

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KIMBERLY GADDY and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

*Docket No. 00-2340; Submitted on the Record;
Issued September 21, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to justify termination of the employee's compensation effective October 10, 1998; and (2) whether the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On December 16, 1990 appellant, then a 32-year-old clerk, fell and injured her knee, hand and head. Appellant did not stop work but returned to limited duty on December 17 to 23, 1990 and regular duty December 24, 1990. The Office accepted appellant's claim for head, right hand and knee contusions and expanded this to include injury to the cervical spine and aggravation of herniated cervical disc.¹ Appellant was paid appropriate compensation.

On April 12, 1991 appellant filed a CA-2a, notice of recurrence of disability. She indicated a recurrence on April 2, 1991, noting that she experienced persistent pain in her neck and back causally related to the employment-related injury of December 16, 1990. Appellant stopped work on April 2, 1991 and returned to work part-time limited duty on March 10, 1993. The Office accepted appellant's claim for recurrence of disability.

On April 8, 1993 appellant filed a CA-2a, notice of recurrence of disability. She indicated a recurrence on March 22, 1993, noting that she experienced pain, weakness and

¹ The record indicates that on September 5, 1990 appellant was involved in a nonwork-related automobile accident whereby she sustained a herniated disc.

numbness in her neck and shoulders causally related to the employment-related injury of December 16, 1990. Appellant stopped work on March 23, 1993 and did not return.²

Appellant continued submitting reports from Dr. Harvey Lewis, a Board-certified orthopedic surgeon, supporting continuing total disability.

Thereafter, appellant submitted two reports from Dr. Lewis dated September 23, 1997 and Dr. Ravindra S. Shah, a Board-certified urologist, dated October 3, 1997. Dr. Lewis' report noted appellant was permanently disabled and indicated this condition was associated with her prior injury. Dr. Shah's report noted a history of appellant's injury on December 16, 1990 and her treatment thereafter. He noted appellant's present symptomology as severe pain in the neck radiating to both shoulders and upper extremities. Dr. Shah diagnosed appellant with post-traumatic bilateral cervical radiculopathy at level C5-6. He opined that there was a causal relationship between the diagnosis and the condition found. Dr. Shah further indicated appellant was totally disabled.

On July 31, 1998 the Office referred appellant for a second opinion to Dr. Michael J. Katz, a Board-certified orthopedic surgeon. The Office provided Dr. Katz with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated August 10, 1998, Dr. Katz indicated that he reviewed the records provided to him and performed a physical examination of appellant. Dr. Katz noted that upon physical examination appellant's right hand revealed a range of motion in dorsiflexion of 90 degrees; range of motion in palmar flexion was 45 degree; there were negative Finkelstein's, Tinel's and Phalen's sign's; range of motion in pronation was 90 degrees; range of motion in supination was 90 degrees; the right knee range of motion was 0 to 125 degrees in the flexion; normal valgus alignment of the knee; no joint line tenderness; there was no retropatellar crepitation; the cervical spine indicated a range of motion in flexion of 45 degrees; range of motion in rotation was 45 degrees on the right and left side; the upper extremities revealed good strength in the biceps and triceps; and there was a negative Tinel's sign at the elbow and wrist. He diagnosed appellant with resolved cervical strain, right hand contusion and right knee strain. Dr. Katz noted that the contusion suffered on December 16, 1990 was an exacerbation of preexisting degenerative changes in the neck. Dr. Katz stated appellant's contusion of the right hand, neck and right knee had resolved. He found appellant had no residuals with regard to her injury and was capable of resuming work, full time without restrictions.

On August 28, 1998 the Office issued a notice of proposed termination of compensation on the grounds that Dr. Katz's August 10, 1998 report established no continuing disability as a result of the December 16, 1990 employment injury.

² In a decision dated August 10, 1993, the Office denied appellant's claim for recurrence of disability. Appellant requested a review of the written record. In a decision dated May 17, 1994, the hearing representative set aside the Office decision dated August 10, 1993 and remanded the case for further development and referral for a second opinion. On remand the Office accepted the March 22, 1993 recurrence of disability claim and commenced payment for temporary total disability.

By decision dated October 2, 1998, the Office terminated appellant's compensation benefits effective October 10, 1998 on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from her December 16, 1990 employment injury.

On October 19, 1998 appellant requested a hearing before an Office hearing representative. Appellant submitted a report from Dr. Shah, dated September 24, 1998 and Dr. Elie J. Sarkis, a Board-certified orthopedic surgeon, dated September 25, 1998. Dr. Shah's report noted appellant's present symptomology as severe pain in the neck radiating to both shoulders and upper extremities. He diagnosed appellant with post-traumatic bilateral cervical radiculopathy at level C5-6, contusion of the right shoulder and injury to the right knee and lower back. Dr. Shah noted an essentially normal physical examination, however, indicated that the cervical spine flexion was full with pain; tenderness and paravertebral muscle spasm on both sides of the cervical spine; and range of motion of both shoulders was restricted. He noted appellant did not complain about pain in the lower back or the right knee. Dr. Shah opined that "there was a causal relationship between the diagnosis and the condition found." He further indicated that appellant was totally disabled at this time. Dr. Sarkis' report dated September 25, 1998, noted a history of appellant's work injury and subsequent treatment. He noted appellant's present symptomology of pain and stiffness of the cervical spine radiating down the right shoulder with numbness and tingling of the right hand. Dr. Sarkis noted upon physical examination of appellant's cervical spine findings of sharp limitation of motion; extension was restricted; flexion was 10 degrees; both tilts were sharply restricted and painful; with tenderness over both the right and left paracervical group of muscles and right supraspinous region of the right shoulder; the right shoulder external and internal rotation were painful and restricted by 15 to 20 degrees with pain; numbness and tingling of the right hand; mild tenderness over the distal styloid; the left shoulder reveals full range of motion with pain at the extreme of motion; the lumbar spine examination revealed complaints of slight discomfort in the lumbosacral region and the straight leg test was positive with no tenderness in the lumbosacral region, buttocks or sacrosciatic notches. He diagnosed appellant with possible herniated cervical disc and radiculitis; sprain of the right shoulder, rule out rotator cuff tear; and lumbosacral joint sprain. Dr. Sarkis opined that the "above occurrence is a competent producing cause of the injuries and disabilities sustained." He further noted that appellant was disabled.

