

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA FISHER and U.S. POSTAL SERVICE,
CARVER STATION, Jacksonville, FL

*Docket No. 99-173; Oral Argument Held September 4, 2001;
Issued September 17, 2001*

Appearances: *Edward L. Brown, Sr.*, for appellant; *Julia Mankata, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

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

The issues are: (1) whether appellant has any continuing disability causally related to her left arm tendinitis; (2) whether appellant has met her burden of proof in establishing a left foot condition causally related to her employment; and (3) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's left foot claim for review of the merits.

Appellant, a 43-year-old letter carrier filed a notice of traumatic injury on September 11, 1993 alleging that she developed soreness in both sides after carrying a large caseload. The Office accepted appellant's claim for back strain and entered her on the periodic rolls on April 10, 1995. Appellant returned to work on September 19, 1995.

By decision dated March 13, 1996, the Office found that the light-duty position of modified transitional clerk represented appellant's wage-earning capacity and reduced her compensation benefits to zero. The Office denied modification of this decision on November 7, 1996 and July 1, 1997. As these decisions were issued more than one year prior to the date of appellant's appeal to the Board on September 15, 1998, the Board will not consider these decisions on appeal.¹

On September 25, 1995 appellant filed a notice of occupational disease alleging that she developed left arm tendinitis due to factors of her federal employment. The Office accepted this claim for left shoulder strain. Appellant stopped work on September 10, 1996 as her temporary

¹ 20 C.F.R. § 501.3(d)(2). This is Office claim number 060580454. Appellant also requested appeal of Office claim number 60640945 regarding her left leg. The Office has not issued a final decision on this claim and the Board will not address this claim on appeal. 20 C.F.R. § 501.2(c).

appointment ended. Appellant received a schedule award for six percent permanent impairment of her left upper extremity on January 8, 1997. As this decision was not issued within one year of the date of appellant's appeal to the Board, the Board will not address this decision on appeal.²

On August 13, 1997 appellant filed a notice of recurrence of disability and alleged that on September 29, 1995 she sustained a spontaneous recurrence of symptoms in her left arm, left shoulder, left hip, left leg, left ankle and left foot causally related to her 1993 employment injury. Appellant indicated that she did not stop work until August 29, 1996. Appellant filed a claim for compensation on August 13, 1997 request wage-loss compensation from August 29, 1996 to October 31, 1997.

By decision dated February 24, 1998, the Office accepted that appellant sustained a recurrence of her left shoulder condition causally related to her 1993 employment injury and authorized noninvasive medical treatment.

Appellant submitted a claim for compensation on February 28, 1998 requesting wage-loss compensation from August 30, 1996 to August 31, 1998. By decision dated July 29, 1998, the Office denied appellant's claim for wage loss finding that she failed to submit the necessary medical evidence.³

Appellant filed a notice of occupational disease on October 22, 1996 alleging that she developed left foot neuritis, a left ankle condition and a sore right foot due to factors of her federal employment. By decision dated August 20, 1997, the Office denied appellant's claim for failure to establish fact of injury. Appellant requested reconsideration on October 31, 1997 and submitted factual allegations. By decision dated November 12, 1997, the Office denied modification of its August 20, 1997 decision. Appellant again requested reconsideration on April 5, 1998. By decision dated June 29, 1998, the Office declined to reopen appellant's claim for consideration of the merits.

The Board finds that appellant has failed to meet her burden of proof in establishing that she was disabled beginning August 29, 1996 due to her 1993 employment injury.

In this case, the Office accepted that appellant sustained a recurrence of a medical condition and authorized treatment. However the Office found that appellant had not met her burden of proof to establish disability due to her 1993 employment injury beginning August 29, 1996 on July 29, 1998.

Appellant was originally hired by the employing establishment as a transitional employee with a 359-day appointment on March 22, 1993. She was subsequently placed on limited duty

² 20 C.F.R. § 501.3(d)(2).

