

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RITA V. JARVIS and U.S. POSTAL SERVICE,
POST OFFICE, St. Louis, MO

*Docket No. 98-2005; Submitted on the Record;
Issued February 17, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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 February 5, 1990 appellant, then a 37-year-old part-time flexible carrier, filed an occupational illness claim alleging that around December 26, 1989 she first realized that carrying the excessive holiday mail in the snow and ice had caused her back to become sore and caused her left leg to become numb. She noted the nature of her illness as a pinched nerve, lower back. Appellant was placed on light duty by her gynecologist effective January 8, 1990, stopped work on January 11, 1990 and took sick leave; she began leave without pay on February 7, 1990.

In support of her claim, appellant submitted a January 12, 1990 report from her treating physician, Dr. Panduranga R. Kini, a Board-certified neurologist, which noted that appellant complained about low back pain that seemed to involve the left leg as well, reported that a physical examination revealed that she seemed to have a left limp and some tenderness in the lower thoracic and midsacral regions¹ and stated that he suspected that appellant probably had S1 radiculopathy. He also stated as history that appellant carried heavy mail five days a week during December 26, 1989 and January 6, 1990 and additionally sustained falls on December 26, 1989 landing on her knee and during the first week of January 1990 landing on her left hand.²

¹ No tenderness or stiffness in the paralumbar muscles was noted and straight leg raising was negative.

² Largely illegible medical treatment notes, illegibly signed noted that on February 1, 1990 appellant had pain only in back on exertion, with some pain in left calf but no pain in left leg; that on February 15, 1990 appellant had mid back pain as well as low back pain; that on March 1, 1990 appellant had no pain without the mailbag but pain with the mailbag and that she could walk two and one half miles a day; and that on March 15, 1990 appellant had low and mid back pain for two days and that she was having endometriosis.

However, an electromyogram (EMG) and nerve conduction velocity (NCV) testing of the left lower limb on January 31, 1990 was reported as being normal by Dr. Kini.

In an April 20, 1990 report, Dr. Kini indicated that appellant had a hysterectomy four weeks earlier and that her gynecologist would be releasing her to return to work in about four more weeks. He noted that she was presently off work due to her recent surgery.

Dr. Kini opined that appellant could return to work on May 29, 1990 with no lifting over 20 pounds and no repetitive bending.

On September 1, 1990 an Office medical adviser opined that the medical evidence of record did not currently support a work-related condition and concluded that no work-related diagnosis was established.

By decision dated October 17, 1990, the Office rejected appellant's claim finding that the evidence of record failed to establish that an injury was sustained as alleged. The Office accepted that the claimed events, incidents and exposures occurred as alleged; however, it found that Dr. Kini failed to diagnose a discreet condition causally related to appellant's carrying heavy mail around December 26, 1990.

By letter dated October 29, 1990, appellant, through her representative, requested an oral hearing. The hearing was held on March 12, 1991 at which appellant testified.

Following the hearing appellant submitted a March 7, 1991 report from Dr. William F. Feldner, an osteopathic Board-certified family practitioner, which reviewed appellant's history of back pain beginning in December 1989 and January 1990, noted that she claimed that when she was substituting for the regular carrier she carried exceptionally heavy bags and walked 10 to 13 mile mail routes and stated that a physical examination showed significant somatic dysfunction throughout the lumbar spine and pelvis, with marked fascial strains and restrictions in motion. He also noted lumbar paraspinal spasm and tenderness at multiple trigger points and he felt that appellant had significant soft tissue injuries and strain from cumulative trauma. Dr. Feldner noted a positive straight leg raising, an increase in back and leg pain with dorsiflexion, sensory deficit in the right lateral thigh and decreased Achilles reflex bilaterally. He noted that appellant worked two hours per day in July 1990 but increased to five or five and one half hours per day in the Fall and then could not get out of bed for two days in October 1990. Dr. Feldner noted that in November 1990 appellant was working four hours per day and complained of neck spasms and neck, shoulder and low back pain with numbness in the left arm and hand; physical examination at that time demonstrated marked cervical paraspinal spasms. He noted that after an orthopedic evaluation, appellant's diagnosis was cervical, thoracic and lumbosacral sprain/strain and he recommended work hardening. Dr. Feldner concluded that because appellant had not been complaining of back pain prior to her increase in activity carrying a heavy mailbag in December 1989 and January 1990, this cumulative trauma resulted in an overuse type of injury. He noted that physical examination revealed evidence of soft tissue injuries and opined that this sudden increase in appellant's activity, carrying a heavy mailbag during December 1989 and January 1990, was responsible for her complaints of back pain.

