

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MEGAN K. KLEIN and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Denver, CO

*Docket No. 99-1750; Submitted on the Record;
Issued April 30, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant established that she had a recurrence of disability effective October 24, 1994; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's most recent request for reconsideration.

On October 5, 1990 appellant, then a 33-year-old letter-sorting machine operator, filed a claim for neck and shoulder spasms and tendinitis. She stated that she had been having severe tension headaches since October 1989, which were subsequently related by a physician to neck and shoulder tension. Appellant related her conditions to keying on the letter-sorting machine. The Office accepted appellant's claim for chronic cervical strain resulting in right shoulder pain, tension headaches and thoracic outlet syndrome. She worked intermittently until September 3, 1992 when she stopped working. The Office began payment of temporary total disability compensation at that time.

In a June 29, 1994 letter, the employing establishment offered appellant a limited-duty position in which she would serve as a telephone receptionist and perform various clerical duties. Appellant accepted the position and returned to work, four hours a day, on July 7, 1994, gradually increasing to eight hours a day by July 18, 1994. She stopped working on October 25, 1994, claiming that she had increased pain.

In a February 3, 1995 decision, the Office rejected appellant's claim for compensation and medical benefits after October 25, 1994 on the grounds that the medical evidence did not establish that her disability after that date was causally related to the accepted employment-related conditions. In a February 21, 1995 letter, appellant requested reconsideration. In a March 6, 1995 decision, the Office denied appellant's request for reconsideration on the grounds that she had not submitted substantive legal argument nor new and relevant medical evidence in support of her claim. In an April 19, 1995 letter, appellant again requested reconsideration. In a May 16, 1995 letter, the Office denied appellant's request on the grounds that the evidence was repetitious and, therefore, insufficient to warrant further review of the prior decision. In a December 6, 1995 letter, appellant requested reconsideration. In a January 8, 1996 merit

decision, the Office denied appellant's request for modification of the prior decision.¹ In a September 16, 1996 letter, appellant again requested reconsideration. In a December 6, 1996 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative and repetitive and, therefore, insufficient to warrant further review of the prior decisions. In a January 23, 1997 letter, appellant requested reconsideration. In a February 24, 1997 merit decision, the Office denied appellant's request for modification of the prior decision. Appellant requested further information from the Office, stating that she intended to file another request for reconsideration. In a March 4, 1998 letter, appellant formally submitted her request for reconsideration. In a May 29, 1998 merit decision, the Office denied appellant's request for modification. In a June 11, 1998 letter, appellant requested reconsideration. In a June 16, 1998 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was cumulative and, therefore, insufficient to warrant review of the prior decisions. In a February 5, 1999 letter, appellant's attorney submitted appellant's eighth request for reconsideration. In an April 2, 1999 decision, the Office denied appellant's request on the grounds that the evidence submitted in support of the request was cumulative and, therefore, insufficient to warrant review of the prior decision.

The Board finds that appellant had not established that her disability after October 24, 1994 was causally related to her accepted employment injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.²

The modified limited-duty job offered to appellant was approved by her treating physician, Dr. Larry Doehring, an osteopath. In a May 17, 1994 report, Dr. George Leimbach, a physiatrist, diagnosed fibromyalgia, a possible superimposed focal myofascial pain syndrome involving the cervical and thoracic spinal regions and right shoulder girdle, possible thoracic outlet syndrome on the right side and headaches, probably of a muscular tension type. In a June 9, 1994 functional capacity evaluation, Dr. Leimbach indicated that appellant had pain in motion of the neck. He found no difficulty in appellant while she was sitting and noted she had no complaints while standing. Dr. Leimbach reported appellant was able to walk on a treadmill for 20 minutes without complaints of pain. Appellant was observed performing squatting, heel sitting, kneeling and altering positions without complaints of discomfort. He noted appellant complained of pain and discomfort in lifting up to 19 pounds.

¹ During this period, appellant sought compensation for periods of leave without pay (LWOP) that occurred prior to the commencement of compensation for temporary total disability. In an October 23, 1996 decision, the Office found that appellant was entitled to compensation for some of the periods of LWOP.

² *George DePasquale*, 39 ECAB 295 (1987); *Terry R. Hedman*, 38 ECAB 222 (1986).

In a November 1, 1994 report, Dr. Michael E. Janssen, an orthopedic surgeon, indicated that appellant had been off work “for the last couple of weeks” due to pain. He diagnosed chronic neck pain with no focal myelopathy or radiculopathy. Dr. Michael E. Janssen stated that cervical x-rays showed no sign of spondylosis, degenerative changes, instability, or osteolytic lesions. In a November 17, 1994 report, he stated that a magnetic resonance imaging (MRI) scan of appellant’s neck was completely normal with no evidence of discogenic etiology for pain. He concluded that appellant had no identifiable objective findings that he could support on radiographic findings or examination.

In a December 16, 1994 report, Dr. Willard D. Schuler, an orthopedic surgeon, diagnosed chronic myofascial injury to the neck and interscapular areas. He recommended that appellant receive psychological counseling to deal with chronic pain and disability. Dr. Schuler commented that, on her present course, she was only getting worse and would be totally disabled if no intervention occurred. In a January 20, 1995 report, he stated that appellant had disabling subjective symptoms, which began on September 23, 1990 and had been present since that time.

