

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARYELLEN R. LIND and U.S. POSTAL SERVICE,  
POST OFFICE, Topeka, KS

*Docket No. 98-461; Submitted on the Record;  
Issued November 5, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review.

The Office accepted that on October 19, 1993 appellant, then a 50-year-old distribution clerk, sustained a right medial thigh contusion and right elbow contusion when she tripped and fell on an unsecured floor mat. On the October 20, 1993 claim form, appellant described her injuries as a "bruised right elbow, bruised and swollen right knee." She was on light duty for one week following the fall, then returned to full duty.<sup>1</sup>

On June 20, 1994 appellant claimed a recurrence of disability beginning that day, asserting that she sustained a left upper arm injury at the time of the October 19, 1993 fall as her left arm was on top of a stack of letter trays when she fell on her right side. Appellant indicated that she was on full duty at the time of the claimed recurrence of disability.

In a July 26, 1994 letter, the Office advised appellant of the additional medical and factual evidence needed to establish her claim for recurrence of disability, in particular an attending physician's rationalized statement explaining an objective, pathophysiologic relationship between the alleged left upper extremity condition and the October 19, 1993 fall.

In an August 6, 1994 statement, appellant asserted that in the October 19, 1993 fall, her left arm "held onto the top of 10 to 12 trays (stacked) much above the floor and my head as [her] right arm was on the floor." Appellant noted experiencing episodes of severe left upper arm pain

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<sup>1</sup> An October 20, 1993 report signed by an emergency room physician noted complaints of "right elbow pain" after tripping over a mat at work the previous night, with pain and swelling in the right knee. The physician diagnosed a right medial thigh contusion and strain, and a right elbow contusion. An October 28, 1993 employing establishment incident report states that on October 19, 1993, appellant "fell while moving empty trays injuring right elbow, bruised and swollen right knee -- tripped on uneven flooring where static mat was not taped down." These reports do not mention any left upper extremity complaints.

in May 1994 and attributed it to the October 1993 fall. She noted that since October 1993, she had been treated for respiratory problems with severe cough, with physical therapy for her left arm, possible bursitis and “ribs out of place.”

Appellant submitted chart notes from Dr. John Toth, an attending family practitioner, regarding left upper extremity complaints prior to the October 19, 1993 fall. An August 21, 1990 note stated that appellant was seeing a chiropractor for “muscular discomfort along left sternal border which she attributed to “repetitive motions at work,” which Dr. Toth diagnosed as costochondritis. April 28 and June 8, 1992 notes describe appellant’s complaints of left upper arm tightness and tingling in the fingers, diagnosed as upper extremity pain.<sup>2</sup>

Dr. Toth also noted appellant’s left upper extremity complaints after October 19, 1993. In an undated 1994 note, he diagnosed “left shoulder dysfunction.” In notes from March 17 to May 23, 1994, Dr. Toth related appellant’s complaints of left arm pain radiating into the left ribs and chest, which appellant attributed to “excessive coughing.”

In a June 10, 1994 report, Dr. Toth noted appellant’s account of muscular left arm pain “ongoing” since November 1993, which she attributed to a “[f]all mid-October 1993.” He diagnosed “myositis (myofascial restriction)” and prescribed physical therapy.<sup>3</sup>

By decision dated September 7, 1994, the Office denied appellant’s claim for a recurrence of disability beginning June 20, 1994 on the grounds that causal relationship was not established due to insufficiently rationalized medical evidence. The Office noted that the first medical evidence submitted mentioning both the October 19, 1993 fall and appellant’s left arm was Dr. Toth’s June 10, 1994 report.

Appellant disagreed with this decision and in a September 18, 1994 letter, requested reconsideration, reiterating her belief that her left arm and shoulder complaints were related to the October 19, 1993 fall as the symptoms did not begin until afterward. She submitted an October 18, 1994 report from Dr. Toth, who noted the October 19, 1993 fall and appellant’s account that “she did not complain of her left upper extremity at the time of injury due to her concern for her right extremity injuries.” He remarked that appellant “had a preceding left upper

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<sup>2</sup> Dr. Toth also submitted chart notes and test results dated prior to October 19, 1993, regarding conditions unrelated to the upper extremities.

