

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PEGGY SWANSON and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Denver, CO

*Docket No. 00-568; Submitted on the Record;
Issued December 13, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits for bilateral wrist and low back strain as a result of the October 17, 1996 employment injury; and (2) whether the refusal of the Office to reopen appellant's case on January 19, 1999 for further reconsideration constituted an abuse of discretion.

On October 17, 1996 appellant, then a 42-year-old secretary filed a traumatic injury claim alleging that she sustained a work injury to her back, both wrists and forearms, when she caught the heel of her shoe on a carpet seam and then attempted to catch herself from falling. The Office accepted the claim for bilateral wrist and low back strain. Appellant received appropriate compensation and returned to limited duty on December 4, 1996 for four hours a day. She continued to receive evaluation and treatment of the accepted injuries following the injury.

On July 7, 1997 diagnostic testing was performed, specifically nerve conduction studies and an electromyography (EMG) which showed that appellant had a normal bilateral nerve conduction study and EMG needle of the upper extremities.

In a September 4, 1997 report, Dr. Peter Reusswig, a Board-certified anesthesiologist noted that appellant had a working diagnosis of low back strain coupled with myofascial pain and fibromyalgia. He further indicated that appellant had been evaluated by three separate providers from whom the majority opined that regarding her bilateral upper extremity pain, appellant did not display true neurogenic carpal tunnel syndrome and that her bilateral upper extremity pain was an extension of her fibromyalgia.

In a work capacity evaluation form dated September 17, 1997, appellant's attending physician, Dr. George Leimbach, a Board-certified physician in physical medicine and rehabilitation, noted that appellant's continuing restrictions and disability were not related to the

employment injury but to her fibromyalgia condition. In a report dated September 18, 1997, Dr. Leimbach conducted a follow-up examination and found that appellant had fibromyalgia via history with significant exacerbation, secondary to fall, cervical and lumbar pain and diffuse upper extremity pain of unclear etiology, possibly secondary to tendinitis versus fibromyalgia. He then determined that appellant had reached maximum medical improvement with respect to her ongoing fibromyalgia symptoms.

Following review of the updated medical evidence, the Office referred appellant to Dr. Philip Heyman, a Board-certified orthopedic surgeon to determine if appellant had any residual disability resulting from the October 17, 1996 employment injury. In his September 2, 1997 report, Dr. Heyman reviewed appellant's medical history, history of injury and his findings on examination. He found that appellant had full range of motion of the wrist, forearm and elbow, no evidence of intrinsic or extrinsic atrophy and no other remarkable findings. Dr. Heyman further stated:

“[Appellant has bilateral and nonspecific hand, wrist and forearm pain. There appears to be no clear evidence of any anatomical pathology given that she has a normal bone scan and two sets of essentially normal electrical studies bilaterally... There are no objective findings that substantiate [appellant's] subjective symptoms. There are no objective medical findings substantiating any impairment or disability. This is a moot point to discuss how what pathology was caused by this work injury, as there appears to be no hard evidence of pathology. Since there are no objective findings there is no objective reason why the prognosis should be anything but excellent. There should be no permanency. I believe that [appellant] should be released to work regular duty.”

Dr. Heyman concluded that appellant had no objective evidence of disability.

By decision dated September 24, 1997, the Office terminated appellant's entitlement to compensation and medical benefits on the grounds that the medical evidence did not establish that appellant had any residual disability as a result of the October 17, 1996 employment injury.

Following a hearing held on June 1, 1998 at appellant's request, an Office hearing representative in an August 13, 1998 decision, affirmed the prior termination decision. The Office hearing representative found that medical reports from three different physicians of record contained rationalized medical opinions that negated residual disability and causal relationship.

On October 22, 1998 appellant requested reconsideration and submitted new evidence. By decision dated November 18, 1998, the Office denied modification of the August 13, 1998 decision, on the grounds that the evidence submitted on reconsideration did not establish any causal relationship between appellant's current condition or disability and the employment injury of October 17, 1996.

On January 4, 1999 appellant again requested reconsideration and submitted additional evidence. By decision dated January 19, 1999, the Office denied appellant's request for review of the merits on the grounds that the evidence submitted was found to be cumulative of previously submitted evidence and insufficient to warrant review of the prior decision.

On October 5, 1999 appellant requested reconsideration and submitted new evidence.¹ By decision dated October 25, 1999, the Office denied modification of the November 18, 1998 decision on the grounds that appellant had failed to establish that she continued to suffer from any medical condition or disability causally related to the October 17, 1996 employment injury.

The only decisions over which the Board has jurisdiction are the Office's November 18, 1998 and October 25, 1999 decisions denying modification of the prior decision and the Office's January 19, 1999 decision denying appellant's request for a review of the merits of the case. Because more than one year has elapsed between the issuance of the September 24, 1997 and August 13, 1998 Office decisions and November 12, 1999, the date appellant filed her appeal before the Board, the Board lacks jurisdiction to review these decisions.²

The Board finds that the Office met its burden of proof in terminating appellant's compensation for her work-related bilateral wrist and low back strains.

