

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of YOUNG S. BURNS and U.S. POSTAL SERVICE,  
POST OFFICE, Seattle, WA

*Docket No. 03-901; Submitted on the Record;  
Issued November 20, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant established entitlement to wage-loss compensation for the period May 3, 2000 through May 16, 2001.

On September 19, 1999 appellant, then a 47-year-old mail clerk, filed a traumatic injury claim alleging that on September 18, 1999 she hurt her right finger while lifting a 20-pound mail tray in the performance of duty. The Office of Workers' Compensation Programs accepted the claim for a right middle finger strain only.<sup>1</sup> Appellant worked light duty following her work injury and received appropriate compensation for intermittent periods of wage loss. On May 3, 2000 she stopped work entirely and began filing a series of CA-7 claims for lost wages beginning May 3, 2000. She returned to light duty on May 16, 2001.

Appellant came under the care of Dr. Kyle Oh, who is Board-certified in physical medicine and rehabilitation, for treatment of her work injury. Dr. Oh placed appellant on limited duty with restrictions that she perform no repetitive type of activities with her upper extremities except for simple grasping up to two hours per day. On May 3 and 8, 2000 Dr. Oh noted appellant's complaints of swelling in both wrists and pain in her right hand. He diagnosed bilateral shoulder sprain and bilateral hand sprain. Dr. Oh indicated that he was at a loss as to why appellant had swelling in the wrist given her work restrictions that allowed for only minor use of her upper extremities. He indicated that he had taken appellant off work for one month in the hopes that her condition would improve. Dr. Oh opined that appellant's condition was due to her "work injury, repetitive use syndrome." In a May 15, 2000 treatment note, Dr. Oh noted that appellant was off work and stated that "this will tell us whether her swelling is

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<sup>1</sup> Appellant previously filed a claim for bilateral shoulder tendinitis due to work factors that was accepted by the Office. She was placed on light duty with restrictions effective October 10, 1998. The Office doubled the prior occupational disease claim with the traumatic injury claim under master file number A14-339963.

secondary to her work or inflammatory arthritis.”<sup>2</sup> He ordered a magnetic resonance imaging (MRI) scan of the bilateral wrists on July 31, 2000 that showed symmetrical periarticular osteopenia. On November 6, 2000 Dr. Oh noted that appellant’s condition had not improved and that the swelling had continued. He felt that appellant should be seen by a rheumatologist.

In a July 18, 2000 letter, the Office advised appellant of the factual and medical evidence required to establish her claim for compensation. The Office explained that she had the burden to establish that her disability for work was causally related to the September 18, 1999 work injury. The Office also referred appellant to Dr. Harry Reese, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated January 4, 2001, Dr. Reese noted findings of diffuse tenderness throughout the upper extremities but was unable to relate appellant’s symptoms to conditions of her employment. He advised against repetitive use of the upper extremities more than two hours daily.

Appellant subsequently submitted reports dated January 8 and February 9, 2001 from Dr. Oh, stating that she could work light duty with permanent restrictions including no repetitive use of the upper extremities. In a report dated March 28, 2001, Dr. Oh noted that appellant’s condition was stationary and had not changed over the course of a year. He agreed with Dr. Reese’s work restrictions but felt that appellant would be better off not returning to work for the employing establishment.

In a March 9, 2001 decision, the Office denied appellant’s claim for compensation on the grounds that the medical evidence of record failed to establish that she was disabled for work on or after May 3, 2000 as a result of the accepted work injury. Appellant subsequently requested a hearing, which was held on September 20, 2001. In a decision dated December 7, 2001, an Office hearing representative affirmed the Office’s March 29, 2001 decision, finding that the medical evidence was insufficient to establish either a change in the nature and extent of appellant’s work-related condition or a change in the nature and extent of her light-duty job requirements.

By letter dated November 3, 2002, appellant, by her representative, requested reconsideration and submitted additional evidence. In support of her reconsideration request, appellant submitted a progress note dated September 8, 1999, CA-17 duty status report dated July 30, 2000 listing work restrictions, copies of her CA-7 claim forms, the December 7, 2001 Office decision and a May 2, 2000 job offer. She also submitted progress notes from Dr. Oh dated February 11, 12 and 14, 2002, April 22, October 23 and November 7, 2002, which indicated that appellant had stayed off work due to complaints of pain in her hands and arms. He

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<sup>2</sup> Dr. Oh referred appellant to Dr. John Baldwin, a rheumatologist, who found that appellant tested negative for arthritis. He diagnosed musculoskeletal pain of the right hand and the shoulders of unknown etiology. Appellant was also seen by Dr. Steven Reed, an orthopedic hand surgeon, who indicated that her bilateral shoulder pain and right hand pain had been incompletely diagnosed in the past but did not specify his own diagnosis.

reported, however, that he could offer her no further medical treatment and recommended that she see a psychiatrist.<sup>3</sup>

By decision dated December 6, 2002, the Office determined that the evidence on reconsideration was insufficient to establish a change in the nature or extent of appellant's accepted work injury or a change in the nature or extent of appellant's light-duty job requirements. The Office also concluded that appellant's evidence was insufficient to warrant a merit review under section 8128.<sup>4</sup>

The Board's jurisdiction to hear and decide appeals from final decisions<sup>5</sup> of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>6</sup> In this case, because appellant's appeal was filed on February 24, 2003, the Board's jurisdiction extends only to the December 6, 2002 decision denying appellant's reconsideration request.