<sup>3</sup> In an August 24, 1994 letter, Mr. Jim Green, an exercise physiologist, noted providing rehabilitation treatment modalities as directed by Dr. Toth from April 26 to May 13, 1994. Mr. Green also submitted copies of the physical therapy notes. These notes do not appear to have been signed by a physician.

extremity complaint,” and that “the injury at work could have caused/aggravated [appellant’s] persistent left upper extremity” musculoskeletal pain.”<sup>4</sup>

By decision dated December 9, 1994, the Office denied modification on the grounds of insufficient evidence, as Dr. Toth merely reiterated appellant’s account of events and her opinion on causal relationship.<sup>5</sup>

Appellant disagreed with this decision and in a February 6, 1995 letter, requested reconsideration and submitted additional medical evidence.<sup>6</sup> In treatment notes from September 21, 1994 to January 24, 1995, Dr. Kurt Knappenberger, an attending orthopedist, diagnosed adhesive capsulitis of the left shoulder, successfully treated with physical therapy and medication. He noted that appellant “possibly injured her shoulder” in the October 19, 1993 fall as “increasing soreness within the shoulder” began approximately one week later. In a January 24, 1995 note, Dr. Knappenberger commented that appellant had “no history of problems with her shoulder” prior to the October 19, 1993 fall and thus it was “a high probability that the fall did initiate the adhesive capsulitis.”

By decision dated July 12, 1995, the Office denied modification on the grounds of insufficient evidence, finding that Dr. Knappenberger’s treatment notes did not support an objective, medical causal relationship between appellant’s claimed left upper extremity condition and the October 19, 1993 fall. The Office further found that Dr. Knappenberger’s opinion was of diminished probative value as he appeared unaware of appellant’s history of left upper extremity symptoms prior to the October 19, 1993 fall.

Appellant disagreed with this decision and in an August 22, 1995 letter requested reconsideration. In an attached August 1, 1995 statement, appellant explained that in the October 19, 1993 fall, her left arm “was about three to four feet on top of some trays which kept it in back of [her] right side which fell to the floor giving it a jerk,” thus injuring her left shoulder and causing adhesive capsulitis as diagnosed by Dr. Knappenberger. Appellant noted her history of left arm “aching” due to repetitive motion at work, but that the symptoms were quiescent for approximately six months prior to October 1993. Appellant also submitted an August 7, 1995 report from Dr. Knappenberger, stating that appellant “possibly injured her shoulder” in the

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<sup>4</sup> Appellant also submitted nonmedical evidence. In notes from November 12, 1993 to May 19, 1994, Dr. Steven Lucas, a chiropractor, diagnosed a “left shoulder subluxation” and provided various therapies. As Dr. Lucas did not diagnose a spinal subluxation by x-ray, he is not considered a physician under the Act for purposes of this case, and his opinion is of no probative value; *see* 5 U.S.C. § 8103. In a September 21, 1994 letter, Mr. Jim Green, an exercise physiologist, noted appellant’s referral by Dr. Toth for physical therapy regarding the left upper arm and shoulder. As Mr. Green is not a physician, his letter is of no probative medical value.

<sup>5</sup> The Office also found that Dr. Lucas’ August 23, 1994 report was of no probative value as he was not considered a physician under the Act as he did not diagnose a subluxation of the spine by x-ray. The Office also found that Mr. Green’s September 21, 1994 letter was of no probative value in establishing causal relationship as he was not a physician.

<sup>6</sup> Appellant also submitted a drawing of her recollection of the October 19, 1993 fall, showing her left arm on a stack of trays three to four feet high, while at the same time she fell on an uneven floor mat, landing on her right elbow, hand and knee.

October 19, 1993 fall, as she related “soreness ... and decreasing range of motion after that.” He opined that the adhesive capsulitis “develop[e]d over time” and that appellant’s history was “consistent with the physical findings.”