Dr. Schuler indicated that appellant’s complaints were not related to an altercation involving her fiancé and his friend in July 1994 nor were they related to sinus problems or problems involving her period. In a September 12, 1996 report, he stated that appellant continued to have myofascial injury to her neck and suprascapular areas. Dr. Schuler indicated that it was doubtful that appellant would ever fully recover from this problem. He commented that the chronic pain appellant suffered when she engaged in repetitive motion of her arms caused her to be unable to remain on the job and interfered with her life away from the job. Dr. Schuler concluded that appellant’s condition had become static in that she had not been guided into a rehabilitative program that would help her deal with her pain. He stated that, when appellant would try to return to unrestricted work, her pain would be aggravated immensely. Dr. Schuler indicated that, if appellant returned to work, it should be with restrictions of no work above shoulder level, no lifting over 10 pounds and an ability to change positions every 20 minutes.

In a November 30, 1994 report, Dr. Doehring stated that appellant worked until October 25, 1994 and was forced to stop because of her deteriorating condition. In an April 12, 1995 report, Dr. Doehring stated that appellant had returned to a position on July 7, 1994 that was within her work restrictions he had set. He again noted that she stopped working because her condition had deteriorated. In a November 17, 1995 report, Dr. Doehring stated that appellant had a trial return to work in July 1994 because she had progressed far enough to be reintroduced to the workforce. He indicated that it was understood by appellant and the facilitator for the employing establishment that if appellant’s symptoms worsened or if she was unable to perform her duties then the trial would be terminated and appellant would return to disability status. Dr. Doehring reported that appellant’s symptoms did increase after she returned to work and she stopped work at his suggestion. He stated that appellant’s symptoms were related to her employment injury in 1990 and that her symptoms were aggravated by her trial of work. Dr. Doehring stated that her condition at the time she stopped work was directly related to her 1990 injury. In a February 12, 1998 report, Dr. Doehring stated that when appellant returned to work in July 7, 1994 she was not symptom free. He again indicated that, there was an agreement that, if appellant was unable to perform the duties of the limited-duty position, the trial of work would be terminated and appellant would return to disability status. Dr. Doehring

commented that the office notes for this period showed appellant's symptoms of headaches, cervical and thoracic myositis and muscle spasms did increase during her trial of work. He stated that it was logical to assume that appellant's job duties, including typing, sitting, telephone work and filing were directly related to her increased symptoms. Dr. Doebling commented that appellant's job duties were terminated as a result of the continued deterioration of her condition.

The reports of Drs. Schuler and Doebling indicated that appellant stopped working due to a deterioration of her condition. They related appellant's condition to her employment injury of September 1990, when her symptoms began. Drs. Schuler and Doebling, however, only noted that appellant had increasing pain due to the employment injury. They did not explain how the September 1990 employment injury or appellant's return to limited duty caused her disability beginning October 25, 1994, particularly in light of Dr. Janssen's finding that appellant had no objective findings, either in x-rays, an MRI scan or examination that would explain her continued complaints of pain. Drs. Schuler and Doebling only gave general explanations in relating appellant's recurrence of disability to the employment injury. They did not give any detailed medical rationale on how the employment injury would have caused appellant's disability four years later in the absence of any objective findings. Their reports, therefore, have limited probative value and are insufficient to satisfy appellant's burden of proof.

The Board finds, however, that the Office improperly denied appellant's request for reconsideration.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant. Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.608(b) 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.³ 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.⁴ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁵

As part of her request for reconsideration, appellant submitted articles from medical journals, which discussed the relationship between fibromyalgia and trauma. However, the Board has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment. These materials are general in application and do not indicate

³ 20 C.F.R. § 10.608(b).

⁴ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁵ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

whether the specific condition claimed is related to the particular employment factors alleged by the employee.⁶

Appellant, however, submitted a new medical report from Dr. Christopher Ryan, a Board-certified physiatrist. In the November 23, 1998 report, he reviewed appellant's extensive medical history. In examination, Dr. Ryan found a decreased cervical range of motion and muscle spasm in the scapular elevators, extreme tightness in the scalene and interscapular muscles. He found global atrophy in the shoulder girdle, which extended into the arms. Dr. Ryan noted limited abduction of the right shoulder with impingement and limitation in internal rotation. He diagnosed myofascial neck and shoulder pain. Dr. Ryan related appellant's condition to her nutritional and postural status. He noted that efforts were made to improve appellant's nutritional status to allow repair of the employment injury. Dr. Ryan indicated that the shoulder and cervical strain developed into a chronic pain condition as appellant had no way to repair the injury that occurred at work. He stated that, but for the employment injury, the cervical and shoulder symptoms would not have manifested itself and appellant would not have developed a chronic muscular and skeletal condition. Dr. Ryan concluded that appellant's condition was related to the original injury in 1990 and the subsequent aggravation in 1994, noting that she had no other injury during this period. His medical report presents new, rationalized medical evidence that is relevant to the issue present in this case and is not repetitive or duplicative of previous medical evidence. The Office must, therefore, conduct a merit review of appellant's case based on Dr. Ryan's report.

The decisions of the Office of Workers' Compensation Programs dated June 16 and May 29, 1998 are hereby affirmed. The April 2, 1999 decision, denying appellant's request for reconsideration, is reversed and the case is returned to the Office for further action as set forth in this decision.

Dated, Washington, DC
April 30, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *William C. Bush*, 40 ECAB 1064, 1075 (1989).