewing additional documentation submitted by her treating physician, the loss of earnings was a result of injuries sustained by the Appellant in November 1996[4] and not from the

[2] Between the orders dated August 19, 1999 and March 16, 2000, the Appellant made another request to reopen her case. However, no action was taken by the VCCB.

[3] The order stated that "the Board found that the claimant was victimized again in the State of Maryland on 8/1/99, and felt the current disability is related to the recent incident. Therefore the claimant needs to apply to the State of Maryland."

[4] As a result, compensation was denied because the Appellant never applied for losses as a result of the November 1996 assault.

August 1998 or the August 1, 1999 assaults.[5] The Appellant appeals this decision.

[5] In its order, the VCCB mistakenly used the dates of November 29, 1996 and August 14, 1998 in describing the assaults. As mentioned above, according to the police report, the correct date of the assault in 1998 was August 10, 1998. In addition, based upon other documents in the record, the correct date of the assault in 1996 was November 24, 1996. The Court believes that the confusion in the order for the date in 1996 lies with the fact that the Appellant's doctor saw the Appellant on November 29, 1996.

2. On an appeal to this Court of a Board decision, this Court must uphold the determination of the Board unless it acted arbitrarily, committed an error of law, or made findings of fact unsupported by substantial evidence.[6] The determination of the credibility of witnesses is for the Board, not this Court.[7] The Court does not substitute its judgment for that of the agency.[8] When a party, who has the burden of proof, fails to convince the Board, the denial may be overturned only for errors of law, inconsistencies, or capricious disregard of competent evidence.[9]

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[6] *Campbell v. Delaware Violent Crimes Compensation Bd.*, Del. Super., C.A. No. 90A-NO-5, Herlihy, J. (Jan. 14, 1992), Op. at *2.

[7] *Id*. at *3.

[8] *Id*.

[9] *Id*.

3. The General Assembly established the VCCB as a means to "indemnify those persons who are victims of crimes committed within the State."[10] A victim may file a claim with the VCCB for indemnification of all pecuniary loss, which is a direct result of the crime alleged.[11] If a claim is approved, the award shall be the amount of pecuniary loss actually and reasonably sustained by reason of the personal injury, but the VCCB is not compelled to provide compensation in any case, nor is it compelled to award the full amount claimed.[12] Instead, the VCCB is entitled to make its award dependent upon such condition as it deems desirable.[13] Once a claim is filed, the VCCB initiates an investigation of the claim and then renders a decision on whether to award compensation, which is mailed to the claimant.[14] If the claimant is dissatisfied with the decision, the claimant must request a hearing within 15 days after the date the decision is mailed; otherwise, the VCCB's decision becomes final and unappealable to this Court.[15] If a hearing is requested, the claimant may present

[10] 11 *Del. C*. §9001; *Anderson v. Violent Crimes Compensation Bd.*, Del. Super., C.A. No. 92A-01-004, Carpenter, J. (Feb. 2, 1994)(Mem. Op.). "Crime" is defined in 11 *Del. C.* § 9002(3).

[11] 11 *Del. C*. §9005.

[12] 11 *Del. C*. §9005(1) and (3).

[13] 11 *Del. C*. §9005(3).

[14] 11 *Del. C*. §9008(a).

[15] 11 *Del. C*. §9008(b).

evidence to the VCCB to show why its decision should be reversed or modified.[16] Furthermore, 11 *Del. C.* §9005(7) allows a case to be reopened or reinvestigated as long as it is done within two years from the date of the decision rendered by the VCCB.

4. The Appellant raises several arguments for the reversal of the VCCB's order. First, she claims that the VCCB should be collaterally estopped from denying compensation for the August 1998 assault when the VCCB concluded on two prior occasions that she was entitled to compensation. Secondly, the Appellant argues that the decision was not supported by substantial evidence. Lastly, she asserts that the VCCB committed legal error when it considered inadmissible hearsay evidence to establish a pivotal issue at the hearing.

