

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET A. SAND and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Phoenix, AZ

*Docket No. 00-563; Submitted on the Record;
Issued January 5, 2001*

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for merit review.

On November 19, 1997 appellant, then a 39-year-old clerk, filed a notice of traumatic injury alleging that she sustained "pain on right side of body" from buttocks through to her right knee on November 8, 1997 when she lifted a "tray of mail out of [a] cage."¹ She stopped work on November 12, 1997² and returned to part-time light-duty work on approximately December 3, 1997.

Appellant submitted several statements containing a history of injury consistent with that provided in her November 19, 1997 claim form. In a January 24, 1998 letter, she asserted that she sustained a back injury when she lifted a 30-pound tray of mail out of a mail cage on November 8, 1997. In a January 26, 1998 statement, appellant again stated that on November 8, 1997 at 1:00 p.m., she "pulled a tray of mail weighing approximately 30 pounds from the top shelf of a [mail] cage" and experienced a "sharp pain in [her] lower back and buttocks which shot down to [her] knee." She then recalled telling coworker Katheryn Shaft about what had occurred.

Ms. Shaft submitted a January 26, 1998 letter, stating that on November 8, 1997, she was working with appellant at approximately 1:00 p.m. and appellant stated that her "lower back

¹ In a January 5, 1998 letter, the Office advised appellant of the additional medical and factual evidence needed to establish her claim, in particular a "detailed narrative report" from her attending physician, including "history of injury, examination findings, test results, diagnosis, treatment provided, prognosis, period and extent of disability, and an opinion on the relationship of the diagnosed condition(s) to [her] [f]ederal employment activity."

² In a November 24, 1997 letter, the employing establishment controverted appellant's claim, asserting that appellant provided incomplete and conflicting accounts of how the claimed injury occurred.

[was] hurting her” after “she had pulled a tray off the top shelf and felt a sharp pain in her lower back that shot down to her knee.”³

Appellant submitted medical evidence in support of her claim from Dr. Laura Adler, an attending family practitioner. In a November 17, 1997 report, she diagnosed a “severe strain” and proscribed all work activities, noting that appellant would “be going to physical therapy on narcotic pain relievers and [would] be on bed rest” for at least one week.⁴ In a December 1, 1997 report, Dr. Adler diagnosed sciatica.

The employing establishment submitted statements from supervisors Timothy Felton and Irma DiDomenico. In a November 14, 1997 letter, Mr. Felton noted that appellant telephoned on November 10, 1997 to report a back injury. He asked appellant “if she had been hurt at work and she responded; no, I have no idea how I got hurt.” Appellant allegedly stated that she “sat down in [her] chair at home and could not get up.”⁵ In a November 19, 1997 letter, Ms. DiDomenico stated that appellant telephoned her on November 11, 1997 to report that “she injured herself while working” on November 8, 1997 when she reached for a tray of mail from the top shelf of a mail cage and “felt a pain in her buttocks down to her knee,” then could not get out of bed the next day. Ms. DiDomenico later questioned an unnamed “employee who was working with [appellant]” on November 8, 1997 and he indicated that appellant had not mentioned an “accident to him at that time.”

By decision dated January 28, 1998, the Office denied appellant’s claim on the grounds that fact of injury was not established due to inconsistencies in the history of injury provided by

³ In a January 26, 1998 statement, Mr. Charles Sundgaard, an Equal Employment Opportunity (EEO) counselor, noted that during a meeting on an unspecified date in November 1997, appellant mentioned that “she had bad back pain.”

⁴ Dr. Adler also submitted progress notes and other reports not directly addressing the history of injury. In a second November 17, 1997 report, Dr. Adler noted that right knee and hip x-rays showed no “dislocation, fracture or significant degenerative changes.” Appellant submitted physical therapy notes dated November 26 to December 3, 1997. In December 1, 1997 duty status and form reports, Dr. Adler stated that appellant was totally disabled from November 10 to December 2, 1997 due to “sciatica, back strain.” He released appellant to light duty as of December 3, 1997, with “no lifting or carrying greater than five pounds,” standing for no longer than 20 minutes at a time and a workday no longer than four hours. In a December 31, 1997 report, Dr. Adler stated that appellant was disabled for work from December 31, 1997 to January 1, 1998 due to “back pain” and could return to work on January 2, 1998. In a January 22, 1998 form report, Dr. Adler noted that a cough and bronchitis had aggravated her back pain and diagnosed sciatica. He checked a box “yes” indicating her support for a causal relationship between unspecified work factors and appellant’s “back pain” and sciatica.

⁵ In a January 24, 1998 letter, appellant stated that during the November 10, 1997 telephone conversation, Mr. Felton said “he could [not] hear [appellant] because of noise on the workroom floor” and that she responded “yes” to his inquiry as to whether she was claiming to have been injured at work. She denied telling Mr. Felton that she did not know how her back injury occurred.

appellant, her supervisors and her physician.⁶ Appellant disagreed with this decision and in a January 25, 1999 letter requested reconsideration and submitted additional evidence.

In a November 10, 1997 form report, Dr. Adler noted a history of onset of pack pain on November 8, 1997, that appellant “came home from work, got up and felt severe pain [in her] knee and hip.” He diagnosed “rule out strain -- sciatic.”

