

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICKIE J. FOTHEN and U.S. POSTAL SERVICE, SAPPINGTON
BRANCH POST OFFICE, St. Louis, MO

*Docket No. 00-181; Submitted on the Record;
Issued January 16, 2001*

DECISION and ORDER

Before DAVID S. GERSON, PRISCILLA ANNE SCHWAB,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) on the grounds that the request was not timely filed and appellant failed to present clear evidence of error.

The Board has duly reviewed the case record on appeal and finds that the Office properly determined that appellant's request for reconsideration was not timely filed and failed to present clear evidence of error.

On May 5, 1997 appellant, then a 46-year-old letter carrier technician, filed a notice of occupational disease claim, Form CA-2, alleging that she became aware of a work-related illness on April 5, 1997 when she woke up with left arm and left neck pain. She stated that she stopped working on April 8, 1997. Appellant submitted disability notes, one of which dated April 7, 1997 stated that she was unable to work approximately through April 14, 1997.

By letter dated April 24, 1997, the Office informed appellant that additional evidence was required including a narrative report from her treating physician explaining how the exposure or the incidents of her federal employment contributed to her condition. Appellant submitted a statement dated May 1, 1997, a medical report from Dr. Karl A. Jacob, a Board-certified neurological surgeon, dated April 28, 1997, and attending physicians' reports from Dr. Jacob, undated but received by the Office on May 15, 1997, and from Dr. David L. Pittenger, an osteopath, dated June 5, 1997. In his April 28, 1997 report, Dr. Jacob considered appellant's history of injury, performed a physical examination and diagnosed, *inter alia*, cervical disc displacement, cervical spondylosis with myelopathy and cervical sprain and pain, remote by history. In her May 5, 1997 statement, appellant stated that her work activities which involved exertion or repeated movement of the wrist and hand including casing mail of approximately 680 individual stops, reaching in the vehicle to pick up small bundles of mail and lifting mail trays weight from 35 to 45 pounds.

In his undated report, Dr. Jacob diagnosed cervical disc displacement, checked the “yes” box that the diagnosed condition was work related and stated that the pain was increasing with lighter and lighter loads. In his June 5, 1997 report, Dr. Pittenger diagnosed cervical sprain and checked the “yes” box that the condition was work related.

By decision dated July 17, 1997, the Office denied appellant’s claim, stating that the evidence of record failed to support that she suffered a condition related to her federal employment.

By letter dated January 28, 1999, appellant requested reconsideration of the Office’s decision and submitted additional evidence including medical reports from her treating physician, Dr. Rodney T. Routsong, an osteopath, dated September 16 and December 11, 1997, March 18 and July 16, 1998.

In his September 16, 1997 report, Dr. Routsong, as part of a neurosurgery consultation, considered appellant’s history of injury, performed a physical examination, reviewed the diagnostic tests consisting of a magnetic resonance imaging scan, a myelogram and a computerized axial tomography scan, and diagnosed lower cervical somatic dysfunction on the left and mild left thoracic syndrome. He found that all the diagnostic tests were normal showing no signs of disc herniation, nerve or spinal cord compression. He stated that appellant was off work which seemed to help but even doing her secretarial work and turning her neck and shoulders seemed to increase her pain. Dr. Routsong stated that appellant’s neck movements were limited in flexion and sidebending to the left as these caused some pain over the lower cervical area on her left. He recommended appropriate activity limitations and adjustment of work habits as well as appropriate use of nonsteroidal anti-inflammatory agents and muscle relaxants.

In his December 11, 1997 report, Dr. Routsong reiterated his diagnosis of cervical somatic dysfunction and left first rib head somatic dysfunction and stated that since changing her activity levels at work, appellant had noticed significant improvement. He stated that appellant noticed shoulder soreness and occasional rib head discomfort if she altered her activity and tried to return to any of her previous reaching and overhead activities. Dr. Routsong performed a physical examination and found that it was normal. He recommended that appellant continue to avoid the activity of reaching or casing at work as her attempts to return to that activity brought a return of her previous symptoms.

In his March 18, 1998 report, Dr. Routsong considered appellant’s history of injury, noting that appellant had the onset of neck and left shoulder pain in 1987 while she was delivering mail and that she had a significant flare-up of her left shoulder condition in 1994 while performing her daily work activities. He reiterated his diagnoses in his September 16, 1997 report and his finding of no cervical nerve or spinal compression. Dr. Routsong stated that when appellant was restricted from reaching, lifting and twisting with the left shoulder, she had much better control of the shoulder pain and recommended that restriction. He stated: “In regard to onset and etiology of her present complaints, I must go by the history given to me by [appellant].” Dr. Routsong stated that appellant told him that her left shoulder problem did not begin until work activities beginning in approximately 1987 which worsened in 1994.

In his July 16, 1998 report, Dr. Routsong stated that appellant had a new job where she did not have to lift or twist the left shoulder and was much more comfortable with her new job. He examined appellant and found her neurological examination was normal, her physical examination showed that she was limited to approximately 70 degrees of left shoulder abduction and attempts of external rotation caused some tendinitis pain at the left shoulder. Dr. Routsong emphasized the need for activity restrictions at work and gentle home physical therapy.

By decision dated June 7, 1999, the Office denied appellant's request for reconsideration on the grounds that appellant's request for reconsideration dated January 28, 1999 was filed more than one year after the Office's July 17, 1997 decision and therefore was untimely. Further, the Office found that appellant failed to establish clear evidence of error.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹ The Office will not review a decision denying or terminating benefits unless the application for review is filed within one year of the date of that decision.² The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.³

In the present case, appellant's request for reconsideration dated January 28, 1999 was filed more than a year after the Office's July 17, 1997 decision and therefore is untimely. Further, by the evidence she submitted, appellant has not shown clear evidence of error. None of Dr. Routsong's reports dated September 16 and December 11, 1997 and March 18 and July 16, 1998 address whether appellant's arm and neck condition diagnosed by Dr. Routsong as left, cervical somatic dysfunction and mild left thoracic syndrome resulted from her employment. In his September 16, 1997 report, he stated that appellant's doing secretarial work and turning her neck and shoulders seemed to increase appellant's pain but did not provide any medical rationale explaining how appellant's employment caused her condition. In his December 11, 1997 report, Dr. Routsong stated that appellant should avoid the activity of reaching or casing at work as her attempts to return to that activity brought a return of her previous symptoms but he did not provide any medical rationale on causation in his report. In his March 18, 1998 report, he stated that regarding the onset of appellant's complaints, he went by her history. In his July 16, 1998 report, Dr. Routsong emphasized appellant's need for restrictions. Neither of these reports contain the requisite medical rationale to establish causation.⁴ Further, his opinion that appellant's return to her usual work activities would aggravate her condition is not probative since the fear of a new injury or a recurrence of disability is not a basis for the payment of

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.607(a). *See also Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

³ 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁴ *See Lourdes Davila*, 46 ECAB 139, 143 (1993).

compensation.⁵ Appellant has therefore failed to show clear evidence of error in the Office's July 17, 1997 decision.

The decision of the Office of Workers' Compensation Programs dated June 7, 1999 is hereby affirmed.

Dated, Washington, DC
January 16, 2001

David S. Gerson
Member

Priscilla Anne Schwab
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

⁵ See *Patricia A. Keller*, 45 ECAB 278, 287 (1993).