

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELENE M. FUSCO and U.S. POSTAL SERVICE,
POST OFFICE, Plantsville, Conn.

*Docket No. 96-1316; Submitted on the Record;
Issued March 24, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established that her condition on and after December 9, 1994 was related to her accepted right shoulder bursitis; and (2) whether the Office of Workers' Compensation Programs abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by refusing to reopen her case for merit review.

On March 28, 1991 appellant, then a 49-year-old distribution clerk, filed a claim for right shoulder bursitis sustained on or before November 11, 1990. Appellant noted experiencing discomfort in the right upper extremity when raising her arm to case mail.

In a January 30, 1991 report, Dr. Robert W. Elwell, Jr., an attending family practitioner, noted examining appellant on January 15, 1991 "for a worsening right shoulder problem," and diagnosed "acute right biceps tendinitis, right subacromial bursitis and a near frozen right shoulder." He prescribed anti-inflammatory medication and physical therapy.¹ In a March 20, 1991 follow-up report, Dr. Elwell noted that appellant had right shoulder pain since November 1990, improved by February 28, 1991 examination. He opined that appellant's subacromial bursitis was caused or aggravated by "repetitive motion tasks" at work.

In a June 3, 1991 letter, appellant's supervisor noted that appellant's duties required sorting mail for 2 hours per day, 5 days per week "at a 49-hole distribution case ... using a repetitive motion ... side to side and up and down."

In a July 3, 1991 report, Dr. Elwell noted that appellant was released from physical therapy on March 8, 1991 and would continue doing home exercises. Dr. Elwell stated that appellant's "problem was caused by the chronic strain of sorting the mail ... each morning for two to three hours," picking up mail with her left hand from a tray in front of her, and sorting into the case with her right hand. "The right arm moves repeatedly from the chest outward to a

¹ The record indicates that appellant underwent physical therapy from January through March 1991.

fully extended position above and below eye level.” Dr. Elwell emphasized that appellant’s mail casing duties were the “only source of arm strain,” and “responsible for [her] problem.”

The Office accepted the claim for tendinitis of the right shoulder.

On May 1, 1995 appellant filed a notice alleging a recurrence of disability beginning December 9, 1994 related to the November 9, 1990 right shoulder tendinitis. She noted an onset of “the same symptoms as original complaint” while sorting mail in September 1994, and in January 1995 was diagnosed with a torn rotator cuff. Appellant asserted that her symptoms and the “causes for the aggravation [we]re the same, [her] job ha[d] not changed,” and that she had aggravated her “existing condition for four additional years” after 1990.

In a July 25, 1995 report, Dr. Robert Belniak, an attending physiatrist, noted treating appellant for a right shoulder rotator cuff tear, with surgical repair and decompression performed on June 7, 1995. Dr. Belniak opined that Dr. Elwell’s January 1991 report described “an identical problem ... [Appellant’s] current problem represents a continuation of her previous injury to her right shoulder and is related to repetitive trauma due to her work.”

In a July 26, 1995 letter, the Office advised appellant of the type of additional medical and factual evidence needed to establish her claim for recurrence of disability, including a narrative report from her physician discussing causal relationship.

Appellant responded by August 10, 1995 factual statement. She noted seeking treatment in October 1994, with physical therapy through January 1995, at which time she was referred to Dr. Belniak. She described relief with cortisone injections, but symptoms returned in April 1995 at which time she consulted Dr. Belniak, who opined the problem was a torn rotator cuff requiring surgical repair. Appellant explained that her current condition was related to the accepted November 11, 1990 right shoulder tendinitis as her job requirements had not changed, her symptoms began while casing mail, and there were no intervening traumas.

By decision dated September 28, 1995, the Office denied appellant’s claim for recurrence of disability on the grounds that causal relationship was not established. The Office found that the evidence submitted attributed appellant’s condition to “continued use of her shoulder,” thus constituting “a new injury, and not a recurrence of disability from the previously accepted tend[i]nitis.”

Appellant disagreed with this decision, and in an October 19, 1995 letter requested reconsideration. She asserted that she “did not have tendinitis for five years,” or “any accident that would result in a torn rotator cuff. It was years of repetitive motion that caused the injury. I thought by referencing the Nov[ember 11, 1990] injury I would be showing that indeed my shoulder had been deteriorating over the years of my employment.”

