

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAMELA D. MORGAN and U.S. POSTAL SERVICE,  
POST OFFICE, Gary, IN

*Docket No. 97-2229; Submitted on the Record;  
Issued September 28, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant did not have any continuing disability or medical residuals causally related to her October 1, 1993 occupational injury; and (2) whether the Office properly refused to reopen appellant's claim for merit review in a June 10, 1997 decision.

On December 9, 1994 appellant, then a 47-year-old letter carrier, filed an occupational disease claim alleging that she sustained a neuropathy of the ulnar nerve of her left elbow due to the repetitive nature of her federal employment. The Office accepted the claim for an ulnar neuropathy of the left elbow. The record indicates that appellant underwent an ulnar release of the left elbow on January 10, 1996. Appellant returned to work on February 7, 1996 with restricted duties and gradually increased her hours and duties pursuant to her physician's orders. Appellant was working an 8-hour day with a 30-pound lifting restriction as of May 1, 1996.

By decision dated August 26, 1996, the Office found that the evidence of record failed to demonstrate that the continuing disability of appellant's restricted status was causally related to the accepted work condition. This decision was affirmed by an Office hearing representative in a decision dated January 21, 1997. Appellant requested reconsideration. By decision dated June 10, 1997, the Office denied appellant's request for reconsideration without merit review of the claim.

The Board has reviewed the record and finds that appellant has no continuing disability or medical residuals causally related to her October 1, 1993 occupational injury.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>1</sup> has the burden of establishing 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

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

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.<sup>2</sup> These are the essential elements of each and every claim. As part of this burden, the claimant must present rationalized medical evidence based upon a complete factual and medical background showing causal relationship.<sup>3</sup> Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>4</sup>

As applied to this case, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her continued lifting restriction and the accepted occupational condition of an ulnar neuropathy of the left elbow.<sup>5</sup> This burden includes providing medical evidence from a physician who concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>6</sup> The Board has held that the mere belief that a condition was caused or aggravated by employment factors is not sufficient to establish a causal relationship between the two.<sup>7</sup>

In a report dated June 17, 1996, Dr. Marvin Gold, a Board-certified orthopedic surgeon and appellant's attending physician, noted that appellant was working with a 40-pound lifting restriction and was continuing to do well. Dr. Gold noted that when he saw her again in six weeks she probably would be released from all restrictions. In a July 25, 1996 report, he noted that appellant had a minimal discomfort and should probably be maintained on the 40-pound lifting restriction. Dr. Gold also estimated that appellant had a 17 percent permanent impairment rating. No objective findings or medical rationale was provided.

In a letter dated August 5, 1996, the Office requested Dr. Gold to provide objective findings to support the continued need for the 40-pound lifting restriction. The Office further inquired that if there were no objective findings, whether Dr. Gold felt that the restriction was preventative in nature.

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<sup>2</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>3</sup> *Joseph T. Gulla*, 36 ECAB 516 (1985).

<sup>4</sup> *James Mack*, 43 ECAB 321 (1991).

<sup>5</sup> *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

<sup>6</sup> *See Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

<sup>7</sup> *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

In a report dated August 12, 1996, Dr. Gold stated that the 40-pound lifting restriction was preventative in nature. Inasmuch as Dr. Gold classified the restrictions as preventative in nature, he inferred that there were no objective factors of disability. Preventative restrictions or fear of reinjury is not covered under the Act as such feelings are not sufficient to constitute a personal injury sustained in the performance of duty within the meaning of the Act.<sup>8</sup> Therefore, Dr. Gold's opinion is insufficient to establish that appellant's continued lifting restriction was causally related to her accepted employment injury.

In a report dated September 17, 1996, Dr. Gold stated that appellant achieved maximum medical improvement about July 23, 1996. He stated that she has a full range of elbow motion. Dr. Gold noted mild complaints of pain in the elbow and some local tenderness of the ulnar nerve in its anteriorly transposed site. He opined that appellant had a 17 percent permanent impairment of the left upper extremity.

Dr. Gold, however, has not provided any clear objective findings to substantiate appellant's subjective complaints of pain and tenderness.<sup>9</sup> Moreover, he did not provide an opinion on whether the complaints of mild pain and tenderness constituted a residual condition causally related to the accepted work condition. Therefore, Dr. Gold's report is not sufficient to meet appellant's burden of proof.

The Board therefore finds that the weight of the evidence indicates that appellant does not have any continuing disability or medical residuals causally related to her October 1, 1993 occupational injury as Dr. Gold clearly stated that appellant's restrictions were preventative in nature.

The Board further finds, however, that the Office abused its discretion in refusing to reopen appellant's claim for merit review in its June 10, 1997 decision.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act.<sup>10</sup> 20 C.F.R. § 10.138(b)(1) provides that the claimant may obtain review of the merits of the claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or a fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>11</sup>

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<sup>8</sup> See generally, *Artice Dotson*, 41 ECAB 754 (1990); *Buck Green*, 37 ECAB 374 (1985); *Peter Sammarco*, 35 ECAB 631 (1984).

<sup>9</sup> The Board has frequently explained that subjective complaints of symptoms unsupported by objective physical findings of disability are not compensable. *John L. Clark*, 32 ECAB 1618 (1981); *Charles D. Wallace*, 21 ECAB 347 (1970).

<sup>10</sup> 5 U.S.C. § 8128(a).

<sup>11</sup> 20 C.F.R. § 10.138(b)(2).

As noted above, the issue in this case is whether appellant continued to have residuals of her October 1, 1993 employment injury. In her reconsideration request, appellant submitted a March 18, 1997 report from Dr. Gold. Dr. Gold noted that he had assessed a permanent partial impairment to appellant's left upper extremity because "moving [the] ulnar nerve from its normal position to an abnormal anterior position, while relieving [her] complaints, also necessarily caused permanent scarring." Dr. Gold stated that appellant's arm is no longer suitable for unrestrictive use as it will not tolerate lifting more than 40 pounds. He noted that this was an active restriction and not merely "preventative" in nature.

As Dr. Gold stated that the 40-pound restriction was not preventative in nature, this is a clear change from his earlier opinions in which he found the restriction to be preventative in nature. This is not simply a reinterpretation of earlier evidence previously submitted. Thus, the Office abused its discretion by refusing to reopen appellant's claim for merit review in its June 10, 1997 decision. On remand, the Office should review the request for reconsideration and the evidence submitted under the appropriate standard. After such further development as it deems necessary, it should issue an appropriate decision.

The decisions of the Office of Workers' Compensation Programs dated January 21, 1997 and August 26, 1996 are affirmed. The decision dated June 10, 1997 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
September 28, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member