By decision dated November 22, 1995, the Office denied modification on the grounds of insufficient evidence, as Dr. Knappenberger’s August 7, 1995 report was speculative, insufficiently rationalized and based on an inaccurate, incomplete history.

Appellant disagreed with this decision and in a May 22, 1996 letter requested reconsideration, noting that Dr. Toth had referred her to Dr. Knappenberger. Appellant also submitted a May 2, 1996 report from Dr. Knappenberger, in which he related that appellant “felt that she possibly injured her shoulder” in the October 19, 1993 fall while “grabbing on to something with the left shoulder, therefore, a pulling type of injury could have occurred at that time. If this is what happened then this could be consistent with the symptoms and pain that she had experienced ... she had a diagnosis of adhesive capsulitis,” a condition that slowly worsened over time. “This is exactly what had occurred.”

By decision dated August 23, 1996, the Office denied modification on the grounds of insufficient evidence, as Dr. Knappenberger’s May 2, 1996 report was speculative, based on treatment beginning more than one year after the October 19, 1993 injury and tainted by an inconsistent, incomplete factual and medical history.”

In an August 11, 1997 letter, appellant requested reconsideration of the Office’s August 23, 1996 decision. Appellant summarized medical evidence previously of record and asserted that her left arm symptoms were related to the October 19, 1993 fall as she did not have any such complaints prior to that date. She also submitted a note signed by three coworkers, who indicated an “aware[ness] of [appellant’s] fall and the results.” Appellant did not submit any new medical evidence.

By decision dated October 1, 1997, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted was repetitious in nature and, therefore, insufficient to warrant a merit review of the August 23, 1996 decision.<sup>7</sup> The Office found that appellant’s statement merely “reiterated information previously submitted and explain[e]d medical documentation previously presented by Dr. Knappenberger.” The note signed by appellant’s coworkers merely stated that they were aware of appellant’s fall.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant’s case for a merit review.

The Board’s jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>8</sup> As

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<sup>7</sup> In its October 1, 1997 decision denying appellant’s request for reconsideration, the Office mentions a November 15, 1996 decision. There does not appear to be a November 15, 1996 decision in this case.

<sup>8</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

appellant filed her appeal with the Board on November 21, 1997 the only decision properly before the Board is the October 1, 1997 decision, denying appellant's request for a merit review.

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," and by showing the Office erroneously applied or interpreted a point of law, 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.<sup>9</sup> Section 10.328(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>10</sup>

The critical issue in the case at the time appellant submitted her August 11, 1997 request for merit reconsideration was whether she sustained a left upper extremity injury at the time of the October 19, 1993 fall. Therefore, to support her request, appellant would have had to submit new, relevant evidence on this issue, in the form of rationalized medical evidence, based on a complete, accurate factual and medical history, explaining an objective, pathophysiologic relationship between the October 19, 1993 fall and her left upper extremity condition on and after June 20, 1994.<sup>11</sup> However, appellant did not submit such evidence.

In support of appellant's August 11, 1997 request for a merit review, she submitted a statement explaining why she believed her left shoulder symptoms were related to the accepted October 19, 1993 injury and a note signed by three coworkers that they were "aware" of appellant's fall on October 19, 1993. The Board finds that this statement is repetitive of appellant's contentions previous of record and, therefore, does not constitute relevant and pertinent evidence not considered by the Office.

Additionally appellant's August 11, 1997 letter and accompanying coworker statement do not show that the Office erroneously applied or interpreted a point of law, or advance a point of law or fact not previously considered by the Office. The Board finds that the Office properly exercised its discretion in conducting a limited review of the evidence submitted and afterward properly denied appellant's August 11, 1997 request for a merit review.

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<sup>9</sup> 20 C.F.R. § 10.138(b)(1).

<sup>10</sup> 20 C.F.R. § 10.138(b)(2).

<sup>11</sup> See *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

The decision of the Office of Workers' Compensation Programs dated October 1, 1997 is hereby affirmed.

Dated, Washington, D.C.  
November 5, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member