U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of TORI RABE and U.S. POSTAL SERVICE,
POST OFFICE, Des Moines, IA

*Docket No. 00-1027; Oral Argument Held July 18, 2001;*
*Issued September 27, 2001*

Appearances: *Tori A. Rabe, pro se*; *Miriam D. Ozur, Esq.*,
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant established that she sustained a recurrence of disability on or after August 30, 1997 causally related to her accepted thoracic strain or that her limited-duty work assignment resulted in a worsening of her medical conditions; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits.

On May 24, 1995 appellant, then a 22-year-old part-time flexible clerk, sustained a back injury when she was struck by a tow pin in the performance of duty. The Office accepted the claim for a thoracic strain. Appellant was off work from May 27, 1995 until she returned to a modified position with lifting restrictions effective November 20, 1995.[1]

On August 30, 1997 appellant stopped work and filed a (CA-8) claim for continuing compensation for wage loss. At the direction of the Office, appellant filed a claim for a recurrence of disability on October 15, 1997. The date of the recurrence of disability was listed as August 30, 1997.

Appellant submitted treatment notes from Dr. Rodney E. Johnson, a Board-certified orthopedic surgeon. Dr. Johnson stated on September 3, 1997 that appellant was seen for follow-up because "she believes that her weight restrictions she was on as a result of her injury to the chest wall led to the right shoulder problem that she is now experiencing. She says the pain is so severe she is unable to function. She cannot do the work that is available at the post office."

[1] On January 28, 1996 appellant, filed a claim for an occupational disease alleging that she sustained a right shoulder condition related to her limited-duty position. The claim (A11-0146879) was denied by the Office on July 22, 1996.

In a report dated September 10, 1997, Dr. Mohammed S. Iqbal, a Board-certified pain management specialist, stated:

> "The patient was hurt at her job. She is an employee at the [p]ost [o]ffice and she was pinned between to [sic] metal containers. She had immediate pain over the right hemithorax. She has been treated by Dr. Johnson ever since. I saw her on [November 13, 1995] when she was referred to me for an intercostal nerve block which was given at the 10th intercostal nerve. The patient tells me that the intercostal nerve block helped the pain for about three weeks. Since then she has been having constant pain in that area which gets worse with sitting, standing, walking and any other activity. She works at the [p]ost [o]ffice and is throwing mail with the right hand. This is constant repetitive motion and after an hour or so the pain is so severe in the flank area that she is unable to perform her duties.... Over the weekend when she is not throwing mail she is quite comfortable without any medication. She also has some idea about disability and is wondering if she can be classified as disabled so she doesn't have to work and can stay home and be pain free."

Dr. Iqbal indicated that appellant was very tender in the flank area in the distribution of the T10 interspace. He advised that she had not decided whether to take medication for her pain or have a series of intercostal nerve blocks.

In a September 24, 1997 treatment note and an October 20, 1997 report, Dr. Johnson related that appellant had refused an intercostal nerve block and that she was being referred to a neurologist. He stated, "She is in pain. She says she can not work."

In a November 26, 1997 report, Dr. David L. Friedgood, a Board-certified neurologist, related appellant's history of work injury and subsequent medical treatment. He related that appellant complained of back pain with any activity and that she alleged that her work was a heavy physical job and that her employer was not following her 10-pound lifting restriction. Dr. Friedgood noted normal neurological findings, but stated that appellant was unable to go back to work.

In a decision dated November 14, 1997, the Office denied compensation on the grounds that the medical evidence was insufficient to establish that appellant sustained a recurrence of disability beginning August 30, 1997 that was causally related to her accepted work injury.

Appellant requested a hearing, which was held on May 7, 1998.

Prior to the hearing, appellant submitted a December 3, 1997 report from Dr. Johnson. He related that appellant was being seen and treated for dorsal spine and chest wall pain with injury occurring on May 24, 1995. He stated, "She was most recently seen on September 3, 1997 with the same complaints resulting from the same injury of May 24, 1995. She was seen on September 3, 1997 because of an increase in pain. The pain was severe enough to warrant her being off work for a period of time to control discomfort."

In a January 19, 1998 report, Dr. Friedgood noted that appellant had undergone a course of physical therapy and was able to perform the exercises but still complained of pain in her mid thoracic region extending around her right flank. On physical examination, appellant's spine

was "not terribly remarkable." He reported tenderness along the right rib cage extending to the right flank. The impression was that appellant was post-traumatic, right thoracic radiculopathy with a normal neurological evaluation. Dr. Friedgood stated that appellant could return to work and full activity to the level of her tolerance. He further noted, " I have explained to her that activities will not cause her any physical harm, though I note she finds it quite uncomfortable to lift even small weights or to perform any type of repetitive activity."

On February 4, 1998 Dr. Friedgood related that appellant was unable to work because of pain and that she was looking into acupuncture treatments. He did not report any physical findings at that time.

In a June 22, 1998 decision, an Office hearing representative affirmed the Office's November 14, 1997 decision.

