

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANICE K. WYATT and U.S. POSTAL SERVICE,,
POST OFFICE, Atlanta, Ga.

*Docket No. 96-824; Submitted on the Record;
Issued February 2, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the refusal of the Office of Workers' Compensation Programs, in its decision dated October 25, 1995, to reopen appellant's claim for merit review constituted an abuse of discretion.

On August 2, 1991 appellant, then a 35-year-old letter carrier, filed a claim for compensation alleging that she sustained left and right shoulder strain in the performance of duty.¹

On June 12, 1992 the Office notified appellant that it had accepted her June 17, 1991 injury of left shoulder strain and paid appropriate benefits.

In a treatment note dated February 24, 1993, Dr. William M. Craven, a general surgeon and appellant's treating physician, stated that, based on examination, appellant's left shoulder pain had an unknown etiology. He noted that she did not have a bony, muscular or interarticular problem by clinical examination, and that her pain was disproportionate to anything he could find. Dr. Craven recommended that appellant return to full activities in hopes that the pain would resolve. He also urged her to consider medical care from another physician.

On April 16, 1993 the employing establishment notified appellant that, based on medical documentation received from her treating physician, her limited-duty appointment had terminated and she was ordered to return to full duty.

¹ The Board notes that appellant filed a compensation claim for her right shoulder on April 16, 1993. However, the only decision before the Board concerns appellant's left shoulder injury, and the Board will not consider evidence concerning the right shoulder injury in this appeal; *see* 20 C.F.R. § 501.2(c).

On April 19, 1993 appellant filed a claim for compensation, stating that on March 25, 1993 she sustained a recurrence of disability to her left shoulder which caused her to miss work on April 5 and 6, 1993.

On April 26, 1993 appellant's representative requested that the Office release appellant from Dr. Craven's care and authorize Dr. Robert Warner Wood, a Board-certified orthopedic surgeon, to be her treating physician.

On May 20, 1993 the Office approved appellant's change in treating physician to Dr. Wood.

On June 23, 1993 Dr. Craven stated that he had released appellant to return to full work duty on February 25, 1993.

In a treatment note dated June 10, 1993, Dr. Wood stated that he had examined appellant and noted tenderness and pain around internal rotation and forward flexion, noting also that appellant had full range of motion. He read left shoulder x-rays as normal, found no muscle atrophy and could identify no significant weakness. In a treatment note dated September 1, 1993, Dr. Wood stated that appellant's recent arthrogram was normal, and that he could make no objective findings regarding the cause of her left shoulder pain. He stated that appellant's subjective complaints of pain were in areas inconsistent with tendinitis, noting that she had full range of motion. Dr. Wood concluded that that appellant had no permanent partial impairment and released her to regular duty effective that day.

In a claim for compensation received by the Office on September 7, 1993, appellant alleged wage loss from May 15, 1993. On the reverse side of the form, the employing establishment stated that appellant's pay stopped on May 17, 1993.

On October 4, 1993 the Office, in a decision, denied appellant's claim for benefits on the grounds that the medical evidence failed to support that her June 17, 1991 employment-related injury resulted in disability from work, wage loss, or loss of capacity to earn a wage on or after March 25, 1993.

On October 8, 1993 appellant requested an oral hearing on the Office's October 4, 1993 decision denying benefits.

On June 8, 1994 a hearing was held and appellant testified in her behalf. The hearing representative accepted additional evidence from appellant including medical reports dated September 13, 1993 and June 8, 1994 from Dr. Christine Indech, a Board-certified orthopedic surgeon and appellant's treating physician. In the September 13, 1993 report, Dr. Indech stated that appellant had been under her care since April 1993. She noted that, based on a physical evaluation and a familiarity with her history of her injury, appellant had tendinitis of the supraspinatus and the long biceps tendons of the right shoulder rotator cuff. Dr. Indech restricted appellant from lifting more than 10 pounds with her right arm. She also noted that a left shoulder MRI revealed a mild denting of the supraspinatus and a streak of tendinitis as well as some acromial clavicular area proliferation. In the June 8, 1994 report, Dr. Indech stated that appellant had undergone physical therapy to increase the rotator cuff strength of both shoulders,

noting that her left shoulder “bothers her far more than the right shoulder.” She added that appellant had chronic mild rotator cuff tendinitis in both shoulders. Dr. Indech also stated that appellant’s left shoulder had stabilized, but that she was unable to perform overhead work and should restrict use of the shoulder to lifting no more than five pounds.