By decision dated January 24, 1996, the Office denied appellant’s request for a merit review on the grounds that her October 19, 1995 letter, the only evidence submitted in support of her request, did not raise substantive legal questions or include relevant evidence sufficient to warrant a review of the merits of her case.

Regarding the first issue, the Board finds that appellant did not meet her burden of proof in establishing that she sustained a recurrence of right shoulder tendinitis on and after December 9, 1994.

When an employee claims a recurrence of disability causally related to an accepted employment injury, he or she has the burden of establishing by the weight of the reliable, probative and substantial medical evidence that the claimed recurrence of disability is causally related to the accepted injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.² An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's unsupported belief of causal relation.³

In this case, appellant must establish that her claimed right shoulder condition beginning December 9, 1994 was causally related to accepted right shoulder tendinitis caused by work factors on or before November 11, 1990.

The record supports that appellant had two episodes of right shoulder difficulties, one commencing prior to November 11, 1990 and ending in approximately March 1991 when she was released from treatment, and another beginning in September 1994. In an August 10, 1995 statement, appellant noted seeking treatment in October 1994, experiencing relief of symptoms by January 1995, and a return of symptoms in April 1995. She asserted that her condition beginning December 1995 was caused by casing mail, as was the accepted November 1990 right shoulder tendinitis. However, in order to establish a recurrence of disability, appellant must establish that the two periods of right shoulder tendinitis were both caused by casing mail or other work factors on or before to November 11, 1990.

Appellant herself asserts that her claimed recurrence of disability beginning December 9, 1994 was due to "years of repetitive motion" causing her shoulder to deteriorate, and that the claimed recurrence of disability was due to aggravating her "existing condition for four additional years." This indicates appellant is claiming a new injury related to casing mail after November 9, 1990, and not a recurrence of disability.

While Dr. Belniak, in a July 25, 1995 report, opined that Dr. Elwell's January 1991 reports described "an identical problem" to appellant's April 1995 presentation, and opined that appellant's condition was "a continuation of her previous injury to her right shoulder," he did not provide a sufficient explanation of appellant's medical condition to connect her work factors on or before November 11, 1990 with her alleged recurrence in May 1995.

The Board also notes that appellant contends that she had no symptoms from sometime in 1991 to October 1994.⁴ In an October 19, 1995 letter, appellant asserted that she "did not have

² See *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

³ *Ausberto Guzman*, 25 ECAB 362 (1974).

⁴ For the importance of bridging information in establishing a claim for a recurrence of disability, see *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Shirloyn J. Holmes*, 39 ECAB 938 (1988); *Richard McBride*, 37 ECAB 748

tendinitis for five years,” indicating that her tendinitis was not continuous from March 1991 through September 1994. The record indicates that appellant did not seek medical treatment regarding her right shoulder from March 1991 until April 1995, a period of approximately four years. Following Dr. Elwell’s July 3, 1991 report, the next medical evidence of record mentioning appellant’s shoulder condition is the July 25, 1995 report of Dr. Belniak. Appellant submitted no contemporaneous medical evidence documenting any symptoms or treatment during the interim period. The medical reports submitted by appellant provide no details of her condition between July 1991 and the time of her claimed recurrence of disability beginning December 1994.

Consequently, appellant has not established that she sustained a recurrence of disability, as she did not submit sufficient evidence establishing a causal relationship between her right shoulder condition on and after December 1994 and work factors prior to November 11, 1990.

Regarding the second issue, the Board finds that the Office’s refusal to reopen appellant’s case for a merit review did not constitute an abuse of discretion.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office, identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed, by showing that the Office erroneously applied or interpreted a point of law, or advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office.⁵ Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the three requirements will be denied by the Office without review of the merits of the claim.⁶

Appellant’s October 19, 1995 letter did not demonstrate that the Office committed legal error, advance a new point of law or fact, or contain relevant, pertinent evidence not previously considered by the Office. Therefore, the letter did not constitute a basis for reopening appellant’s case for merit review under 20 C.F.R. § 10.138.⁷

(1986). *See Willie R. Thompson*, 32 ECAB 1705 (1981).

⁵ 20 C.F.R. § 10.138(b)(1).

⁶ 20 C.F.R. § 10.138(b)(2).

⁷ *Gaetan F. Valenza*, 35 ECAB 763 (1984).

The decisions of the Office of Workers' Compensation Programs dated January 24, 1996 and September 28, 1995 are hereby affirmed.

Dated, Washington, D.C.
March 24, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member