In a January 22, 1998 report, Dr. Adler stated that on November 10, 1997 appellant reported that on November 8, 1997, “she had gotten up from in work [*sic*] and felt severe pain into the knee and into the hip ... exacerbated with sitting.”⁷ In an April 15, 1998 report, she stated that on November 8, 1997, appellant “had gotten up from work and was lifting a tray of mail from above her shoulders weighing approximately 30 pounds. [Appellant] felt pain in her back acutely that spread down to her knee and even into the hip.” In a January 13, 1999 form report, Dr. Adler provided a history of a November 8, 1997 injury sustained “while lifting a heavy tray at work” and diagnosed sciatica. He elaborated that appellant’s back “injury was caused by heavy lifting while working.”

Appellant also submitted reports from Dr. Kishore Tiperneni, an attending orthopedist to whom she was referred by Dr. Adler. In a March 30, 1998 report, Dr. Tiperneni noted a history of injury as “lifting a 30-pound box at work” on November 8, 1997, with pain increasing in severity over the next few days, developing into radiculopathy. He diagnosed a herniated disc with lumbar radiculopathy and limited appellant to six hours per day light duty. Dr. Tiperneni submitted May 7 and June 4, 1998 progress reports noting a trend of improvement.⁸

By decision dated April 16, 1999, the Office denied reconsideration on the grounds that the evidence submitted in support of appellant’s request was either cumulative or irrelevant to establishing fact of injury.

Following a thorough review of the evidence of record and the legal issues involved, the Board finds that the Office improperly denied appellant’s request for a merit review.

⁶ The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. The Board notes that as appellant filed her appeal with the Board on November 12, 1999, the Board has jurisdiction only over the April 16, 1999 denial of merit review and not over the January 28, 1998 decision denying appellant’s claim. 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁷ Dr. Adler noted that appellant’s condition had improved until coughing due to bronchitis exacerbated her pain on approximately December 31, 1997. In a January 22, 1998 duty status report, Dr. Adler limited lifting to 5 pounds, standing no more than 20 minutes at a time, walking as tolerated, no climbing, kneeling, bending, stooping, pushing or pulling.

⁸ Appellant also submitted physical therapy notes dated December 12, 1997 to February 4, 1998. As these forms were not signed by a physician, they do not constitute medical evidence in this case as physical therapists are not considered to be physicians under the Act. 5 U.S.C. § 8101(3).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁹ the Office's regulations provides 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) submitting relevant and pertinent new evidence not previously considered by the Office.¹⁰ Section 10. 608(a) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.¹¹

The Board finds that following the issuance of the January 28, 1998 decision, appellant submitted new, relevant and pertinent evidence sufficient to warrant a review of her case on the merits. Dr. Adler's January 22 and April 15, 1998 reports are the first narratives from her of record. They contain an amplified history of injury not contained in her earlier reports other than comporting with the November 8, 1997 date of injury. Thus, the January 22 and April 15, 1998 reports are not cumulative.

The Board notes that in its April 16, 1999 decision, the Office found that Dr. Adler's January 22 and April 15, 1998 narratives were irrelevant as they provided an inconsistent history of injury. The Office found that the January 22, 1998 explanation that appellant "had gotten up from in work [*sic*]," was not in comport with the April 15, 1998 description that appellant had "gotten up from work and was lifting a tray of mail." The Board, however, finds that this "inconsistency" is most likely an error in dictation or transcription, as the January 22, 1998 phrase "gotten up from in work" does not make grammatical sense. Thus, Dr. Adler's January 22 and April 15, 1998 reports, as well as the January 13, 1999 form report attributing appellant's injury to heavy lifting at work on November 8, 1997, constitute new medical evidence which is directly relevant to the critical issue of fact of injury in this case.

Appellant also submitted reports from Dr. Tiperneni, an attending orthopedist, which were not of record prior to the issuance of the January 28, 1998 decision. Thus, they are new evidence. Also, Dr. Tiperneni, in his March 30, 1998 report, noted a history of injury as "lifting a 30-pound box at work" on November 8, 1997, with pain increasing in severity over the next few days, developing into radiculopathy. He diagnosed a herniated lumbar disc. Dr. Tiperneni's history of injury is directly relevant to the fact of injury issue. His reports cannot be considered cumulative as there are no reports from him prior to the issuance of the January 28, 1998 decision.

Thus, appellant has submitted new, relevant evidence on the critical issue of fact of injury.¹² Therefore, the case must be returned to the Office for further development, including

⁹ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

¹⁰ 20 C.F.R. § 10.608(a).

¹¹ 20 C.F.R. § 10.606(b)(2); *see also* Norman W. Hanson, 45 ECAB 430 (1994).

¹² The Board notes that there is no medical evidence of record controverting the opinions of Dr. Adler and Dr. Tiperneni regarding the history of appellant's back injury.

proper consideration of all evidence appellant submitted after the January 28, 1998 decision. Following this and any further development the Office deems necessary, the Office shall issue an appropriate decision in the case.

The decision of the Office of Workers' Compensation Programs dated April 16, 1999 is hereby set aside and the case remanded for further development consistent with this decision and order.

Dated, Washington, DC
January 5, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member