In a decision issued on August 29, 1994 and finalized on the same day, the hearing representative affirmed the Office’s decision dated October 4, 1993 to deny appellant’s claim for compensation on the grounds that appellant’s medical evidence failed to establish that her condition on March 25, 1995 was causally related to her employment-related injury of June 17, 1991.

On August 13, 1995 appellant filed a petition for reconsideration on the hearing representative’s August 24, 1994 decision. Submitted in support of her petition was an August 11, 1995 notice from the U.S. Office of Personnel Management (OPM) stating that her application for disability retirement had been approved; an August 1, 1995 decision by the U. S. Merit Systems Protection Board reversing an initial decision by OPM denying disability retirement; appellant’s January 10, 1995 petition filed before OPM; a July 6, 1994 medical report from Dr. Indech, an employability assessment profile dated September 14, 1994, a labor market survey dated September 23, 1994, a copy of her position description; and a pamphlet describing shoulder conditions.

On October 24, 1995 the Office declined to review the August 29, 1994 decision of the hearing representative.

The Board finds that the Office did not abuse its discretion by denying merit review on October 24, 1995.²

Section 8128(a) of the Federal Employees’ Compensation Act³ provides for review of an award for or against payment of compensation. Section 10.138, the statute’s implementing regulation, requires a written request by a claimant seeking review that specifies the issues which the claimant wishes the Office to review and the reasons why the decision should be changed.⁴ Thus, a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.⁵

Section 10.138(b)(2) provides that if a request for review of the merits of the claim does not meet at least one of the three requirements, the Office will deny the request without

² The Board’s scope of review is limited to those final decisions issued within one year prior to the filing of the appeal. 20 C.F.R. § 501.2(c). Because appellant filed his notice of appeal on January 22, 1996, the Board has jurisdiction only of the Office decision dated October 24, 1995 which was a non-merit decision.

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.138(b)(1); *John F. Critz*, 44 ECAB 788, 793 (1993).

⁵ 20 C.F.R. § (b)(1)(i)-(iii); *Willie H. Walker, Jr.*, 45 ECAB 126, 131 (1993).

reviewing the merits.⁶ If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.⁷

In this case, the Office properly declined to review the merits of appellant's claim on October 24, 1995.

In requesting reconsideration, appellant was required to address the relevant issue of whether the alleged recurrence of disability was causally related to the employment-related injury. With respect to the evidence appellant submitted regarding her disability retirement, the labor market survey and the employability assessment, the Office properly found that this evidence was irrelevant and immaterial and had no bearing on the issue which was a medical question concerning whether appellant's alleged recurrence of disability was causally related to her employment-related injury.⁸ With respect to Dr. Indech's July 6, 1994 medical report, the Office properly recognized that the doctor's medical diagnosis had previously been considered. Further, said report does not discuss or address the relevant issue of the causal relationship of the alleged recurrence of disability to the employment-related injury. Inasmuch as appellant failed to submit new and relevant evidence probative to the issue of whether her alleged recurrence of disability was causally related to the employment-related injury, the Office properly declined to reopen the claim.⁹

⁶ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

⁷ *John E. Watson*, 44 ECAB 612, 614 (1993).

⁸ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979) (Appellant's disability status is irrelevant to whether he sustained an injury in the performance of his federal duties).

⁹ *See Norman W. Hanson*, 45 ECAB 430, 435 (1994) (The Office properly declined to reopen claim because appellant presented no new and relevant evidence).

The decision of the Office of Workers' Compensation Programs dated October 24, 1995 is affirmed.

Dated, Washington, D.C.
February 2, 1998

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member