

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAMELA J. MISHICH and U.S. POSTAL SERVICE,  
POST OFFICE, Milwaukee, WI

*Docket No. 98-2599; Submitted on the Record;  
Issued April 21, 2000*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs' refusal to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) constituted an abuse of discretion.

Appellant filed a claim on August 13, 1991 alleging that on or about March 1, 1991 she developed tendinitis in both hands, wrists and fingers as a result of her work duties. The Office accepted her claim for tendinitis of both hands, wrists and fingers. Appellant returned to light-duty work and had permanent restrictions imposed on June 30, 1992. On November 8, 1994 she filed for a recurrence of disability which was accepted and appropriate benefits were paid.

On June 28, 1996 appellant filed another notice of recurrence of disability on June 25, 1996 claiming that she still has pain in her fingers, swelling of her hands and numbness. She noted that she had been working on light duty with restrictions since her original injury. Appellant stopped work the following day.

By decision dated October 24, 1996, the Office denied the claim on the grounds that the medical evidence of file failed to establish a causal relationship between the accepted injury and the claimed recurrence of disability.

In an October 2, 1997 letter, appellant requested reconsideration. Additional evidence was submitted including medical reports and studies pertaining to a lifting incident appellant experienced at work on September 7, 1995 and a duplicate copy of her permanent restrictions rendered June 30, 1992.

In an October 30, 1995 report, Dr. Lawrence J. Frazin, a Board-certified neurosurgeon, noted that appellant had been complaining of an onset of pain in the interscapular area, neck and right shoulder radiating down the arm for the past two months. He noted that the x-rays of the neck showed evidence of significant spondylitic changes with spurring at C5-6. Dr. Frazin

provided the results of his examination findings and opined that appellant has a C6 radiculopathy which corresponds to her x-ray studies.

In an April 16, 1996 report, Dr. P. Daniel Suberviola, a Board-certified neurosurgeon, noted that appellant was seen on October 30, 1995 for interscapular pain as well as neck pain with radiation to the right upper extremity which appellant related to a lifting incident at work on September 7, 1995. Examination findings were provided. In a subsequent report of April 24, 1996, he noted the objective studies and set forth treatment options.

In a January 15, 1997 report, Dr. Suberviola noted that appellant was seen on October 30, 1995 by Dr. Frazin and that a diagnosis of C6 radiculopathy secondary to cervical disc disease was rendered. Surgery was suggested, but appellant declined. Dr. Suberviola stated she saw appellant on April 15, 1996 and concurred with the diagnosis and review of her studies which showed the presence of a disc herniation at C4-5 and C6-7, as well as osteophyte formation at C5-6. Appellant elected not to undergo an anterior cervical discectomy, fusion and instrumentation at C4-5, C5-6 and C6-7. Dr. Suberviola noted that appellant was now complaining of continuing and worsening neck and interscapular pain with radiation into the right upper extremity, through the arm and into the fingers. In addition, appellant has now developed some occasional pain in the left shoulder and arm. He noted a relatively normal examination and stated that appellant continued to show evidence of cervical radiculopathy with multiple level disease. A new magnetic resonance imaging (MRI) study was requested. A January 16, 1997 MRI scan of the cervical spine related a C6-7 focal disc herniation, a mild diffuse disc bulging at C3-4, C4-5 and C5-6, with a left osteophyte present at C5-6.

In a February 10, 1997 report, Dr. Stuart M. Suster, a Board-certified internist, noted the date of injury as being September 7, 1995 and related the history of injury and treatment as reported by appellant. Objective tests were reviewed, which included October 16, 1995 x-rays and the January 16, 1997 MRI scan. Results of the physical examination were provided. Cervical disc herniations at C6-5 with a disc bulging at C4-5 was diagnosed.

In a July 17, 1997 report, Dr. Nancy B. Petro stated that appellant was seen on June 26, 1996 for continuing complaints from her initial injury of March 2, 1991. She placed appellant on restricted work on June 26, 1996 of a 5-hour work shift with the same restrictions of no repetitive high speed work, less than 20 pounds lifting. Dr. Petro stated that "at no time was this to be interpreted as a new injury, nor was this to be interpreted as anything other than a continuing process from the initial injury of 1991, for which appellant stated she was under permanent light-duty restrictions and under permanent care from Dr. Stark.

