

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DIANE L. BROIDE and U.S. POSTAL SERVICE,  
POST OFFICE, Portland, OR

*Docket No. 98-242; Submitted on the Record;  
Issued August 24, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for a merit review on July 29, 1997.

On December 17, 1992 appellant, then a 34-year-old letter carrier, filed a notice of occupational disease alleging that she suffered a shoulder strain, a thoracic strain and elements of overuse syndrome causally related to her federal employment. On July 6, 1993 the Office accepted appellant's claim for bilateral shoulder strain. The Office subsequently awarded appellant compensation for temporary total disability.

On April 14, 1994 Dr. John Takacs, appellant's treating physician and an osteopath, completed a work restriction evaluation. He indicated that appellant could perform continuous sitting and walking. He stated that appellant could lift, climb, kneel and twist for two hours each day. He stated appellant could bend and stand for four hours a day and squat for one hour each day. Dr. Takacs indicated that appellant could lift zero to ten pounds, but that he had hand restrictions involving pushing and pulling. He stated appellant could not lift above her shoulder and indicated that she had reached maximum improvement.

On May 16, 1994 Dr. Takacs checked "yes" to indicate that appellant's present condition was due to injury claimed and that she was disabled from her usual work. He stated that appellant could only perform limited manipulation with her arms and shoulders and that she should not work above shoulder level. Dr. Takacs repeated these conclusions in a report dated May 16, June 2 and 16, 1994. On June 16, 1994 Dr. Takacs also reviewed a limited-duty job description and found that employment suitable. In a report dated July 5, 1994, Dr. Takacs indicated that appellant was released to a modified job on June 28, 1994.

In a letter dated July 15, 1994, the Office stated that the position of temporary general clerk was suitable to appellant's work capabilities as outlined by Dr. Takacs. The Office allowed appellant 30 days to either accept the position or offer adequate explanation for refusing

the modified employment. Appellant accepted the position on July 13, 1994 and returned to work on July 11, 1994.

The Office subsequently referred appellant to Dr. William Duff, a Board-certified orthopedic surgeon, to provide a second opinion examination. Dr. Duff examined appellant on July 12, 1994. He indicated that appellant's present condition was not related to her employment injury and that she could resume her usual work. He noted that appellant demonstrated no objective evidence of disability. On July 19, 1994 Dr. Duff indicated that he agreed with Dr. Takacs that the modified position offered was within appellant's physical capabilities. On September 6, 1994 Dr. Duff indicated that there was no evidence of physical impairment which would preclude appellant from returning to her normal work activities and he stated that appellant's "disability" was entirely subjective.

By decision dated October 27, 1994, the Office terminated appellant's compensation inasmuch as appellant's work-related disability had ceased by July 12, 1994. The Office indicated that the weight of the medical evidence rested with the opinion of Dr. Duff.

On November 22, 1994 appellant requested an oral hearing. In support, she submitted a November 21, 1994 report from Dr. Takacs in which he diagnosed chronic strain/tendinitis and elements of overuse syndrome of the shoulder girdle and arms. On November 29, 1994 Dr. Takacs diagnosed overuse syndrome of the upper extremities and indicated that there was limited objective evidence corroborating appellant's symptoms.

By decision dated July 23, 1996, an Office hearing representative affirmed the Office's October 28, 1994 decision terminating benefits. The hearing representative indicated that Dr. Duff's well-rationalized opinion indicating that appellant's condition had ceased remained the weight of the evidence.

Appellant subsequently submitted a request for reconsideration which was received by the Office on July 22, 1997. In support, appellant submitted an April 21, 1997 report from Dr. Takacs diagnosing chronic tendinitis in appellant's shoulder. Dr. Takacs indicated that appellant could not perform pulling/pushing or reach above her shoulders. He stated that appellant could only continuously carry 5 pounds and intermittently lift 20 pounds, 4 hours per day.

In a decision dated July 29, 1997, the Office denied appellant's request for review because she neither raised substantive legal questions or provided new and relevant evidence.

The only decision before the Board on this appeal is that of the Office dated July 29, 1997 in which the Office declined to reopen appellant's case on the merits because she failed to submit new relevant and pertinent evidence. Since more than one year elapsed from the date of issuance of the Office's July 10, 1996 and October 27, 1994 decisions to the date of the filing of appellant's appeal on October 15, 1997, the Board lacks jurisdiction to review those decisions.<sup>1</sup>

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<sup>1</sup> See 20 C.F.R. § 501.3(d).

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on July 29, 1997.

Under section 8128(a) of the Federal Employees' Compensation Act,<sup>2</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,<sup>3</sup> which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or a fact not previously considered by the Office;  
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

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 requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>4</sup>

In the instant case, appellant did not submit any new argument or evidence in support of her claim. The only evidence submitted by appellant on reconsideration was Dr. Takacs' April 21, 1997 report in which he diagnosed chronic shoulder tendinitis and stated that appellant could not perform pushing/pulling or reach above the shoulders. These restrictions and diagnosis were previously provided by Dr. Takacs in his November 21, June 16 and 2, May 16 and April 14, 1994 reports. Because the conclusions presented in Dr. Takacs' April 21, 1997 report were previously provided in his other reports which were considered by the Office, this evidence is not new and is merely cumulative. Accordingly, it is insufficient to warrant a merit review.<sup>5</sup>

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.138(b)(1).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> On appeal appellant submitted additional evidence which the Board cannot review for the first time on appeal. 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated July 29, 1997 is affirmed.

Dated, Washington, D.C.  
August 24, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member