

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANN LACOUNT and U.S. POSTAL SERVICE,
POST OFFICE, City of Industry, CA

*Docket No. 00-1011; Submitted on the Record;
Issued March 19, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant has established disability commencing March 4 through October 23, 1997 and November 16, 1998 causally related to her employment injuries; and (2) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration of its October 14, 1998 decision denying wage-loss benefits from September 8 through September 25, 1998.

Appellant, a 45-year-old postal clerk, filed a claim alleging that the torn meniscus of her left knee was causally related to her federal employment. Appellant related that she was first aware of her condition on March 3, 1997. The Office accepted the claim for a left knee meniscus tear. Appellant did not stop work, but returned on March 4, 1997 doing office work -- answering telephones.

On September 6, 1998 appellant filed a claim for compensation (Form CA-7), commencing September 8 through September 25, 1998. By decision dated October 14, 1998, the Office determined that appellant was not entitled to compensation for wage loss for the period September 8 through September 25, 1998 as the medical evidence failed to support that appellant was temporarily disabled due to her employment injury. By decisions dated January 29 and November 5, 1999, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was not sufficient to reopen the case for merit review.

On December 3, 1998 the Office received appellant's CA-7, 7a and 7b forms, claiming leave buy back for wage loss for the period beginning March 4, 1997 and ending October 23, 1997. By decision dated March 12, 1999, the Office determined that appellant was not eligible for compensation pay for the period beginning March 4, 1997 and ending October 23, 1997 as the medical evidence failed to establish disability from her accepted work injury. Appellant was further found to be ineligible for compensation pay for the period October 23, 1997 and November 16, 1998 as no wage loss was suffered.

The Board only has jurisdiction over the January 29 and November 5, 1999 decisions, which denied appellant's request for review of the merits of the October 14, 1998 decision and the March 12, 1999 decision, which denied compensation from March 4 through October 23, 1997 and November 16, 1998. Because more than one year has elapsed between the issuance of the Office's decision finalized October 14, 1998 and January 13, 2000, the date appellant filed her appeal with the Board, the Board lacks jurisdiction to review the decision finalized October 14, 1998, which denied wage-loss compensation from September 8 through September 25, 1998.¹

The Board has reviewed the record and finds that appellant has not established that she sustained employment-related disability commencing March 4 through October 23, 1997 and November 16, 1998.

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.³

In the present case, the medical evidence is not of sufficient probative value to meet appellant's burden of proof to establish leave buy back from March 4 through October 23, 1997 or compensation for wage loss on November 16, 1998. At the time of her March 3, 1997 injury, appellant was working a full-time light-duty job. The Office accepted the condition of left knee meniscus tear and appellant underwent left knee arthroscopic surgery on October 28, 1997. Appellant claimed leave buy back beginning March 4 and ending October 23, 1997 along with a four hour leave buy back for wage loss on November 16, 1998.

In regards to the period of compensation requested in 1997, the medical evidence is insufficient to support compensation for the requested dates. In a report dated October 1, 1997, Dr. Charles Hsu, a Board-certified family practitioner of Kaiser Permanente, advised that he saw appellant March 4, 1997 and diagnosed a left knee sprain. He advised that appellant was temporarily disabled from March 4 through March 6, 1997 having found that the left knee range of motion was limited, tender at medial collateral ligament. However, under the Act, appellant is not entitled to compensation for the first 3 days of temporary disability except when the disability exceeds 14 days.⁴ In his next examinations of March 17, March 28 and May 2, 1997, documenting appellant's condition, Dr. Hsu does not provide for any restrictions thereby evidencing appellant's ability to work.

¹ See 20 C.F.R. §§ 501.2(c), 501.3(d).

² 5 U.S.C. §§ 8101-8193.

³ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ 5 U.S.C. § 8117(1).

In a March 28, 1997 report, Dr. William Scott, a family practitioner of Kaiser Permanente, noted complaints of lumbar pain with back symptoms and prescribed medication for pain along with a knee immobilizer. No finding of disability was provided.

In a June 5, 1997 report, Dr. David Anderson, an orthopedic surgeon of Kaiser Permanente, released appellant to return to temporary light duty from June 5 through July 27, 1997 with restrictions on walking and driving. He specifically noted that appellant stated she could get to work and do her desk job without problems.

In a June 26, 1997 examination, Dr. Herman Schoene, an orthopedic surgeon of Kaiser Permanente, advised that appellant was temporarily disabled from June 26 through August 1, 1997. He advised that he was placing her on an off-work order and was going to call to obtain permission to schedule surgery. Dr. Schoene did not give dates for the duration of the "off-work order." Moreover, the next day, June 27, 1997, Dr. Schoene provided a return-to-work order. Although the record contains an undated CA-20 form report in which Dr. Schoene states that appellant was totally disabled from June 26 through December 1, 1997, this report is insufficient to meet appellant's burden as it is incomplete and is contrary to Dr. Schoene's previous reports. Moreover, the record reflects that appellant continued to work her light-duty job until the surgery date October 28, 1997, thereby demonstrating her ability to work her light-duty job.