[16] *Id*.

5. Under the doctrine of collateral estoppel, if a court has decided an issue of fact necessary to its judgment, that decision precludes relitigation of the issue in a suit on a different cause of action involving a party to the first case.[17] Collateral estoppel extends not only to issues decided by courts, but also to issues decided by administrative agencies acting in a judicial capacity where the parties had an opportunity to litigate.[18] The Court must consider the following factors for collateral estoppel to apply:

> (1) The issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[19]

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[17] *Messick v. Star Enter*., Del. Supr., 655 A.2d 1209, 1211 (1995).

[18] *Id*.

[19] *Atkinson v. Delaware Curative Workshop,* Del. Super., C.A. No. 98A-02-013, Cooch, J. (May 19, 1999), Order at *3 (*quoting State v. Machin*, Del. Super., 642 A.2d 1235, 1239 (1993)). The use of the conjunctive "and" requires all factors to be satisfied for the doctrine of collateral estoppel to apply. *Atkinson* at *4. *See also Taylor v. State*, Del. Supr., 402 A.2d 373, 375 (1979)(holding that "[t]he test for applying collateral estoppel requires that (1) a question of

fact essential to the judgment, (2) be litigated and (3) determined (4) by a valid and final judgment").

6. The Court finds that collateral estoppel is not applicable to this case. The issue previously decided by the VCCB in its initial order of May 7, 1999 was whether the Appellant was entitled to compensation as a victim of a crime that occurred on August 10, 1998 and if so, how much. The VCCB found that she was entitled to lost wages for the time period of August 30, 1998 to March 24, 1999. The disposition also provided that "for any future loss of wages the claimant must submit in writing a request to re-open her claim. Along with the request must be a current disability slip from her treating physician." As such, the Appellant requested in writing to reopen her claim for consideration of lost wages. In an order dated May 28, 1999, the VCCB granted an award for loss of wages for the time period of March 26, 1999 to May 7, 1999. Again, in the disposition, the VCCB stated that "[i]n the event that future losses/expenses are incurred, the claimant must submit a written request to re-open claim within two years from the date authorized below." Once again, the Appellant requested that her claim be reopened for loss of wages, and the VCCB granted an award for the time period of May 10, 1999 to August 1, 1999.

Accordingly, each time the Appellant requested that her case be reopened, there was a new issue as to the causal relationship between the crime and the additional benefits for which she was seeking compensation. As such, the VCCB was not presented with identical issues each time the matter was reopened because they

involved potentially new losses and expenses, which occurred at different time periods and which needed to be connected to the criminal incident involving the Appellant.[20]

When the applicant reopens the case claiming additional benefits, the VCCB has an obligation to ensure that the new losses are connected to the crime. If new information is provided that calls into question this relationship, the VCCB is not required to ignore it. That is what has occurred in this case. The VCCB was not renouncing its prior decisions by its May 4, 2000 order but simply found that on the new claim for additional wages, the Appellant had not presented sufficient evidence to connect the new injuries to the crime. What makes this case so frustrating is that it appears that the doctor may have provided incorrect information on which the VCCB based its prior decisions. However, if the Court was to adopt the Appellant's collateral estoppel argument, the VCCB would be required to continue to make awards in full recognition that the medical testimony did not establish a causal relationship between the injury and the crime. Besides being unfair to other victims who have a legitimate claim on these funds, such action would be contrary to the duties and responsibilities of the VCCB, which is to only compensate injuries which the victim has established are related to the crime.

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[20] *See Atkinson* at *3-4.

