

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTOINETTE HAYES and U.S. POSTAL SERVICE,
POST OFFICE, New Orleans, LA

*Docket No. 01-305; Submitted on the Record;
Issued January 9, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained neck and right shoulder injuries in the performance of duty on August 17, 1998; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for further review on the merits under 5 U.S.C. § 8128(a).

Appellant, a 32-year-old mailhandler, injured her lower back, neck and right shoulder in the performance of duty on February 26, 1996. The Office accepted her claim for lumbar spine strain, cervical spine strain and right shoulder strain. The Office paid compensation for appropriate periods. Appellant missed work intermittently and returned to light duty on February 15, 1997. She went off work on April 12, 1997, then returned to work on August 17, 1998.

In a work capacity evaluation dated July 29, 1998, Dr. William R. Knight, appellant's treating physician and an osteopath, released her to return to work with restrictions on reaching, reaching above the shoulder, operating a motor vehicle, repetitive movements of wrists and elbows, pushing, pulling, lifting and climbing. He also advised that appellant should take a five to ten minute break every hour.

On August 17, 1998 the employing establishment offered appellant a position in which she would be required to remove tags from tray sleeves, load empty tray sleeves into a cartridge, place empty tray sleeves in other equipment. The job description stipulated that appellant would carry a card stating her limitations at all times.

On August 17, 1998 the date she returned to work at the modified job, appellant filed a new claim for benefits. She alleged that she sustained an injury to her neck and right shoulder on that date as a result of having to work at a job which exceeded her work restrictions. By letter dated August 20, 1998, the employing establishment controverted the claim and rebutted her allegation that it was making her work beyond her work restrictions.

In support of her claim, appellant submitted an August 17, 1998 report from Dr. Knight advising that she should not work late evening hours or night hours because that is the time when she experiences her most severe neck pain and advising that appellant can only work Monday through Friday for a 40-hour work schedule with no overtime; an August 17, 1998 note from a medical center stating that she would be unable to work until she was seen by Dr. Knight during the week; and an October 7, 1998 Form CA-20, which indicated that she was requesting total disability as of August 18, 1998 and continuing based on an injury that occurred on January 3, 1996.

In a report dated August 18, 1998, Dr. Knight stated that appellant had returned to work the day before and had apparently worked at a job which required some excessive reaching, as a result of which she had an exacerbation of neck pain with neck spasms.

By letter dated September 18, 1998, the Office advised appellant that she needed to submit additional information in support of her claim. The Office requested that she submit additional medical evidence in support of her claim and provide factual evidence, including statements from witnesses, which would corroborate her account of the events which occurred on August 17, 1998. The Office stated that appellant had 30 days to submit the requested information. Appellant did not respond to this request within 30 days.

By decision dated October 22, 1998, the Office denied appellant's claim, finding that she failed to establish fact of injury. The Office stated that it had requested additional factual and medical evidence by letter dated September 18, 1998, but that appellant had failed to respond to this request.

In a letter received by the Office on September 9, 1999, appellant requested reconsideration. She submitted reports dated July 7 and July 27, 1999 from Dr. Pedro Oliveros, a specialist in physical medicine; and medical reports dated September 2, September 16, October 7, November 4, November 16 and December 21, 1998 from Dr. Liza Maniquis Smigel, Board-certified in physical medicine and rehabilitation. These reports stated findings on examination, indicated that she had complaints of neck and right shoulder pain and reiterated appellant's allegation that she was placed in a job on August 17, 1998 which required her to do repetitive overhead lifting which aggravated her preexisting employment-related shoulder condition. However, none of these reports contained factual or probative, rationalized medical evidence relating her complaints of pain to the alleged August 17, 1998 work injury.

The employing establishment submitted an August 18, 1998 statement from her supervisor reiterating that appellant was not required to work outside her physical restrictions.

By decision dated October 14, 1999, the Office denied reconsideration.

By letter dated January 14, 2000, appellant's attorney requested reconsideration.

By decision dated March 17, 2000, 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.

By letter dated May 1, 2000, appellant's attorney requested reconsideration.

By decision dated May 15, 2000, 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.

By letter dated August 8, 2000, appellant's attorney requested reconsideration. Appellant submitted an August 2, 2000 letter, which purported to be from Dr. Knight. The letter, which purportedly contained Dr. Knight's signature, stated that appellant had been injured on August 17, 1998, treated at the emergency room and that Dr. Knight attested to the fact that she had sustained an injury at work; *i.e.*, that appellant reinjured her neck and shoulder due to repetitive movement of the right upper extremity on August 17, 1998 because she was forced to work at a modified job which contained duties which exceeded Dr. Knight's physical restrictions.

The employing establishment subsequently submitted an October 10, 2000 investigative memorandum. This memorandum indicated that Dr. Knight's office had been contacted, that Dr. Knight had been specifically asked whether he dictated or signed the August 2, 2000 report submitted by appellant and that Dr. Knight denied writing or knowing about such a letter.

By decision dated November 17, 2000, the Office denied reconsideration.

The Board finds that appellant has failed to establish that she sustained neck and right shoulder injuries in the performance of duty on August 17, 1998.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing that the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁴ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁵

¹ 5 U.S.C. §§ 8101-8193.

² *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁴ *John J. Carlone*, 41 ECAB 354 (1989).

⁵ *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(ee).

In this case, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. Although appellant alleged in her CA-1 form that she injured her neck and right shoulder on August 17, 1998 because she had been forced to work at a modified job whose duties exceeded her work restrictions, this statement was subsequently contradicted by her supervisors and by the October 10, 2000 investigative memorandum from the employing establishment which established that Dr. Knight did not dictate or sign the August 2, 2000 report which, appellant claimed, had been written by Dr. Knight.⁶ This contradictory evidence created an uncertainty as to the time, place and in the manner in which appellant sustained her alleged neck and right shoulder injuries.

In addition, appellant failed to submit to the Office a corroborating witness statement in response to the Office's request. This casts additional doubt on appellant's assertion that she injured her neck and right shoulder while engaging in repetitive tasks, contrary to her work restrictions, on August 17, 1998. The Office requested that appellant submit additional factual and medical evidence explaining how she injured her neck and right shoulder on the date in question and requested probative, rationalized medical evidence in support of her claim that her neck and right shoulder pain was related to the alleged work incident of August 17, 1998. Appellant failed to submit such evidence. Therefore, given the inconsistencies in the evidence regarding how she sustained her injury, the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.⁷

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.607, 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 relevant and pertinent evidence not previously considered by the Office.⁸

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.⁹

In this case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal argument not previously considered by the Office; and she has not submitted relevant and pertinent evidence not previously

⁶ The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. *See generally Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

⁷ *See Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

⁸ 20 C.F.R. § 10.607(b)(1). *See generally* 5 U.S.C. § 8128(a).

⁹ *Howard A. Williams*, 45 ECAB 853 (1994).

considered by the Office. The evidence appellant submitted was either previously considered and rejected by the Office in prior decisions or is not pertinent to the issue on appeal. Additionally, the January 14 and May 1, 2000 letters from appellant's attorney failed to show that the Office erroneously applied or interpreted a point of law nor did they advance a point of law or fact not previously considered by the Office. Therefore, the Office acted within its discretion in refusing to reopen appellant's claim for a review on the merits.

The decisions of the Office of Workers' Compensation Programs dated November 17, May 15 and March 17, 2000 are affirmed.

Dated, Washington, DC
January 9, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member