In a December 27, 1998 report, Dr. Ibrahim Yashruti, a Board-certified orthopedic surgeon, and Office referral physician, opined that appellant was temporarily disabled from October 19 through December 31, 1997. Inasmuch as appellant is claiming compensation through October 23, 1997 and the evidence reflects that appellant was working her light-duty job until her October 28, 1997 surgery, appellant is not eligible for compensation from October 19 through October 23, 1997.⁵

The only medical evidence pertaining to the requested compensation for November 16, 1998 is a physician's supplemental industrial report from Dr. Neeraja Reddy, an anesthesiologist of Kaiser Permanente, of the same date. The report notes appellant's complaints of bilateral knee pain, shoulder pain and myofascial pain and places appellant on restricted duties until December 13, 1998. The Board notes that a bilateral knee condition, shoulder condition and myofascial pain have not been accepted as being employment related. It is further noted that since the restricted duties Dr. Reddy placed appellant on are not written on the report, there is no showing that appellant is temporarily disabled from performing her light-duty position. Additionally, there is no showing by Dr. Reddy that appellant's accepted condition worsened as he did not provide a reasoned opinion as to disability supported by objective findings.

The employing establishment also indicated that June 13, 1997 was a nonscheduled day and that appellant worked 7.84 hours on October 23, 1997. Appellant is not eligible for lost wages on her days off or for the days she worked. The record does not contain a reasoned medical opinion, based on a complete factual and medical background, as to a disability commencing on or after March 4, 1997 and the accepted employment injury. Appellant was

⁵ The record reflects that the Office paid compensation for October 25 through November 21, 1997.

advised of the necessary factual and medical evidence needed to support leave buy back compensation, by letters dated December 3 and December 10, 1998. Accordingly, appellant has not met her burden of proof for the period of compensation claimed.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for reconsideration of its October 14, 1998 decision denying wage-loss benefits from September 8 through September 25, 1998.

Section 10.606 of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (i) showing that the Office erroneously applied or interpreted a point of law; or (ii) advancing a relevant legal argument not previously considered by the Office; or (iii) submitting relevant and pertinent evidence not previously considered by the Office.⁶ Section 10.607 provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.⁷

In the present case, appellant's claim for compensation from September 8 through September 25, 1998 was denied on the basis that the medical evidence failed to support that appellant was temporarily disabled due to her accepted left knee employment injury. Although in her reconsideration requests of October 30, 1998 and October 12, 1999 appellant attempts to offer relevant medical evidence which the Office did not previously consider,⁸ such evidence, although new, is insufficient to require reopening of appellant's case for further review of the merits of her claim pursuant to section 8128 as it is either irrelevant or duplicative of evidence already within the case record.

In an August 31, 1998 report, which was generated in response to appellant's telephone call regarding her right knee pain, Dr. Schoene opined that appellant was temporarily disabled from August 31 through September 22, 1998 and provided an off-work order until September 22, 1998. The Board notes that a right knee condition is not an accepted condition in this case. Moreover, Dr. Schoene's report is of no probative value as it is predicated solely on the basis of a telephone conversation with a claimant.⁹ In a September 22, 1998 report, Dr. Anderson stated that appellant was temporarily disabled from September 22 through October 25, 1998. Dr. Anderson advised of the possibility of surgery regarding both knees and stated that appellant's overall symptom complex was suggestive of something more extensive than internal derangement of the knee (*i.e.*, fibromyalgia). As the Office only accepted a left knee condition and Dr. Anderson's report does not limit appellant's disability solely to the accepted condition, this evidence is not sufficient to require reopening of appellant's case for further review of the merits of her claim. In an October 5, 1998 report, Dr. George Hanna noted

⁶ 20 C.F.R. § 10.606 (1999).

⁷ 20 C.F.R. § 10.607 (1999).

⁸ Reports which were previously of record and reviewed in the original decision include August 9, 1998 reports and August 9, 1998 documentation of medical impairment.

⁹ *Rose Marie Paszkiewicz*, 16 ECAB 223, 226 (1964).

his findings of his September 4, 1998 examination, but provided no findings of disability other than noting that appellant was off work per Dr. Schoene's recommendation. Dr. Schoene's October 12, 1998 report releasing appellant to temporary light duty with restrictions on October 19, 1998 is irrelevant as it is outside the compensation period claimed. Dr. Lauri Hemsley, a specialist in occupational medicine, in a February 1, 1999 report and Dr. Schoene, in a May 7, 1999 report, provide no new information to justify total disability for the period in question and both physicians merely summarize information already in the record. The August 24, 1998 form providing service codes and documentation of medical impairment on December 28 and December 22, 1998 are irrelevant to the disability period in question. The additional evidence was, therefore, properly found to be irrelevant or duplicative of evidence already on file and, thus, was not sufficient to require reopening of appellant's case for further review of the merits of her claim pursuant to section 8128.

The decisions of the Office of Workers' Compensation Programs dated November 5, March 12 and January 29, 1999 are affirmed.

Dated, Washington, DC
March 19, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member