Appellant also submitted multiple medical treatment progress notes and physical therapy notes relating to her low back and cervical region. A July 10, 1990 magnetic resonance imaging (MRI) scan was reported as being normal.

By decision dated April 30, 1991, the hearing representative affirmed the October 17, 1990 Office decision finding that Dr. Feldner's report was not rationalized and did not discuss appellant's hysterectomy and its attendant disability. It also found that his report did not explain how appellant's cervical complaints reported eight or nine months after the initial low back complaints were related to her employment.

By letter dated April 28, 1992, appellant, through her representative, requested reconsideration and in support she submitted further medical evidence.

Appellant submitted an August 15, 1991 report from Dr. Casimiro C. Garcia, a Board-certified gynecologist, regarding treatment of appellant's gynecological problems and January through March hospital records regarding her gynecological problem and subsequent hysterectomy. He noted that appellant did not complain of back pain during her initial visit but complained of a right sided cyst and subsequent back pain complaints were referred to Dr. Kini. Dr. Garcia noted that appellant's back pain complaints were not related to her endometriosis.

Also submitted were consultant reports from Dr. Anwar A. Khan, a Board-certified physiatrist and duplicate reports from Dr. Kini. Dr. Khan discussed appellant's history of back pain following carrying mail during the winter of 1989 through 1990, noted that appellant had fairly negative physical findings and a normal EMG and normal NCV studies. He diagnosed "complaints of pain and discomfort back of neck with radiation of pain towards bilateral shoulders, low back pain with tingling and numbness bilateral posterior thighs and calves."

By decision dated June 29, 1992, the Office denied modification of its April 30, 1991 decision finding that the evidence submitted in support of her claim was insufficient to warrant modification. The Office found that Dr. Garcia did not fully discuss appellant's back pain and that Dr. Khan did not provide an opinion on causal relation.

By letter dated June 24, 1993, appellant, through her representative, requested reconsideration. In support of her claim she submitted a further report from Dr. Kini, a work tolerance screening report and a discharge summary.

In a December 15, 1992 letter, Dr. Kini stated: "I want to make it clear to a reasonable degree of medical certainty that [appellant] started having back pain from exertion when she carried a heavy load of mail between December 26, 1989 and January 6, 1990. My office notes of January 12, 1990 did mention about this."

By decision dated September 23, 1993, the Office denied modification of its June 29, 1992 decision finding that the evidence submitted in support of her claim was insufficient to warrant modification. The Office found that Dr. Kini's opinion was of little probative value as it failed to address the nature and degree of medical uncertainty regarding appellant's diagnosed condition, any preexisting conditions and any residual disability. The Office also found

Dr. Kini's report unrationalized and did not present a complete historical assessment of all contributory factors.

By letter dated September 22, 1994, appellant, through her representative, requested reconsideration. In support appellant submitted another report from Dr. Kini.

In an undated report received by the Office on September 23, 1994, Dr. Kini noted that he first saw appellant on January 11, 1990 on referral from Dr. Garcia, that she walked dragging her foot and complained of side and lower back pain, that historical examination revealed that her job had recently increased in effort with the moving of a greater volume and weight of mail in difficult weather and that appellant also reported falling two times. Dr. Kini noted that an examination at that time revealed some spasms and a tentative diagnosis of possible S1 radiculopathy was made. However, he noted that EMG testing did not confirm the radiculopathy, but explained that EMG findings within the normal limits did not eliminate the potential for pathology. Dr. Kini noted that the etiology of appellant's back pain was further supported by the fact that she did not exhibit any back pain from her previous experiences delivering mail and that the pain only started when she was forced to carry the increased load of year end mail. He opined that it was reasonable to conclude that the increase did in fact exceed her own limitations causing the break down of homeostasis and giving rise to the instability which was now causing the pain. Dr. Kini also opined that it was possible that the instability was caused by the falls but that since appellant continued to work, it was impossible to tell whether the falls or the increased work load caused the injury. He noted that within a reasonable degree of medical certainty, appellant's problems began with her activities during the weeks of December 26, 1989 to January 6, 1990 and that delay in initiating the recommended work hardening caused her condition to deteriorate to the point where she will have a prolonged rehabilitation period. Dr. Kini opined that appellant's back pain was in fact different from the side pain which originated with her female problems and that there was no real clinical significance to the fact that appellant had prior existing side pain before she fell and began sensing back pain.

By decision dated November 28, 1994, the Office denied modification of its September 23, 1993 decision finding that the evidence submitted was insufficient to warrant modification. The Office found that Dr. Kini's report did not contain a diagnosed condition nor medical rationale and therefore was of diminished probative value.