7. In determining whether the VCCB's decision is supported by substantial evidence, the Court notes that prior to the hearing of May 4, 2000, there appears to be medical documentation provided to the VCCB for related applications that fully supports the Appellant's contentions. Since 1998, Dr. David M. Krasner, the Appellant's treating physician, has provided a series of handwritten notes regarding the care and treatment of the Appellant. The Court lists them below chronologically:

1. In a note dated December 15, 1998, Dr. Krasner stated, "Sharon Flood has been unable to work since 8/30/98 and will be unable to work until 6/30/99 due to an injury caused by an assault."

2. In a note dated February 24, 1999, Dr. Krasner stated, "Sharon Flood has developed low back pain and inflammation of her left sciatic nerve as a result of being pushed up against a door jam (allegedly) on 8/14/98. She is now on medication and will soon be getting physical therapy to help resolve this problem."

3. In a note dated March 24, 1999, Dr. Krasner stated, "Sharon Flood has been under my care since 8/14/98 due to alleged criminal violent act committed against her. She is still under my care for these injuries."

4. In a note dated June 3, 1999, Dr. Krasner stated, "Sharon Flood should remain on disability from 5/7/99 - 9/7/99 due to injuries sustained in an alleged criminal assault that occurred on 8/14/98."

5. In a note dated December 9, 1999, Dr. Krasner stated, "Sharon Flood is on SSI due to bowel incontinence that occurred as a result of an assault that occurred in 8/98."

6. In a note dated December 15, 1999, Dr. Krasner stated, "Sharon Flood is a patient of mine who was assaulted on 8/98. As a result of this, she subsequently suffers from bowel incontinence, and therefore needed to go on S.S.I. Please contact me with any questions."

> 7. In a note dated April 25, 2000, Dr. Krasner stated, "Sharon Flood is on disability due to the crime that was allegedly done to her on 8/98. She is in ongoing treatment from this alleged crime. This is not related to what allegedly happened to her 8/99. Her disability is due to the alleged crime that occurred 8/98."

In spite of the representations made by Dr. Krasner in the above notes, the day before and the day of the May 4, 2000 hearing, the doctor provided to the VCCB notes reflecting that the injuries were related to an entirely different assault in 1996. Dr. Krasner's note dated May 3, 2000 stated:

> Sharon Flood began to have bowel dysfunction as a result of an alleged assault that occurred approximately on 11/24/96.

Dr. Krasner's note dated May 4, 2000 stated:

> I saw Sharon Flood on 11/29/96 for an assault that resulted in bowel control problems that have persisted to this day. This problem did not occur as a result of an assault on 8/98.

During the hearing on May 4, 2000, the Appellant again reiterated that she was seeking compensation for the crime that occurred in 1998 when "I was shoved up against the door jam."[21] Afterward, the following colloquy transpired between the Appellant, Leah W. Betts, Vice Chairwoman, and Stephen L. Manista, Commissioner:

[21] (Tr. Bd. Hr'g at 3.)

Flood: No, you should have my doctor's letter.
Betts: We do have it.
Manista: Yes we do.
Betts: We do and it says "I saw Sharon Flood on November 29, '96 for an assault that resulted in bowel central problems that have persisted to this day. This problem did not occur as a result of an assault
Flood: Right.
Betts: on August 98.
Flood: It did not, no. Uh, yes it did. No. I was shoved against a door jam. Is this the one my doctor just sent you?
Manista: Yes.
Betts: Yes.
Flood: It is the one he just sent you?
Betts: Yes, he just sent it today.
Flood: Cause he had called me and told me that he sent you all one.
Betts: He made a mistake he said and he was not looking at the right - your right records.
Flood: Oh, oh.
Betts: So this is not crime-related.
Flood: Yes it is crime-related.
Betts: Not from...
Flood: The guy broke open an internal hemorrhoid that I've had.
Flood: It's caused me...
Betts: But he says it's not. Your doctor says that is not the case.
Flood: I went to see him because of this, um.... Dr. Gerard, I am seeing now and I'm getting anal cream because I bleed out of my anal area from this and I never know when I have to go to the bathroom.
Betts: He said that it is not a result of the assault.
Manista: He says that it is a result of the assault of 11-29-1996.
Betts: Back in 1996.
Flood: Oh, no. That's not a result of that because I was in the healing processes then. That was over with.
Betts: We can only go by what the doctor sent up.
Flood: I don't know but I just know in 1998, in August, I was shoved up against the door jam and I've been bleeding back in the anal area ever since then....[22]

[22] (Tr. Bd. Hr'g at 3-4.)

