U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANNE C. STAHL and U.S. POSTAL SERVICE,
POST OFFICE, Portland, Oreg.

Docket No. 96-188; Submitted on the Record;
Issued February 13, 1998

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The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's right elbow strain.

On December 3, 1991 appellant, then a 49-year-old distribution clerk, filed an occupation disease claim alleging that she sustained a right elbow condition which she attributed to keying activities in her job.

In a report dated December 3, 1991, Dr. Charles D. Layman, a Board-certified surgeon, related that appellant had started performing keying activity in her training for a new job one week previously and was only required to key for one hour per day but had developed pain in the right lateral epicondylar area of her forearm. He provided findings on examination and stated:

> "I find [appellant] to have a significant right lateral epicondylitis and I feel that, on a more probable than not basis, this is directly related to her work activity of the keying that she is required to due at this time."

In a hospital report dated November 1, 1991, a physician related that appellant had been struck by an automobile on that date and that she complained of pain in the right calf, a jammed right shoulder, and neck discomfort. Findings on examination included multiple contusions to unspecified locations.

In a report dated December 12, 1991, Dr. Donald D. Fisher, a general practitioner, related that he had examined appellant on November 5, 1991 and that appellant stated that she had been involved in a "hit and run" pedestrian accident on November 1, 1991. He related that appellant had complained of soreness of the neck and head and that she had a bruise of her right forearm and right leg.

In a letter dated December 19, 1991, appellant's supervisor stated that the keying activity performed by appellant during her training occurred for one hour a day for five days a week. He noted that appellant was taken off this keying activity after complaining of pain.

By letter dated March 23, 1992, the Office accepted that appellant sustained a right elbow strain in the performance of duty due to the keying activity required in her job.

In a memorandum of an interview with Dr. Layman on April 24, 1992, an employing establishment inspector related that Dr. Layman had attributed appellant's elbow and forearm condition to her keying activity required in her job but that at the time of his diagnosis Dr. Layman was unaware that appellant had been involved in a pedestrian accident on November 1, 1991. The inspector noted that Dr. Layman had recently reviewed medical records regarding the November 1, 1991 nonwork-related accident and also medical records from Dr. Fisher and stated that he would have to defer to Dr. Fisher in reaching an opinion as to the mechanism for injury to appellant's right elbow condition.

In a memorandum of an interview with Dr. Fisher on May 8, 1992, employing establishment inspectors related that Dr. Fisher examined appellant on November 5, 1991 following her November 1, 1991 nonwork-related automobile accident at which time he noted a bruise of the right forearm and right leg. They related that on December 2, 1991 he examined her for complaints of pain in the right forearm and wrist which appellant felt was due to keying activity at work. The inspectors noted that, although not reflected in his notes, Dr. Fisher had the impression that appellant was keying continuously. They related that Dr. Fisher now indicated that the mechanism for injury to appellant's right elbow and wrist was the November 1, 1991 automobile accident and that the bruise on her right forearm would indicate a sharp blow, capable of damaging the tendons in her right forearm which would explain the pain in her right wrist and elbow. The inspectors related Dr. Fisher's statement that it was most unlikely that appellant's minimal keying activity would result in the pain in her right wrist, forearm and elbow.

By letter dated August 12, 1992, appellant stated that in the emergency room following the November 1, 1991 automobile accident she was checked for pain to her neck and back and denied that she had an injury to her right elbow or wrist.

In a memorandum dated December 21, 1992, the District medical director noted that the diagnosis of right lateral epicondylitis had been made based on suggestive pain complaints and no objective findings. He stated:

> "There are no diagnoses medically connected to the employment keying activity between November 19 and December 3, 1991.... Medical rationale -- Keying puts essentially no strain or force on the forearm extensors originating at the lateral epicondyle since no extension force is required to key. Therefore this activity could not possibly injure the soft tissues attaching to the lateral epicondyle. This is particularly true since the activity was being carried out 1 hour [per] day, 5 days [per] week during that time period (11 days). This is 10 or 11 hours of keying over a 2-week period. There is no medical rationale to support the contention that this could injure the soft tissues of one's arm."

By decision dated December 23, 1992, the Office rescinded its acceptance of appellant's claim.

By letter dated May 26, 1993, through her representative, appellant requested an examination of the written record by an Office hearing representative.

In a report dated April 23, 1993, Dr. Layman stated that he had reviewed the medical records and noted that appellant did not complain of elbow pain following her November 1991

pedestrian accident nor was right elbow pain specifically discussed when she was examined by Dr. Fisher following the accident. Dr. Layman stated:

> "[Appellant] was noted by Dr. Fisher only to have one small area of bruise in her distal forearm, which would be away from the area of the lateral epicondylitis. [Appellant] specifically states that she was not complaining of right elbow pain at that time, nor was there any mention by either of the doctors in the emergency room or by Dr. Fisher.
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> "Subsequently, [appellant] states that she was training, doing keying activity two hours per day at one time, and during this training period was told to try to increase her production speed and developed right lateral epicondylar pain. She apparently reported this pain immediately after these work sessions to her supervisors and that should be documented in records that they would have.
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> "Based on this new information that has arisen, it would be my opinion that the major contributing cause to her right lateral epicondylar pain and diagnosis of right lateral epicondylitis would be her work activity."

By decision dated October 25, 1993, the Office hearing representative vacated the Office's December 23, 1992 decision rescinding its acceptance of appellant's claim and remanded the case for an examination of appellant by an impartial medical specialist.

By letter dated January 12, 1994, the Office referred appellant, along with the statement of accepted facts and the entire case file, to Dr. Samuel F. Gill, a Board-certified orthopedic surgeon and impartial medical specialist, for an examination and evaluation and an opinion as to whether appellant had sustained any employment-related disability or medical condition.

