

**United States Department of Labor
Employees' Compensation Appeals Board**

MARILEE SPENCER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Drumright, OK, Employer**

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**Docket No. 04-862
Issued: November 2, 2004**

Appearances:
Marilee Spencer, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 13, 2004 appellant filed a timely appeal of an Office of Workers' Compensation Programs December 4, 2003 nonmerit decision which denied her request for reconsideration; and a July 21, 2003 merit decision which denied modification of a prior decision that appellant had not established a recurrence of disability and was not entitled to a schedule award. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability as of August 17, 1998 causally related to her accepted August 15, 1996 cervical injury; (2) whether appellant has sustained any permanent impairment to a scheduled member of her body causally related to her accepted neck injury, thereby entitling her to a schedule award under 5 U.S.C. § 8107; and (3) whether the Office properly refused to reopen appellant's case for reconsideration of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

Appellant, a 39-year-old letter carrier, injured her neck on August 15, 1996 when her vehicle was struck from behind by another vehicle. She filed a claim for benefits on August 15, 1996 which the Office accepted for cervical strain. Appellant missed work intermittently and received compensation for various periods of total and partial disability.

In a January 20, 1997 report, Dr. G. Pat Belford, a Board-certified family practitioner, stated:

“[Appellant] is here for follow up on cervical muscle strain as a result of a motor vehicle accident. She states that her muscle[s] in the upper back and neck have improved remarkably and she is beginning to have normal range of motion of her neck. In addition to this she also states that she has been having increased fatigue and muscle aching, particularly in the distal part of the upper extremities when she does any fine work such as opening mail and handling the drawer work at her job.... [S]he does have a history of lupus as well as fibromyalgia.”

Dr. Belford diagnosed cervical muscle strain, improved, fibromyalgia and a possibility of lupus aggravated by her motor vehicle accident.

On August 22, 1998 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability on August 17, 1998 which was causally related to her August 15, 1996 employment injury. On September 24, 1998 appellant filed a Form CA-7 claim for a schedule award based on her accepted cervical condition. By decision dated October 1, 1998, the Office denied appellant’s claim for a schedule award, finding that she was not entitled to compensation under section 8107¹ based on her accepted cervical injury.

In a report dated October 1, 1998, Dr. Jim C. Martin, appellant’s treating physician, a Board-certified family practitioner, stated that appellant had a 41 percent impairment of the whole person pursuant to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Dr. Martin stated that appellant had a 40 percent impairment of the neck, a 25 percent impairment of the right arm and a 20 percent impairment of the left arm. He noted that appellant underwent a magnetic resonance imaging (MRI) scan which revealed a herniated disc at the C5-6 level. Dr. Martin opined that appellant was unable to perform her job duties as a mail carrier, which included reaching out, pushing, pulling and lifting. He concluded that appellant was 100 percent permanently, economically disabled and unemployable as a postal carrier.

By letter dated October 10, 1998, appellant requested an oral hearing, contesting the Office’s October 1, 1998 decision denying compensation for a schedule award.

After a review of the written record dated November 6, 1998, an Office hearing representative set aside the Office’s October 1, 1998 decision and remanded the case for further development of the medical evidence. On remand the Office was to obtain further medical

¹ 5 U.S.C. § 8107.

evidence to determine whether appellant sustained a recurrence of disability in August 1998, to determine whether appellant sustained any additional impairment causally related to the August 1996 work injury and to determine whether she sustained any permanent impairment. The Office specifically instructed the district office to request a copy of the MRI scan referenced in Dr. Martin's report.

The Office referred appellant to Dr. Sami R. Framjee, a Board-certified neurosurgeon, who submitted a report dated January 19, 1999. Dr. Framjee stated:

“Based on my clinical examination today I was unable to identify any evidence of a direct organic injury to [appellant's] cervical spine, thoracolumbar spine of a permanent nature secondary to the motor vehicle accident of August 15, 1996. From an orthopedic standpoint [appellant] can return to her normal occupational duties as a rural carrier with no restrictions. In accordance with A.M.A., Guidelines, [f]ourth [e]dition, I was unable to find any evidence of a permanent impairment of the cervical spine, thoracic spine, lumbar spine, right and left arms, right and left legs secondary to the motor vehicle accident of August 15, 1996.”

By decision dated March 3, 1999, the Office denied appellant's claims for a recurrence of disability and for a schedule award.

By letter dated March 6, 1999, appellant requested an oral hearing, which was held on September 23, 1999.