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

In this case, the Office accepted that appellant sustained bilateral wrist and low back strains on October 17, 1996 when she caught the heel of her shoe on the seam of a carpet and then attempted to catch herself from falling at work. The issue is whether these accepted strains caused appellant any disability for work or necessitated continuing medical care as of September 24, 1997, when the Office terminated her compensation benefits.

Prior to the termination decision, Drs. Leimbach and Reusswig, appellant's physicians did not find that she was disabled for work or in need of treatment for the accepted bilateral wrist and low back strain after September 17, 1997. The Office relied on this medical evidence, along with the second opinion determination from Dr. Heyman that appellant had no continuing work-related disability when it terminated benefits.

In support of her reconsideration request following termination, appellant submitted a report dated September 1, 1998 from Dr. Dennis Zoglo, a Board-certified family practitioner. In the report he discussed appellant's employment injury of October 17, 1996 and indicated that

¹ The Board notes that appellant first appealed the case to the Board, however, by letter dated July 23, 1999, appellant through counsel requested that the appeal be withdrawn so that she could submit new evidence to the Office for reconsideration. By order dated August 17, 1999, the Board dismissed the appeal docketed at 99-1109 and returned the case record to the Office.

² See 20 C.F.R. §§ 501.2(c), 501.3(d).

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

⁴ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1929).

appellant experienced increasing pain, depression and fatigue due to the injury and that her preexisting fibromyalgia was made markedly worse by the work injury. Dr. Zoglo then stated:

“ ... the patient had minimal upper extremity problems before this and acknowledged that she had fibromyalgia with fatigue, but as one who has been taking care of this woman and seeing her on a constant basis about every [two] [to] [four] weeks, it was clear that before this accident she had problems, but was able to work, as a result of this accident it has markedly worsened her fibromyalgia, her depression and fatigue and she has gotten worse.”

Appellant submitted a May 22, 1998 report from Dr. Patricia Burcar, a Board-certified psychiatrist and neurologist, which discussed that appellant had previously been involved in an automobile accident on September 6, 1993, after which she was diagnosed with fibromyalgia. Dr. Burcar then stated that, following appellant's fall on October 17, 1996, she had an exacerbation of her fibromyalgia. She reported that in 1994 appellant underwent magnetic resonance imaging (MRI) scan testing, which revealed some nonspecific white matter changes and a repeat MRI scan was done on November 8, 1997 with no change. Dr. Burcar indicated that an EMG was performed on February 9, 1998, which yielded normal results. She related in the report that appellant complained of daily headaches, which began in the back of her neck where she reported a great deal of tightness and pain. Appellant described vision fluctuations, nerve sensitivity down the back of her left leg, finger numbness and trouble with balance. Dr. Burcar concluded that appellant might possibly have multiple sclerosis (MS) and ordered a repeat MRI.

Appellant submitted a June 18, 1998 report, in which Dr. Burcar confirmed a diagnosis of MS and noted that the disease had been suspected since 1994, when she developed white matter changes on her MRI scan. Dr. Burcar reported that the MS condition was producing significant fatigue and consequently, appellant could only work for 20-minute intervals with resting intervals of [two] to [three] hours. She concluded that, given the underlying fibromyalgia, the recent injury at work and her diagnosis of MS, appellant was permanently and totally disabled.

Appellant also submitted an October 5, 1998 report, in which Dr. Burcar discussed the treatment of continual symptoms associated with her MS condition and underlying fibromyalgia and reported that she continued to be permanently and totally disabled on the basis of her fatigability, numbness of her left side and fibromyalgia which caused severe pain.

Appellant subsequently submitted a report dated July 16, 1999, in which Dr. Daniel Bennett, a Board-certified anesthesiologist indicated that following examination of appellant and diagnostic intraarticular facet injections, that she had underlying arthropathy of C6-7 facet in the cervical region and L4-S1 facet arthropathy in the lumbar region. He stated: “Certainly, the type of twisting injury and fall she sustained would support injury to the facet joints in the posterior column.... “Based upon [appellant's] function prior to her injury and the results of the diagnostic intraarticular injections, in all medical probability, these are causally related and should be eligible for compensation.

On reconsideration appellant argued that, although she had a condition of fibromyalgia prior to the work injury, she was entitled to benefits for an aggravation of the preexisting claim

of fibromyalgia based on the medical evidence. Appellant further argued that as a consequence of the aggravation of her fibromyalgia and original injury she had developed multiple sclerosis, which rendered her totally disabled. The Office accepted that appellant sustained bilateral wrist strain and low back strain causally related to the accepted October 17, 1996 injury, however, after a review of all the medical evidence, never accepted that her fibromyalgia or multiple sclerosis conditions were consequential to the injury. The Office found that appellant had not presented any medical evidence, which supported disability after September 24, 1997 causally related to the bilateral wrist or low back strain, or identified the need for further medical treatment for these strains after that date.