By letter dated September 26, 1995, appellant, through her representative, requested reconsideration. In support of the request, appellant submitted medical reports and notes from Dr. Bud P. Chomhirun, Board-certified in physical medicine and a rehabilitation specialist and reports of thermographic studies.

In an April 6, 1995 report, Dr. Chomhirun noted appellant's history of working as a substitute carrier at the Lebanon employing establishment during the weeks of December 1989 through January 1990 and of carrying an overload of Christmas/postChristmas mail; he noted that following Christmas appellant slipped and fell twice on the same day, first landing on her left knee and low back and second landing on her left arm, elbow and hand, that she reported these falls to her supervisor, but that no written reports were made. Dr. Chomhirun reported appellant's history of treatment with Drs. Garcia and Kini and noted that posthysterectomy

appellant continued to have upper and lower back pain and neck pain. He noted that thereafter appellant was treated by Drs. Feldner and Khan for continuing neck, upper back and lower back pain and was diagnosed with a soft tissue injury and strain from accumulative trauma with evidence of triggerpoints on the low back. Dr. Chomhirun noted appellant's continued treatment for her back and neck pain up through 1994. He performed a complete physical examination and diagnosed chronic cervical and upper thoracic myofascial sprain syndrome, chronic lumbosacral paraspinal myofascial sprain syndrome and chronic pain syndrome. Dr. Chomhirun opined that his clinical diagnoses correlated with the complaints and subjective findings documented in multiple medical reports available for review and noted that the only objective testing that might confirm the above-noted clinical diagnoses would be a thermographic study and particularly triggerpoint studies that would document the soft tissue injury and nerve root injury.

An April 11, 1995 thermographic report found an abnormal cervical and thoracic trigger point study and an abnormal cervical thermogram and a May 22, 1995 report indicated an abnormal lumbar thermogram. With the May 22, 1995 thermogram study results Dr. Chomhirun opined that the findings were consistent with L5-S1 nerve root irritation and he recommended an EMG.

In May and June 1995 medical progress notes, Dr. Chomhirun reported appellant's continuing symptomatology.

An EMG study dated July 24, 1995 was reported as demonstrating left L5-S1 radiculopathy.

By a report dated July 24, 1995, Dr. Chomhirun noted that thermographic studies were positive and confirmative and made additional positive findings of lumbosacral radiculopathy correlated with low back pain radiating to the left lower extremity. He opined that appellant had been having problems of upper back, neck and low back pain since the injury while working as a substitute mail carrier in December 1989 and has continued to have the problems until the present, as confirmed by objective thermographic testing. Dr. Chomhirun diagnosed chronic cervical and upper thoracic myofascial sprain syndrome, chronic lumbosacral paraspinal myofascial sprain syndrome and left L5-S1 radiculopathy and noted that all of these diagnoses were related to an injury sustained in December 1989 while working as a substitute mail carrier.

By decision dated December 19, 1995, the Office denied modification of its November 28, 1994 decision finding that the evidence submitted was insufficient to warrant modification. The Office found that Dr. Chomhirun's report was of diminished probative value as he was not appellant's treating physician and because he did not address intervening work and activities. The Office also found that Dr. Chomhirun did not provide any objective medical evidence to explain how an incident of December 26, 1989 caused appellant's current conditions and that he used the word "problems" instead of repeating specific diagnoses.

By letter dated September 5, 1996, appellant, through her representative again requested reconsideration. In support of her claim she submitted a supplemental report from Dr. Chomhirun dated May 7, 1996 and a personal affidavit. He repeated his prior observations and findings, noted that the first EMG done three weeks post onset of low back pain could have been too early to demonstrate objective findings of lumbosacral radiculopathy but that

Dr. Khan's testing was also negative and noted that appellant was asymptomatic prior to the initial injury related to neck and back pain. Dr. Chomhirun opined that the initial injury of the low back, upper back and neck initiated the long lasting symptoms of neck and low back pain and multiple other muscle and joint pain as well, due to poor recognition of fibromyalgia syndrome as well as inadequate management of this problem and the chronic illness. He noted that appellant had remained symptomatic and had become progressively worse with current positive findings in the EMG and thermographic studies. Dr. Chomhirun opined that appellant sustained two injuries in late 1989 and early January 1990 while working which precipitated her preexisting condition of fibromyalgia syndrome that was at the time of injury asymptomatic, but which had become slowly and progressively worse with continued symptoms. He diagnosed chronic myofascial sprain syndrome of the lumbosacral paraspinal area with lumbosacral radiculopathy, chronic cervical and upper thoracic myofascial sprain syndrome with cervical radiculopathy, and chronic fibromyalgia syndrome.