In a report dated September 20, 1999, Dr. Martin reiterated his previous finding that appellant had a 41 percent impairment of the whole body pursuant to the fourth edition of the A.M.A., *Guides*. He added that this calculation was based on a 16 percent impairment due to limited range of motion, a 6 percent impairment due to a nonoperated, symptomatic disc lesion at the C5-6 level, an 8 percent impairment due to cervical nerve root injury affecting her left shoulder blade area and left upper extremity, a 6 percent impairment due to cervical nerve injury affecting her right shoulder blade area and right upper extremity and a 5 percent impairment due to chronic pain syndrome. Dr. Martin also attributed some of appellant's overall impairment to chronic weakness and decreased function of her neck. He concluded that she had been forced into retirement because of her injuries.

By decision dated December 17, 1999, an Office hearing representative set aside the March 3, 1999 Office decision, finding that there was a conflict in the medical evidence between Drs. Martin and Framjee. The hearing representative remanded for referral to an impartial medical specialist.

The Office referred the case record to Dr. John F. Josephson, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated March 19, 2000, Dr. Josephson stated that the cervical strain injury of August 15, 1996 had resolved and that appellant's varied symptomatology as of August 1998 was not causally related to the August 1996 work injury. Dr. Josephson opined that appellant was capable of performing her normal job functions.

By decision dated April 19, 2000, the Office denied appellant's claims for a recurrence of disability and for a schedule award, finding that Dr. Josephson's report was sufficiently probative and rationalized to merit the weight of an impartial medical examiner and therefore represented the weight of the medical evidence.

By letter dated August 16, 2000, appellant's attorney requested reconsideration. Appellant's attorney contended that based on a June 19, 2000 report from Dr. Belford, appellant had a history of fibromyalgia, a consequential condition stemming from the accepted 1996 work injury. Dr. Belford stated in this report that he was clarifying a reference he made to a history of lupus and fibromyalgia in his January 2, 1997 report. Dr. Belford advised that the statement "history of [f]ibromyalgia" refers to the condition as it existed before January 2, 1997, but not before August 30, 1996, since he was not aware that appellant suffered from fibromyalgia prior to August 30, 1996. In a letter dated August 28, 2000, appellant contended that Dr. Josephson could not be considered an impartial specialist because he worked in the same clinic as Dr. Framjee.

The Office acknowledged that Drs. Josephson and Framjee worked in the same clinic² and subsequently referred the case record, a statement of accepted facts and appellant's medical history to Dr. Houshang Seradge, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Seradge stated in a report dated November 22, 2000, that there were no objective residual symptoms from her 1996 work injury sufficient to prevent her from working as of August 17, 1998. Dr. Seradge also stated that, based on the results of a functional capacity test, appellant was magnifying her symptoms, which invalidated the impairment rating rendered by Dr. Martin. He stated that the 1996 work injury did not cause any impairment to the upper extremities.

By decision dated December 22, 2000, the Office again denied appellant's claims for a recurrence of disability and for a schedule award, finding that Dr. Seradge's referee report represented the weight of the medical evidence.

By letter to her congressional representative dated July 4, 2003, forwarded to the Office, appellant requested reconsideration of the December 22, 2000 Office decision.

By decision dated July 21, 2003, the Office denied modification of the prior decision, which had disallowed appellant's claims for recurrence of disability and schedule award resulting from the August 15, 1996 injury.

Appellant requested reconsideration on September 24, 2003. She did not submit additional medical evidence with her request, but she attempted to reargue the significance of Dr. Belford's diagnoses. Appellant also submitted documentation of a Social Security disability determination.

² Pursuant to the Federal (FECA) Procedure Manual, Part 3 -- Medical Examinations, *Referee Examinations*, Chapter 3.500.4.b(3)(a) (April 1993), a physician may not be chosen to act as a referee examiner if he is in partnership with a physician previously connected with the claim.

By decision dated December 4, 2003, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.³

The Act at section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁴

ANALYSIS -- ISSUE 1

The Office properly determined that a conflict existed in the medical evidence which required appellant's referral to an impartial medical specialist. In a report dated January 19, 1999, Dr. Framjee, an Office second opinion physician stated that he did not find any evidence of residual injury to appellant's cervical or thoracolumbar spine as a result of the accepted 1996 motor vehicle accident. He explained that appellant could return to her regular work activities as a rural carrier, with no restrictions. He concluded that appellant had no evidence of any permanent impairment to the cervical, thoracic, lumbar spine, upper or lower extremities as a result of the accepted injury. Appellant had submitted a September 20, 1999, report from Dr. Martin wherein he opined that appellant had been forced into retirement because of the accepted cervical injury. He explained that appellant had chronic weakness and decreased function of the neck and that appellant had sustained a permanent impairment to her left shoulder and left upper extremity as a result of the cervical injury, which he diagnosed as a symptomatic disc lesion at C5-6.