The Board finds that the reports of Drs. Zoglo, Burcar and Bennett submitted by appellant do not represent the weight of the medical evidence in this case. The September 1, 1998 report of Dr. Zoglo, which indicated that appellant experienced increasing pain, depression and fatigue due to the injury and that her preexisting fibromyalgia was made markedly worse by the work injury lacks medical rationale causally relating these symptoms to the injury. Further, Dr. Zoglo's opinion that appellant's symptoms associated with her preexisting condition worsened following the injury does not establish that appellant's condition was aggravated by the work injury and not the progression of either the fibromyalgia or diagnosed MS condition from which she was suspected of exhibiting symptoms since 1994. Without the necessary medical opinion evidence and supporting medical rationale, this report is not sufficient to establish that appellant's condition and any additional period of disability was causally related to employment factors. The reports of Dr. Burcar are also insufficient to establish continuing disability related to the work injury. While she described the history related by appellant of her condition and symptoms, the physician mainly discussed evaluations that led to the diagnosis of MS, appellant's preexisting condition, which has not been accepted by the Office. Regarding appellant's claim, Dr. Burcar simply stated that appellant's fibromyalgia was exacerbated by the work injury and did not specifically attribute the progression of appellant's fibromyalgia and MS symptoms to specific employment factors and thus, her opinion is of diminished probative value. The July 16, 1999 report by Dr. Bennett is further deficient because his opinion that appellant sustained a separate cervical and lumbar condition not previously diagnosed due to the employment injury is couched in speculative terms. Although this report supports the probability that appellant had arthropathy of C6-7 and L4-S1 at the time the diagnostic intraarticular injections were performed in 1999, it does not establish that this condition was related to the October 17, 1996 work injury, nor does it rule out that the condition was subsequently acquired or preexisted appellant's employment injury.

The Board finds that the weight of the medical opinion evidence rests with the well-rationalized report of Dr. Heyman, the second opinion specialist dated September 2, 1997. Dr. Heyman provided his findings of whether appellant had residuals of the employment injury following a thorough review of the history of injury, appellant's medical history, a review of diagnostic tests and his findings on physical examination. He concluded that there were no objective findings and or residuals of the work injury and that appellant's subjective symptoms could not be substantiated.

While the record contains evidence that appellant may have some degree of permanent impairment as a result of her fibromyalgia and MS condition, these conditions have not been

accepted by the Office and none of the physicians of record indicated any need for additional treatment causally related to her accepted conditions. Therefore, the Office met its burden of proof to terminate appellant's compensation benefits effective September 24, 1997 and the Office properly denied modification of the termination decision.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁵ the Office's regulations provide that a claimant must: (i) show that the Office erroneously applied or interpreted a point of law; (ii) advance a point of law or a fact not previously considered by the Office; or (iii) submit relevant and pertinent evidence not previously considered by the Office.⁶ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁷ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁸

In support of her reconsideration request, appellant submitted a report from Dr. Dennis Wack, a licensed clinical psychologist, dated October 15, 1998, a report from Dr. Richard Sanders, a Board-certified vascular surgeon, dated December 18, 1998 and a report from Dr. Douglas Schmidt, a Board-certified plastic and hand surgeon, dated November 23, 1998.

In Dr. Wack's report, he stated that appellant had been treated for her depressed mood which developed secondary to the injury sustained at work.

Dr. Sanders stated in his report that appellant complained of upper extremity pain and headaches, which he related had been present for two years due to a work injury. He noted that prior to the work injury, appellant was diagnosed with fibromyalgia dating back to 1993 or 1994 and that a diagnosis of MS was made in March 1998. He later noted that appellant possibly had carpal tunnel syndrome. Dr. Sanders indicated that appellant quit her job in July 1998 because of her symptoms. He concluded that her symptoms were diffuse and appeared to be due to general muscle inflammation and tightness.

Dr. Schmidt indicated in his report that, upon review of appellant's history, he believed that the injuries to her hands and wrists were related to the work injury; that she also suffered from carpal tunnel syndrome and had some bilateral ulnar neuropathy. He further noted that he reexamined appellant in September 1997 and discovered increasing pain in her wrist, aching in both elbows and the presence of a very positive Phalen's test. Dr. Schmidt determined that,

⁵ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.608(b).

based on reasonable medical probability, that appellant had a twisting/torsion injury to both wrists and arms, which caused a compression neuropathy of the median nerves at both wrists and ulnar nerves at both elbows. He recommended that appellant be restricted from repetitive motion and lifting heavy equipment.

The submission of these documents would not require reopening of appellant's claim in that they are cumulative of information found in the record and previously considered by the Office in the November 18, 1998 decision. The reports discuss appellant's subjective complaints of increased pain and depression following the work injury, appellant's underlying condition of fibromyalgia and the subsequent diagnosis of MS and carpal tunnel syndrome. The Office previously found that such evidence lacked sufficient medical rationale to establish a continuing condition or period of disability causally related to the employment injury. The Board has held that the submission of evidence, which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁹

In the present case, appellant has not established that the Office abused its discretion in its January 19, 1999 decision, by denying her request for a merit review of her claim under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

⁹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

Accordingly, the October 25 and January 19, 1999 and November 18, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 13, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member