

U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE A. FASANELLO and U.S. POSTAL SERVICE,
POST OFFICE, West Roxbury, Mass.

*Docket No. 96-764; Oral Argument Held March 5, 1998;
Issued April 28, 1998*

Appearances: *Vincent A. Murray, Jr., Esq.*, for appellant; *Sheldon G. Turley, Jr., Esq.*, for the
Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error.

On May 17, 1989 appellant, then a 41-year-old letter carrier, filed a notice of occupational disease and claim for compensation alleging that on May 13, 1989 she sustained an injury to her right shoulder which she attributed to her federal employment. She was treated by Dr. William A. Mitchell, an orthopedic surgeon, who diagnosed a strain of the scapular muscles caused by repetitive use of her arm in her work.¹ The Office accepted the claim on December 1, 1989 for a right scapulocervical strain. Appellant returned to limited-duty work and received appropriate compensation for intermittent periods of disability.²

On January 11, 1991 appellant underwent a fitness-for-duty examination by Dr. George B. McManama, Jr., an orthopedic surgeon, who reviewed appellant's history of injury and medical treatment. On examination, Dr. McManama noted appellant had no evidence of muscle spasm and full range of motion of the cervical spine. He noted tenderness about the right shoulder in the area of the bicipital groove and subacromial region. Dr. McManama described a full range of right shoulder motion with normal strength and neurologic examination. He concluded that appellant had some vague symptoms referable to her right shoulder with a

¹ Dr. Mitchell indicated that there was no neurological evidence of cervical radiculopathy.

² The record indicates that in 1990, following a period of physical therapy, appellant was restricted to four hours of work per day by Dr. Mitchell.

very mild impingement irritation. He recommended that appellant return to work eight hours a day.³

On June 25, 1991 appellant filed a claim for a recurrence of total disability commencing as of June 21, 1991. In support of her claim, appellant submitted a July 30, 1991 report from Dr. Mitchell who noted that she had persistent dysfunction of her shoulder and pain which was not responsive to physical therapy or anti-inflammatory medication. He recommended that appellant remain off work until he could perform an arthroscopic surgical decompression of the right rotator cuff tendon. In follow up reports, Dr. Mitchell advised that appellant was disabled from work due to her right shoulder condition.

By decision dated June 1, 1992, the Office denied appellant's claim for a recurrence of disability commencing on or after June 21, 1991 causally related to her accepted May 13, 1989 employment injury.

By letter dated July 15, 1992 appellant, through her counsel, requested reconsideration of the June 1, 1992 decision. She submitted the July 1, 1992 report from Dr. Mitchell who again recommended surgical decompression of the rotator cuff tendon and advised that appellant remained totally disabled for work pending surgery. He enclosed the report of a magnetic resonance imaging (MRI) scan performed on April 16, 1992 which listed findings consistent with "mild tendinitis or degenerative type changes of the rotator cuff tear."

By decision dated October 16, 1992, the Office denied modification of the June 1, 1992 decision. In the appeal rights attached to the decision, appellant was advised of the one-year time limitations within which to request reconsideration.

By letter dated October 20, 1992, the Office referred appellant to Dr. James E. O'Neil, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. O'Neil was requested to respond to whether appellant still had residuals of the employment-related condition, whether the surgery proposed by Dr. Mitchell was warranted and whether appellant was able to perform the duties of her modified position.

In a report dated November 13, 1992, Dr. O'Neil listed his findings on physical examination, noting that range of motion of the shoulders and upper extremities was normal, as was muscle strength and no atrophy. He opined that appellant's subjective complaint of right shoulder pain was not supported by the objective evidence and advised that she could return to work as a postal clerk. Dr. O'Neil stated appellant was not a good candidate for surgery and that the surgical procedure would not relieve her symptomatology. He noted that her prognosis for return to work was "quite poor," given the period since she last worked.

In a December 16, 1992 supplemental report, Dr. O'Neil clarified that appellant had some residual chronic tendinitis in her right shoulder which was of a degenerative type rather

³ The record reflects that appellant continued to work for four hours a day. By decision dated June 17, 1991, the Office found that appellant's wage-earning capacity was reflected by her actual earnings as a part-time modified letter carrier.

than due to acute injury. He opined that there was no evidence of any rotator cuff tear and that surgery was not an appropriate treatment for appellant's condition.⁴

By letter dated March 25, 1993, the Office requested Dr. Mitchell to provide additional medical rationale regarding the necessity of the proposed surgery, as Dr. O'Neil recommended against the surgery.

In reports dated May 27 and June 14, 1993, Dr. Mitchell expressed his disagreement with Dr. O'Neil's conclusions and reiterated that arthroscopic surgery was necessary to clarify the causal relation of appellant's shoulder complaints.

On August 5, 1993 the Office referred appellant for an impartial medical examination due to the conflict in medical opinion between Drs. Mitchell and O'Neil. Appellant was referred, together with a statement of accepted facts, questions to be resolved and the medical evidence, to Dr. Charles A. DiCecca, a Board-certified orthopedic surgeon.