In a decision dated August 19, 1999, the hearing representative affirmed the October 2, 1998 decision.

By letter dated March 27, 2000, appellant requested reconsideration of the hearing representative's decision dated August 19, 1999. Appellant submitted a duplicative copy of Dr. Sarkis report dated September 25, 1998.

In a decision dated April 21, 2000, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of the prior decision.

The Board finds that the Office met its burden of proof to terminate benefits effective October 10, 1998.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴

The Office referred appellant for a second opinion to Dr. Katz, who issued a report dated August 10, 1998. He indicated that he reviewed the records provided to him and performed a physical examination of appellant. Dr. Katz noted an essentially normal physical examination. He diagnosed appellant with resolved: cervical strain, right hand contusion and right knee strain. Dr. Katz noted that the contusion suffered on December 16, 1990 was an exacerbation of preexisting degenerative changes in the neck. Dr. Katz noted appellant's contusions of the right hand, neck and right knee have "resolved." He further noted appellant "currently has no residual with regard to this injury and is capable of resumption of work duties, full duty without restrictions at this time."

In his report of October 3, 1997, appellant's treating physician Dr. Shah diagnosed appellant with post-traumatic bilateral cervical radiculopathy at level C5-6. He opined that there was a causal relationship between the diagnosis and the condition found. Likewise, Dr. Lewis, in his report dated September 23, 1997, indicated "the patient has a permanent disability associated with her injury." Although, Drs. Shah and Lewis opinions somewhat support causal relationship in conclusory statements they provided no medical reasoning or rationale to support such statement. The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.⁵

The Board finds that, under the circumstances of this case, the opinion of Dr. Katz is sufficiently well rationalized and based upon a proper factual background such that it is the weight of the evidence and established that appellant's work-related condition has ceased. He indicated that appellant did not suffer residuals from her work-related injury of December 16, 1990. Dr. Katz noted that appellant's condition was resolved.

After the Office properly terminated compensation benefits, the burden of proof was on appellant to show any continuing entitlement.⁶ However, medical evidence submitted by appellant after termination of benefits either did not specifically address how any continuing condition was due to the December 16, 1990 work injury or other nonwork-related incidents or was duplicated evidence previously considered by the Office. Dr. Shah's report of September 24, 1998 indicated that "there was a causal relationship between the diagnosis and the condition found." Dr. Shah's report is cumulative of his October 3, 1997 report, in which he provided a conclusory statement in support of causal relationship, however, he provided no

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivian L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ *See Theron J. Barham*, 34 ECAB 1070 (1983).

⁶ *See Beverly J. Duffey*, 48 ECAB 569 (1997).

medical reasoning or rationale to support such statement. As noted above, the Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.⁷ Additionally, Dr. Shah failed to mention appellant's September 5, 1990 automobile accident, in which she sustained a herniated disc. The Board notes that he does not indicate knowledge of an accurate history of appellant's injury. The Board has found that a medical opinion based on an incomplete history is insufficient to establish causal relationship.⁸ Likewise, Dr. Sarkis report dated September 25, 1998 indicated that the "above occurrence is a competent producing cause of the injuries and disabilities sustained." Although Dr. Sarkis' conclusory statement somewhat supports causal relationship he provided no medical reasoning or rationale to support such statement. Without any further explanation or rationale these reports are insufficient to meet appellant's burden of proof. Additionally, Dr. Sarkis also failed to mention appellant's September 5, 1990 automobile accident, in which she sustained a herniated cervical disc, which indicates that his opinion was based on an incomplete history and is, therefore, insufficient to establish causal relationship.⁹

The Board further finds that the Office in its April 21, 2000 decision properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.¹⁰

Under section 8128(a) of the Federal Employees' Compensation Act,¹¹ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,¹² which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(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 See *Theron J. Barham*, *supra* note 5.

⁸ See *Cowan Mullins*, 8 ECAB 155, 158 (1955).

⁹ *Id.*

¹⁰ See 20 C.F.R. § 10.606(b)(2)(i-iii).

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b) (1999).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.¹³

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was cumulative and insufficient. In support of her request for reconsideration, appellant submitted a duplicate copy of Dr. Sarkis' report dated September 25, 1998. However, this information is cumulative of information already in the record and considered by the Office. Specifically, the Office considered this report in its decision dated August 19, 1999. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office."¹⁴ Therefore, appellant did not submit relevant evidence not previously considered by the Office.

The April 21, 2000 and August 19, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 21, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ 20 C.F.R. § 10.608(b).

¹⁴ 20 C.F.R. § 10.606(b).