By decision dated February 6, 1997, the Office denied modification of its December 19, 1995 decision finding that the evidence submitted was insufficient to warrant modification. The Office found that Dr. Chomhirun's report was speculative and unrationalized and of diminished probative value as he did not see appellant until five years after the onset of back pain.

By letter dated February 4, 1998, appellant, through her representative, again requested reconsideration. In support appellant submitted a January 15, 1998 report from Dr. Feldner which noted that appellant sustained two falls during the December 26, 1989 to January 6, 1990 period which was complicated by the fact that she had gone from working two days per week as a substitute carrier to working longer hours carrying heavier loads over longer distances. He reviewed appellant's history of continuing symptomatology and treatment, Dr. Chomhirun's diagnoses and the recent EMG results demonstrating radiculopathy. He opined: "[Appellant's] injuries and problems related to her low back and left leg were as a result of: (1) Her sudden increase[d] work load in both weight of mailbag and distance traveled per day; and (2) Two separate falls she sustained while working as a letter carrier." Dr. Feldner further opined that these injuries were well documented by the thermogram and EMG performed by Dr. Chomhirun and that Dr. Kini's negative EMG was negative because it was performed too soon after onset of symptomatology. He opined that appellant's injury and subsequent pain and problems "were as a direct result of injuries sustained while working for the [employing establishment]."

By decision dated March 12, 1998, the Office denied merit review of its February 6, 1997 decision finding that the evidence submitted in support was cumulative and not sufficient to warrant a merit review. The Office found that Dr. Feldner's report was cumulative, repetitious and restated previously considered contentions.

The Board has duly reviewed the case record in the present appeal and finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The only decision before the Board on this appeal is the Office's March 12, 1998 decision denying appellant's application for a review on the merits of its February 6, 1997 decision. Because more than one year has elapsed between the issuance of the Office's

February 6, 1997 merit decision and June 9, 1998, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the February 6, 1997 decision.³

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ 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.⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above-mentioned 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.⁷ Evidence that repeats or duplicates evidence already in the case record has no new evidentiary value and does not constitute a basis for reopening a case.⁸ Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.⁹

By letter dated February 4, 1998, appellant requested reconsideration of the February 6, 1997 decision. In support of the request, appellant submitted a new report from Dr. Feldner which was more complete than his earlier report, which was based upon objective testing results and evaluations done by other physicians subsequent to his earlier report and which contained a new opinion on causal relation of appellant's condition attributing it to both her increased work load over longer distances during December 26, 1989 to January 6, 1990 and to two falls sustained at work during that period which were reported but not claimed. His earlier report did not contain such rationale or such a bifurcated opinion, attributing appellant's conditions only to her sudden increase in activity during the period in question. Hence, Dr. Feldner's January 15,

³ See 20 C.F.R. § 501.3(d)(2).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 20 C.F.R. § 10.138(b)(1), 10.138(b)(2).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *Joseph W. Baxter*, 36 ECAB 228 (1984).

⁸ *Mary G. Allen*, 40 ECAB 190 (1988); *Eugene F. Butler*, 36 ECAB 393 (1984).

⁹ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

1998 report constituted new and different medical evidence which required a review on its merits.¹⁰

In the present case, therefore, appellant has established that the Office abused its discretion in its March 12, 1998 decision by denying her request for a review on the merits of its February 6, 1997 decision under section 8128(a) of the Act, because she submitted relevant and pertinent evidence not previously considered by the Office. Consequently, the case is being remanded for the Office to consider the new medical evidence on its merits, in conjunction with the rest of the supportive medical evidence of record, to make a determination as to whether appellant has presented evidence sufficient to fulfill the requirements of establishing a *prima facie* claim.

Consequently, the decision of the Office of Workers' Compensation Programs dated March 12, 1998 is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.

February 17, 2000

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done. *William J. Cantrell*, 34 ECAB 1223 (1983). This holds true in occupational claims as well as in initial traumatic injury claims. In such a case, although none of appellant's treating physicians' reports might contain rationale sufficient to completely discharge appellant's burden of proving by the weight of reliable, substantial and probative evidence that she sustained back injury during the period December 26, 1989 to January 6, 1990 due either to falls or to cumulative trauma and overuse, they could constitute substantial, uncontradicted evidence in support of appellant's claim and raise an uncontroverted inference of causal relationship, that would be sufficient to require further development of the case record by the Office. This is additionally true, where there is no opposing medical evidence in the record; see *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).