³ Following appellant's appeal to the Board on September 15, 1998, the Office issued a decision on September 3, 2000 denying appellant's request for a spa membership and a decision on August 29, 2000 granting appellant a schedule award for a two percent permanent impairment of her right upper extremity. As these decisions by the Office do not address the issue before the Board, whether appellant had a period of compensable disability due to her December 1993 employment injury, the Board will not set aside these decisions. *But see Arlonia B. Taylor*, 44 ECAB 591, 597 (1993).

and worked until her term expired on March 15, 1994. The employing establishment then provided appellant with work as a modified TE clerk on September 18, 1995 and she worked in this position until her term expired on September 10, 1996. The Office issued a formal decision finding that this position represented appellant's wage-earning capacity on March 13, 1996.

The Office's procedure manual provides that a removal from employment due to closure of an installation, cessation of special ("pipeline") funding, or termination of temporary employment, or reductions in force are not considered recurrences of disability.⁴ The procedure manual further provides that in such a removal situation in which a formal wage-earning capacity determination has been made, the claimant has the burden, with respect to any subsequent loss of earnings, to show that one of the accepted reasons for modifying a wage-earning capacity determination applies.⁵

The Board has held that modification of a wage-earning capacity determination is appropriate only if there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was in fact erroneous.⁶

In her claim before the Office, appellant submitted medical evidence in an attempt to establish a material change in the nature and extent of the injury-related condition. Dr. John F. Lovejoy, a Board-certified orthopedic surgeon, completed reports on September 5 and November 12, 1996 and recommended a work hardening program. He diagnosed chronic left-sided pain with no functional limitation in the left shoulder other than pain. Dr. Lovejoy stated on November 12, 1996 that appellant had a permanent impairment of the left upper extremity.

These reports do not provide any medical evidence that appellant's accepted condition of left shoulder strain materially worsened. Instead Dr. Lovejoy indicated that appellant had chronic and permanent conditions related to her accepted employment injuries.

Appellant submitted notes from Dr. Robert W. Capitain, an osteopath. On July 24, 1997 he noted that appellant exhibited marked restriction of motion of the left shoulder. Dr. Capitain diagnosed frozen shoulder left and recommended that appellant attend a pain clinic. On July 29, 1997 he repeated his diagnosis and recommendation. These notes are not sufficient to establish a material change in the nature and extent of appellant's employment-related condition as Dr. Capitain did not provide a history of regarding appellant's left shoulder condition, failed to provide any objective findings in support of his diagnosis and did not explain how this diagnosis was a material change in appellant's employment-related condition. He also failed to provide an opinion on the causal relationship between appellant's diagnosed conditions and her employment.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.12 (May 1997); *Recurrences*, Chapter 2.1500.3(b)(2)(a) (May 1997).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.12(a) (May 1997).

⁶ *Penny L. Baggett*, 50 ECAB ___ (Docket No. 97-2190, issued September 28, 1999).

In a report dated March 25, 1998, Dr. Robert O. Pohl, a Board-certified orthopedic surgeon, stated that appellant complained of multiple musculoskeletal areas of pain including the left trapezial fold and supraspinatus region. He diagnosed rotator cuff syndrome, left shoulder with myofascial pain in the left trapezial fold. Dr. Pohl stated that appellant was unable to sort mail because of her shoulder pain with lifting her arm. This report is also insufficient to meet appellant's burden of proof in establishing a material change in the nature and extent of her employment-related condition. Dr. Pohl did not provide a history of injury or of medical treatment, did not provide any objective findings and did not provide an opinion that appellant's current condition is related to her accepted employment injuries. He did not provide an opinion explaining how appellant's current condition has changed and worsened from the accepted employment condition.

Appellant has failed to submit the necessary rationalized medical opinion evidence to establish a change in the nature and extent of her injury-related condition such that the formal wage-earning capacity should be modified. For this reason, appellant has failed to meet her burden of proof and the Office properly denied her claim for further compensation benefits.

The Board finds that appellant has failed to meet her burden of proof in establishing that she developed a left foot condition due to factors of her federal employment.