In a report dated February 1, 1994, Dr. Gill provided a history of appellant's condition. He noted that in mid November 1991 appellant was in a training program which involved keying for one to two hours daily and that she noted an onset of pain in her right elbow which persisted. He related that her hands were generally unsupported in this activity although the heel of the hand could rest against the base of the keyboard and that the wrist was held in moderate extension and then the fingers operated the keys which were power operated. He noted that the pain she had was over the lateral aspect of the right elbow radiating down into the extensor muscle mass. He also noted that appellant was involved in a motor vehicle when she was struck as a pedestrian by a car and sustained some contusions but was quite specific about the fact that she had no pain or injury to the right elbow. Dr. Gill noted that the records from her attending physician, Dr. Fisher, supported that contention. He provided findings on examination and diagnosed lateral epicondylitis of the right elbow, resolved, and he stated:

> "I believe, on the basis of reasonable medical probability, that there is not a direct relationship between the employment activity, which is described as 'keying' and the subsequent lateral epicondylitis that [appellant] clearly had. This opinion is based on the fact that [appellant] pursued this activity in a very limited fashion between one and two hours a day for a total of eleven days. This activity, that is, operating a key machine, for extended periods of time can result in lateral

epicondylitis.... The reason that I do not believe that the keying activity in her case was a significant causative factor is that the exposure was quite limited. Also, if in fact the keying had been responsible in major fashion for her difficulty, then as soon as she stopped keying I would have expected the condition to promptly revert to normal. That was not the case in the sense that Dr. Layman really did treat her for some period of time before the lateral epicondylitis problem resolved."

By decision dated February 10, 1994, the Office determined that appellant did not have a work-related right elbow condition based upon the weight of the medical evidence as represented by the opinion of Dr. Gill.

By letter dated February 22, 1994, appellant, through her representative, requested an oral hearing before an Office hearing representative.

On March 27, 1995 a hearing was held before an Office hearing representative at which time appellant presented testimony.

By decision dated June 13, 1995, the Office hearing representative set aside the Office's February 10, 1994 decision and remanded the case for further development.

By letter dated August 14, 1995, the Office requested that Dr. Gill provide a supplementary report with an opinion as to whether appellant's employment caused or aggravated her right elbow condition.

In a report dated August 22, 1995, Dr. Gill stated:

"In my review and examination of [appellant], I found no appreciable or measurable relationship between [appellant's] very limited keying activity, which consisted of training ... for one hour at a time, on ten days, not all consecutive.

"Since there is no relationship between the elbow problem and her keying exposure, the question of temporary versus permanent aggravation becomes moot."

By decision dated September 11, 1995, the Office denied appellant's claim for compensation benefits on the grounds that the weight of the medical evidence as represented by the report of the impartial medical specialist established that there was no causal relationship between her claimed lateral epicondylitis condition and her employment.

The Board finds that the Office properly rescinded its acceptance of appellant's claim for an injury to the right elbow.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[1] The

[1] *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[2] It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[3] This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.[4]

In this case, the Office properly based its rescission on new evidence which established that appellant's claimed right elbow condition was not causally related to her employment.

Following the Office's December 23, 1992 decision, rescinding its acceptance of appellant's claim, appellant requested an examination of the written record by an Office hearing representative. By decision dated October 25, 1993, the Office hearing representative vacated the Office's December 23, 1992 decision rescinding its acceptance of appellant's claim and remanded the case for an examination of appellant by an impartial medical specialist in order to resolve a conflict in medical opinion evidence between appellant's physician, Dr. Layman, and the Office medical adviser.[5]

By letter dated January 12, 1994, the Office referred appellant, along with the statement of accepted facts and the entire case file, to Dr. Gill, a Board-certified orthopedic surgeon and an impartial medical specialist, for an examination and evaluation and an opinion as to whether appellant had sustained any employment-related disability or medical condition.

In situations where there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

In a report dated February 1, 1994, Dr. Gill provided a history of appellant's condition. He noted that in mid November 1991 appellant was in a training program which involved keying for one to two hours daily and that she noted an onset of pain in her right elbow. Dr. Gill related that her hands were generally unsupported in this activity although the heel of the hand could rest against the base of the keyboard and that the wrist was held in moderate extension and then

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[2] *Shelby J. Rycroft*, 44 ECAB 795 (1993). *Compare Lorna R. Strong*, 45 ECAB 470 (1994).

[3] *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

[4] *Laura H. Hoexter*, 44 ECAB 987 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990); *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

[5] Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

[6] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

the fingers operated the keys which were power operated. He noted that the pain she had was over the lateral aspect of the right elbow radiating down into the extensor muscle mass. Dr. Gill also noted that appellant was involved in a motor vehicle accident when she was struck as a pedestrian by a car and sustained some contusions but was quite specific about the fact that she had no pain or injury to the right elbow. Dr. Gill noted that the records from her attending physician, Dr. Fisher, supported that contention. He provided findings on examination and diagnosed lateral epicondylitis of the right elbow, resolved, and he stated:

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In a supplementary report dated August 22, 1995, Dr. Gill stated:

> "In my review and examination of [appellant], I found no appreciable or measurable relationship between [appellant's] very limited keying activity, which consisted of training ... for one hour at a time, on ten days, not all consecutive.
>
> "Since there is no relationship between the elbow problem and her keying exposure, the question of temporary versus permanent aggravation becomes moot."

The Board finds that the thorough, well-rationalized reports of Dr. Gill, the impartial medical specialist selected to resolve the conflict in the medical opinion are entitled to be accorded special weight. The reports of Dr. Gill establish that appellant's right arm condition was not causally related to her employment and therefore the Office properly rescinded its acceptance of appellant's claimed right arm condition.

The September 11 and June 13, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
February 13, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member