The Appellant further stated that she started treatment three months after the August 1998 assault and that from 1996 to 1998, she did not have any problems. After deliberating, the VCCB announced to the Appellant that:

> ...we will not rescind our original decision. We will uphold it due to the fact that we do have a statement from the doctor saying, as of May 4, 2000, that he saw Sharon Flood on November 29, 96 for an assault that resulted in bowel central problems that have persisted to this day.[23]

8. Evidenced from the various medical notes summarized above, the Court fairly characterizes the record as a hodgepodge of confusing notes by Dr. Krasner regarding when the injury occurred for which the Appellant now seeks compensation. Dr. Krasner presented no written statements of clarification or explanations of the contradictory opinions. However, in spite of these inconsistencies, it is the note provided to the VCCB on the day of the hearing that is now used to deny benefits. This causes the Court several concerns.

[23] (Tr. Bd. Hr'g at 8.) The VCCB also made a written disposition.

First, the Court finds it troublesome that the documentation was provided to the VCCB by a method that made it impossible for the Appellant to reasonably respond before the VCCB made its decision. During the initial stage of the hearing, the Appellant asked the VCCB whether they had received a letter from her doctor, which she obviously believed supported her claim. She even stated that the doctor had called her to say that he had sent such a letter. In a complete surprise, the VCCB then advised the Appellant that the doctor's note indicated that the injuries were the result of the 1996 incident and not the one in 1998. Vice Chairwoman Betts explained "[h]e made a mistake he said and he was not looking at the right - your right records."[24]

Secondly, and more importantly, this statement by Vice Chairwoman Betts suggests that either a VCCB member or a representative of the VCCB had an out-of-hearing conversation with Dr. Krasner. The Court finds the conversation significant since it served as a basis in finding Dr. Krasner's May 4, 2000 note credible and reliable. In spite of the significance of the conversation with Dr. Krasner, the VCCB made no attempt to create a record regarding the substance of the conversation or why or when it occurred. The comment by the Vice Chairwoman further suggests that the VCCB may have even questioned the doctor about the apparent inconsistencies since Dr. Krasner had given no indication to the Appellant that he had made a mistake in his

[24] (Tr. Bd. Hr'g at 3.)

prior notes.

While the VCCB is correct that they are not bound by the formalities of the rules of evidence,[25] the Court finds that they must exercise their decision-making authority in a manner that provides a fair opportunity for a full presentment of the issues in a fundamentally fair and open forum. To allow a conversation that occurred outside of the hearing, for which there is no record as to the context in which it occurred and no opportunity to challenge its reliability, is such an arbitrary act that the VCCB's reliance upon it is error that this Court cannot allow to stand.

9. For the reasons set forth above, the Court REVERSES the VCCB's decision and REMANDS it to the VCCB for further action consistent with this decision. The Court further reminds the Appellant that she has the burden to present sufficient evidence to the VCCB to justify the benefits that she seeks. If she believes that the new claim is related to the 1998 injury, she must present documentation to support that assertion at the hearing. Failure to adequately prepare her case will result in denial of her claim. The VCCB is under no obligation to present contrary evidence.

IT IS SO ORDERED.

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[25] *McMillin v. Royal Surf Club*, Del. Super., C.A. No. 90A-MY3, Graves, J. (Feb. 1, 1991) at *2. As a matter of fact, hearsay is commonly permitted and it is necessary in order for administrative hearings to function. *Id*.

Judge William C. Carpenter, Jr.