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.⁷

In this case, appellant attributed her left foot neuritis, left ankle condition and sore right foot to carrying mail in October through November 1993. Appellant stated that when she returned to limited duty she stood for extended periods of time. Appellant's date-of-injury position required her to walk or stand for eight hours a day.

The employing establishment responded and stated that appellant's limited-duty position allowed her to stand or use a rest bar.

In a report dated August 15, 1996, Dr. Stephen M. Meritt, a podiatrist, noted that he first examined appellant on March 21, 1996. He noted that appellant had a history of left side problems due to carrying her mailbag. Dr. Meritt performed a physical examination and

⁷ *Lourdes Harris*, 45 ECAB 545, 547 (1994).

diagnosed neuritis of the left side and possible tunnel syndrome. On June 10, 1997 Dr. Meritt examined appellant and diagnosed tarsal tunnel syndrome of the left foot.

Dr. Lovejoy completed a report on September 5, 1996 and noted that appellant reported pain in her left foot. He performed a physical examination and noted mild swelling in both feet. Dr. Lovejoy did not provide a diagnosis. On June 3, 1997 he stated that appellant had constant pain into the left foot and diagnosed neuritis.

These reports are not sufficient to meet appellant's burden of proof as neither Dr. Lovejoy nor Dr. Meritt provided an opinion on the causal relationship between appellant's condition and her employment duties.

After consultation with the employing establishment, the Office prepared a statement of accepted facts and a list of questions which it referred to Dr. Meritt who completed a report on August 10, 1997 and reviewed the statement of accepted facts provided by the Office. He replied to specific questions and stated:

"Tarsal tunnel syndrome is a nerve entrapment of the ankle and can be caused by any misstep or improper gait. The carrying of a heavy mailbag on the shoulder and back strain could indeed cause a gait change which in turn could cause ankle problems and tarsal tunnel. The fact that the tarsal tunnel is located on the left ankle is consistent with her left shoulder injury and back strain and thus may be due to [appellant's] job duties during the period from March 22 until October 10, 1993."

This opinion is not sufficient to meet appellant's burden of proof. Dr. Meritt does not provide a clear opinion that he believes that appellant's employment duties in 1993 are the cause of her condition in 1996. Furthermore, he did not examine appellant until 1996, three years after the alleged employment injury occurred. Appellant has provided no medical evidence regarding her foot condition from 1993 to 1996. This medical evidence is necessary given the lapse in time in seeking treatment and the speculative nature of Dr. Meritt's report.

Dr. Meritt stated that appellant's light duty in September 1995 which required lifting could have significantly and materially worsened her tarsal tunnel due to stress on the ankle and favoring her injured back and shoulder. However, Dr. Meritt relied on appellant's description of job duties rather than the statement of accepted facts to reach this conclusion. As this portion of Dr. Meritt's report is not based on an accurate history of injury, it is insufficient to meet appellant's burden of proof.

As appellant has failed to provide the necessary rationalized medical opinion evidence based on a proper factual background establishing a causal relationship between her diagnosed condition and her employment, appellant has failed to meet her burden of proof.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a left foot condition for consideration of the merits on June 29, 1998.

The Office denied appellant's claim for a left foot condition on August 20, 1997 finding that she failed to submit sufficient rationalized medical opinion evidence to establish a causal

relationship between her employment duties and her diagnosed condition. On April 5, 1998 appellant submitted additional medical evidence and again requested reconsideration. By decision dated June 29, 1998, the Office declined to reopen appellant's claim for consideration of the merits.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁸ Section 10.138(b)(2) provides that, 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.⁹

Appellant submitted a 1993 note addressing her low back strain. This note indicated that appellant had paresthasias of her toes. As this note does not contain an opinion on the causal relationship between appellant's diagnosed condition and her federal employment, it is not relevant to the issue for which the Office denied appellant's claim and is insufficient to require the Office to reopen appellant's claim for review of the merits.

The July 29 and June 29, 1998 and November 12, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 17, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

⁸ 20 C.F.R. § 10.138(b)(1).

⁹ 20 C.F.R. § 10.138(b)(2).