After accepting appellant's argument that Dr. Josephson could not serve as an impartial medical specialist because he was an associate of Dr. Framjee's, the Office properly referred appellant to Dr. Seradge, for an impartial medical evaluation.

The Office based its decision denying appellant's claim for recurrence of disability on the November 22, 2000 report of Dr. Seradge, the independent medical specialist, who advised that he had performed a physical examination and had reviewed the case record. He concluded that

³ *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

⁴ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

there were no objective residual findings from appellant's 1996 work injury sufficient to prevent her from working as of August 17, 1998. Dr. Seradge also stated that, based on the results of a functional capacity test, appellant was magnifying her symptoms, which invalidated the impairment rating rendered by Dr. Martin. He stated that the 1996 work injury did not cause any impairment to the upper extremities as appellant had no residuals of the accepted injury.

The Board holds that the Office properly found that Dr. Seradge's referee opinion negated a finding of any continuing residuals as of August 17, 1998, due to her accepted August 15, 1996 employment injury. Accordingly, the Board finds that Dr. Seradge's opinion constituted the weight of the medical evidence to support the Office's December 22, 2000 decision that appellant did not sustain a recurrence of disability for work as of August 17, 1998 causally related to her accepted August 15, 1996 cervical injury. Appellant has therefore failed to discharge her burden of proof to establish her claim that she sustained a recurrence of disability as a result of her accepted employment injury.⁵

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act⁶ set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁷ However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* fifth edition as the standard to be used for evaluating schedule losses.⁸

ANALYSIS -- ISSUE 2

The Office also properly determined that Dr. Seradge was the impartial medical specialist, regarding the issue of permanent impairment. In this regard Dr. Seradge explained that appellant had no objective residuals of the accepted cervical injury. Because appellant had no residuals of the accepted injury, appellant did not sustain a ratable permanent impairment as a result of the injury. The Office therefore properly denied appellant's claim for a schedule award.

LEGAL PRECEDENT -- ISSUE 3

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting

⁵ With regard to appellant's claim based on a consequential injury for fibromyalgia or lupus, the Board notes that a claim based on either of these conditions was never accepted by the Office.

⁶ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁷ 5 U.S.C. § 8107(c)(19).

⁸ 20 C.F.R. § 10.404.

relevant and pertinent evidence not previously considered by the Office.⁹ 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.¹⁰

ANALYSIS -- ISSUE 3

In the present case, appellant did not show that the Office erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by the Office. She did not submit any additional medical evidence in connection with her September 24, 2003 reconsideration request. Although appellant attempted to reargue points raised by Dr. Belford's report, his reports had been thoroughly considered in the Office's prior merit review. Appellant's arguments were cumulative and repetitive of contentions that were presented and rejected by the Office in previous decisions.

While appellant submitted a determination by the Social Security Administration to bolster her claim of disability, the Board has long held that a determination made by another administrative agency regarding disability is not determinative of the extent of physical disability or impairment for compensation purposes under the Act. The relevant statutes have different standards of medical proof and the question of disability found under one statute does not prove disability under the other.¹¹ Thus, the request did not contain any new and relevant evidence for the Office to review. The Board therefore finds that the Office properly refused to reopen appellant's claim for reconsideration.¹²

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she was entitled to compensation for a recurrence of disability as of August 17, 1998, causally related to her accepted August 15, 1996 cervical injury. Appellant has not sustained any permanent impairment to a schedule member of her body causally related to her accepted neck injury, thereby entitling her to a schedule award under 5 U.S.C. § 8107. The Office properly refused to reopen appellant's case for reconsideration on the merits of her claim under 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

¹⁰ *Howard A. Williams*, 45 ECAB 853 (1994).

¹¹ *James E. Norris*, 52 ECAB 93 (2000).

¹² The Board notes that appellant submitted additional evidence to the record following the December 4, 2003 Office decision. The Board's jurisdiction is limited to a review of evidence which was before the Office at the time of its final review. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the December 4 and July 21, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member