On October 22, 1998 appellant requested reconsideration and resubmitted copies of medical evidence that was already of record.

In a November 2, 1998 decision, the Office denied modification of the June 22, 1998 decision.

Appellant filed another request for reconsideration on February 22, 1999, together with new medical evidence,[2] including a December 11, 1998 report from Dr. Friedgood. He stated that appellant was in considerable pain related to her work-related injury, chronic post-traumatic right thoracic radiculopathy and noted appellant's neurological examination was normal. According to Dr. Friedgood, appellant was "quite concerned about the wording of my previous letters concerning [her] condition. It is my impression that [appellant] is disabled by the pain she is in. From a physical point of view, she is able to return to work. What keeps [appellant] from working her chronic pain related to her post-traumatic thoracic radiculopathy."

In a February 22, 1999 report, Dr. Iqbal stated that appellant wanted to be off work due to her complaints of pain, but that it was his recommendation that she return to some type of work. He stated that it was his impression that appellant was too focused on her pain.

In a decision dated March 25, 1999, the Office denied modification of its prior decision.

Appellant requested reconsideration on June 19, 1999 and submitted a May 7, 1999 report from Dr. Friedgood and an April 7, 1999 notice of removal from the U.S. Postal Service.

In his May 7, 1999 report, Dr. Friedgood reiterated that appellant's inability to work was related to her complaints of pain and symptoms she described. He noted that there was nothing specific on physical examination that he was able to identify and encouraged appellant to follow-up with Dr. Iqbal.

[2] Appellant submitted a copy of a fitness-for-duty examination dated January 22, 1999 from Dr. James L. Blessman, finding that she could work with a lifting restriction of 30 pounds. He noted that there was no objective evidence for appellant's chronic pain symptoms and felt that she could work but for her own perception of her disability.

In a September 21, 1999 decision, the Office found the evidence submitted on reconsideration to be insufficient to warrant a merit review.

The Board finds that appellant failed to establish that she sustained a recurrence of disability causally related to her accepted thoracic strain or that her limited-duty work assignment resulted in a worsening of her medical conditions.[3]

When an employee, who is disabled from the job he or she had when injured on account of employment-related residuals returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to proof by the weight of the reliable, probative and substantial evidence a recurrence of disability and show that the light duty can not be performed. As part of the burden of proof, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[4]

In the present case, appellant did not established that she became unable to work due to a change in the nature and extent of her accepted work injury or a change in the nature and extent of her light-duty requirements. Numerous reports from Dr. Friedgood indicated that appellant has normal neurological findings. Although he has stated on occasion that appellant is unable to work, Dr. Friedgood's statements of disability are based on appellant's subjective complaints of pain. He has provided no reasoned medical opinion supported by objective data that appellant could not perform the duties of her modified position and, therefore, his opinion is insufficient to carry appellant's burden of proof in establishing a recurrence of disability.

Similarly, Dr. Blessman indicated that there was no objective evidence to support appellant's complaints of chronic pain. Appellant's treating physician, Dr. Johnson, has also not offered an opinion that appellant's work-related thoracic condition worsened to the point that she was unable to perform her light-duty job. He merely reported appellant's contention that she was unable to work. Dr. Iqbal likewise suggested that appellant is too preoccupied with pain and that working would be a distraction from her pain. He most recently recommended that appellant return to work. Consequently, the Board finds that the Office properly denied compensation as the evidence is insufficient to establish that appellant sustained a recurrence of disability causally related to her accepted work injury.[5]

The Board also finds that the Office properly denied appellant's request for reconsideration on the merits.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation. The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or

[3] Appellant submitted additional medical evidence subsequent to the Office's November.

[4] *Gary L. Whitmore*, 43 ECAB 441 (1992); *Cloteal Thomas*, 43 ECAB 1093 (1992).

[5] The Board also notes that appellant has alleged that she cannot perform her light-duty job because of a consequential right shoulder condition. The record, however, does not contain a reasoned medical opinion attributing that condition to the accepted work injury. *See generally Margarette B. Rogler*, 43 ECAB 1034 (1992) (definition of a consequential injury).

(2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[6] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[7] 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.[8] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[9] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.

Appellant has submitted no new and pertinent evidence relevant to her claim on reconsideration. The May 7, 1999 report from Dr. Friedgood was correctly deemed by the Office to be repetitive of his prior reports, finding no neurological defects and concluding that appellant was disabled due to her complaints of pain. The notice of removal is not relevant to the issue of whether appellant established a recurrence of disability. Appellant has not shown that the Office erroneously interpreted a point of law, nor has she advanced a relevant legal argument not previously considered by the Office in the adjudication of her claim. Because appellant did not satisfy the requirements of section 8128, the Office properly refused to perform a merit review with respect to her most recent reconsideration request.

The September 21 and March 25, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 27, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] *See* 20 C.F.R. § 10.606(b).

[7] *See* 20 C.F.R. § 10.608(b).

[8] *James A. England*, 47 ECAB 115 (1995).

[9] *Barbara A. Weber*, 47 ECAB 163 (1995).