In a report dated September 17, 1993, Dr. DiCecca reviewed appellant's medical history, her symptoms of subacromial pain and provided his findings on examination. He diagnosed chronic tendinitis or rotator cuff degeneration of the right shoulder with impingement and no evidence of a rotator cuff tear. He stated that there was no indication for the diagnosis of right scapulocervical strain, as was accepted by the Office. Dr. DiCecca stated that appellant's right shoulder condition was a preexisting condition which was temporarily aggravated by her employment and that she had the capacity to work eight hours a day in her limited-duty position. He stated that arthroscopic surgery would not be the most direct route for resolution of appellant's shoulder complaints. Dr. DiCecca recommended cortisone injection treatment be tried and, if not beneficial, then Dr. Mitchell's recommendation for surgery would be a reasonable consideration.

In a letter dated November 17, 1993, appellant, through her counsel, submitted a November 10, 1993 report from Dr. Mitchell, who expressed his disagreement with Dr. DiCecca and again requested that surgery be approved. Appellant also requested that she be compensated for four hours (total disability) as of June 24, 1991.

By report dated February 23, 1994, Dr. DiCecca clarified his opinion, noting that appellant's shoulder condition represented a preexisting disease process which was temporarily aggravated during the period of time in which she was working at her employment. He stated that with the cessation of work activity, the condition returned to its former state and had not been accelerated by her employment activities. Dr. DiCecca opined that the residual impairment affecting appellant's right shoulder was not due to her federal employment and that she exhibited a chronic condition of tendinitis or rotator cuff degeneration.

The record reflects that appellant returned to work in a full-time modified carrier position on March 28, 1994.⁵

⁴ In an April 6, 1993 report, Dr. O'Neil again advised that surgery was not warranted.

⁵ On July 7, 1994 the Office found that appellant's wage-earning capacity was represented by her actual wages as

By letter dated August 2, 1994, appellant contended that she was entitled to compensation benefits from June 24, 1991, the date her total disability benefits were reduced to partial disability, to the date of her return to full-time work effective March 29, 1994. In a letter dated January 24, 1995, the Office informed appellant that she was not entitled to compensation for the period June 24, 1991 to March 29, 1994.

By letter dated July 17, 1995, appellant, through counsel, noted that a decision on her request for reconsideration of the Office's October 16, 1992 decision had never been received by her attorney.

By decision dated October 3, 1995, the Office found that appellant's July 17, 1995 request for reconsideration of the October 16, 1992 decision was not timely as the request was not filed within a year of that decision. The Office also found that appellant's request for reconsideration failed to demonstrate clear evidence of error.

The Board finds that the Office improperly refused to reopen appellant's claim for further consideration of the merits under 5 U.S.C. § 8128(a), on the grounds that the application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2), and did not present clear evidence of error. The Office abused its discretion in denying appellant's reconsideration request as it applied an improper standard in reviewing her reconsideration request.

On October 16, 1992 the Office denied modification of the June 1, 1992 decision denying her recurrence of disability claim. However, following issuance of the October 16, 1992 decision, the Office received additional medical and factual evidence into the record and conducted further development on the merits of appellant's claim by referring her to Dr. O'Neil for a second opinion medical examination on the issue of disability and the necessity for surgery, and subsequently to Dr. DiCecca for an impartial medical evaluation. In so doing, the Office proceeded to exercise its discretionary authority under 5 U.S.C. § 8128. This case is similar to *David F. Garner*,⁶ in which the Board found that after reopening the merits of the employee's claim for further development, the Office abused its discretion in denying reconsideration under the clear evidence of error standard. Rather, the Board noted that the Office should have applied 20 C.F.R. § 10.138(b)(1) and conducted a merit review of the claim.

Following receipt of the October 16, 1992 decision, appellant was notified as of October 20, 1992 that the Office was further developing her claim by her referral to Dr. O'Neil for examination and opinion on the relevant issue in question, *i.e.*, whether she was disabled for work as of June 21, 1991 due to residuals of her accepted shoulder condition pending surgery as recommended by Dr. Mitchell. Following receipt of Dr. O'Neil's medical reports and the determination that a conflict was created under 5 U.S.C. § 8123, appellant was referred by the Office to Dr. DiCecca for an impartial medical examination on August 5, 1993 and was

a full-time modified letter carrier.

⁶ 43 ECAB 459 (1992).

examined by the physician on September 17, 1993. Following examination, further clarification of Dr. DiCecca's opinion was sought and a February 23, 1994 report submitted from the physician. As the record currently stands, the Office has never issued a merit decision evaluating the evidence it obtained from Dr. O'Neil, the second opinion physician, or Dr. DiCecca, the impartial medical specialist, or reviewed the additional medical evidence submitted by appellant during the development of her claim after October 16, 1992.

Exercising its discretionary authority, the Office solicited and received relevant pertinent evidence not previously considered. Therefore, the Office must conduct an appropriate review of the evidence under section 8128(a). Following such a review and any development which the Office deems necessary, the Office shall issue an appropriate decision in this case.

The decision of the Office of Workers' Compensation Programs dated March 28, 1991 is reversed and the case remanded for further proceedings consistent with this decision.

Dated, Washington, D.C.
April 28, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member