In its December 6, 2002 decision, the Office stated that it was denying appellant's request for a merit review under section 8128. The Board, however, notes that the Office decision contains elements of a merit review, specifically the Office's finding that appellant's evidence on reconsideration failed to establish either a change in the nature or extent of appellant's accepted work injury or a change in the nature or extent of appellant's light-duty job requirements. Because the Office's decision is dated within one year of appellant's appeal and contains a merit review, the Board will also consider on appeal the merits of appellant's claim for wage-loss compensation.

The Board finds that appellant failed to carry her burden of proof to establish her entitlement to wage-loss compensation for the period of May 3, 2000 through May 16, 2001.

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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

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<sup>3</sup> Appellant submitted treatment notes and a report dated July 22, 2002 from Dr. Baldwin, who reiterated that he could not confirm a diagnosis for appellant's complaints but did not consider them to be work related. In a July 22, 2002 report, Dr. Dasniel L. Bruzusek, an osteopath, who also stated that appellant, was not totally disabled from a medical standpoint but felt her problems were psychological in nature.

<sup>4</sup> 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation. The regulations at 20 C.F.R. § 10.606(b)(2) provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. 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; *see Edward C. Heinz*, 51 ECAB 652 (2000).

<sup>5</sup> Appellant filed a (Form CA-2a) claim for a recurrence of disability beginning July 25, 2002 and a CA-7 claim for lost wages for the period of July 25 through September 6, 2002 as well as a schedule award claim. The Office has not rendered a final decision on these claims.

<sup>6</sup> *See* 20 C.F.R. §§ 501.2(c) and 501.3; *Marilyn F. Wilson*, 51 ECAB 330 (2000).

disability and to show that he or she cannot perform such light duty.<sup>7</sup> As part of the 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.<sup>8</sup>

In this case, appellant failed to satisfy her burden of proof to establish that she was disabled for work from May 3, 2000 through January 12, 2001 because the evidence is insufficient to show a change in the nature and extent of appellant's work-related condition or a change in the nature and extent of her light-duty job requirements during the period of claimed disability. The record reflects that appellant stopped working light duty on May 3, 2000 based on complaints of bilateral wrist pain and shoulder pain reported by Dr. Oh. The Board notes, however, that the Office has not accepted that appellant has a work-related wrist condition. The claim was accepted for bilateral tendinitis and a right middle finger sprain only. Appellant is not entitled to wage-loss compensation for a nonwork-related condition. Furthermore, although Dr. Oh described appellant's subjective complaints, his reports lack any medical rationale explaining how appellant's condition worsened or why she was unable to perform her light-duty job requirements due to the accepted work injuries. Dr. Oh did not identify any objective evidence to support a finding that appellant's work-related condition had worsened or that she was unable to perform her light-duty job assignment. Similarly, the reports from Drs. Baldwin and Reed have no probative value case since they were unable to come up with a definitive diagnosis regarding appellant's hand, wrist and shoulder complaints. Dr. Oh apparently decided to take appellant off work to ascertain the cause of her subjective complaints and then essentially returned her to work with the same work restrictions previously assigned. His treatment notes of January 2001 basically reiterate that appellant is to work light duty with not repetitive activities of the upper extremities.

The Board further finds that the medical evidence submitted by appellant on reconsideration is insufficient to satisfy her burden of proof. The treatment notes from Dr. Oh dated February 11, 12 and 14, 2002, April 22, October 23, and November 7, 2002 postdate the period of disability in question and, therefore, are not pertinent to appellant's medical condition from May 3, 2000 through May 15, 2001. Appellant did not submit medical evidence on reconsideration that was in any way contemporaneous to the period of disability claimed. She also did not submit any contemporaneous evidence to establish that she was unable to perform her light-duty job as alleged. For these reasons, the Board finds that appellant failed to establish that she is entitled to compensation for wages lost from May 3, 2000 to May 16, 2001.

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<sup>7</sup> *Kim Kiltz*, 51 ECAB 349 (2000); *Carl C. Graci*, 50 ECAB 557 (1999).

<sup>8</sup> *Id.*

The decision of the Office of Workers' Compensation Programs dated December 6, 2002 is hereby affirmed.

Dated, Washington, DC  
November 20, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member