In an August 19, 1997 report, Dr. Sridhar V. Vasudevan, a Board-certified physiatrist, noted that appellant complained of pain in her upper back, neck, both shoulders, both arms, both hands and wrists and shoulder blades with occasional tingling and numbness left greater than right and that the onset of these symptoms began on October 30, 1995. Dr. Vasudevan noted appellant's present history of illness and noted that appellant's past medical history is significant in that she had a diagnosis of tendinitis of her hands and wrists in 1991 which was felt to be work related and she was limited to 20 pounds and continued to work until September 7, 1995. At that time, appellant experienced neck symptoms. After providing the results of his physical examination, Dr. Vasuden diagnosed myofascial pain syndrome of cervical and scapular

muscles; degenerative disc disease of the cervical spine with disc bulging at C4-5, C5-6 and C6-7. Dr. Vasuden provided a discussion pertaining to appellant's complaints of pain in the cervical and scapular region and found that most of appellant's symptom complex was compatible with a soft tissue pathology which was compatible with myofascial pain syndrome.

In an October 22, 1997 report, Dr. Mark R. Wolff, a chiropractor, noted appellant's subjective complaints and stated that appellant denied any accident or incident prior to September 7, 1995 that have produced the current complaints. He noted that appellant was diagnosed with bilateral forearm and wrist tendinitis in 1991. Dr. Wolff reviewed prior medical records, MRI reports of the cervical spine and set forth his findings on examination. He provided diagnosis of chronic cervical strain/sprain of a cervical spine with degenerative joint disease; neck pain, headache, cervical segmental dysfunction and brachial neuritis. Dr. Wolff opined that due to the repetitive nature of appellant's occupation and no past history of any cervical or radiating upper extremity complaints, it appeared that appellant's condition was work related. He opined that appellant was able to return to work on October 23, 1997 with restrictions. A Form CA-20 dated October 22, 1997 was submitted noting that appellant's condition was causally related to her employment activity as there was "no prior history to September 7, 1995 of neck/upper extremity radicular pain."

Copies of the October 1995 MRI reports of the cervical spine and right shoulder were also submitted.

By decision dated January 12, 1998, the Office denied reconsideration on the grounds that the evidence submitted was immaterial and cumulative in nature and therefore insufficient to warrant a merit review of the case. The Office found that some of the medical reports submitted in support of appellant's request for reconsideration related to a September 7, 1995 incident, for which appellant had filed a separate claim.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> As appellant filed her appeal with the Board on August 19, 1998, the only decision properly before the Board is the January 12, 1998 denial of merit review.

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 a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.<sup>2</sup> When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.<sup>3</sup>

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<sup>1</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

<sup>2</sup> 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128.

<sup>3</sup> 20 C.F.R. § 10.138(b)(2).

In her October 2, 1997 reconsideration request, appellant did not show that the Office erroneously applied or interpreted a point of law, nor did she advance a point of law or a fact not previously considered by the Office. In support of her reconsideration request, appellant submitted MRI reports; and medical reports from Drs. Frazin, Suberviola, Suster and Wolff which relate appellant's current condition to a traumatic lifting work incident on September 7, 1995.<sup>4</sup> Although this evidence is new, it is not relevant to the issue in this case. As none of these physicians related appellant's current condition to her 1991 employment injury and did not offer an opinion pertaining to the causal relationship between appellant's accepted diagnosed condition of bilateral hand/wrist tendinitis and her disability commencing June 1996, the Office properly found that this evidence was irrelevant to the issue in this case and insufficient to warrant review of the prior decision.

Although the July 17, 1997 report of Dr. Petro related appellant's complaints of June 26, 1996 to her initial injury of March 2, 1991 and placed appellant on a five-hour shift based on appellant's current restrictions, the Office properly noted that this report is similar in the opinion provided by Dr. Petro in her July 12, 1996 report. In her July 12, 1996 report, Dr. Petro first recommended that appellant be placed on a five-hour shift with her present restrictions. Inasmuch as Dr. Petro's July 17, 1997 report failed to offer any new or additional medical opinion as to why appellant should be placed on a five-hour shift as a result of the March 1991 work factors the Office properly considered Dr. Petro's July 17, 1997 report to be repetitious and cumulative in nature. Therefore, her report is insufficient to warrant review of the prior decision.<sup>5</sup>

As appellant's reconsideration request did not meet at least one of the three requirements for obtaining a merit review, the Board finds that the Office did not abuse its discretion in denying the request.

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<sup>4</sup> The Office noted that appellant filed a claim for this incident under claim number A10-456818.

<sup>5</sup> See *Eugene F. Butler*, 36 ECAB 393, 398 (1984) (finding that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case).

The decision of the Office of Workers' Compensation Programs dated January 12, 1998 is affirmed.

Dated, Washington, D.C.  
April 21, 2000

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member