

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SOPHIA VALLARIO and U.S. POSTAL SERVICE,  
POST OFFICE, Los Gatos, CA

*Docket No. 98-1793; Submitted on the Record;  
Issued July 12, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

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 May 9, 1997.

On December 11, 1987 appellant, then a 30-year-old letter carrier, filed a notice of traumatic injury, alleging that she injured her left knee when she slipped on some leaves in the course of her federal employment. The Office accepted the claim for a left knee contusion, prepatellar bursitis and left ankle sesamoiditis. Appellant subsequently received compensation for total temporary disability.

On October 18, 1994 the Office referred appellant to Dr. William H. Irving, a Board-certified orthopedic surgeon, for a second opinion examination. On November 14, 1994 Dr. Irving reviewed appellant's history and conducted a complete physical examination. He diagnosed a normal right knee, a normal left ankle, left patella baja with moderate degeneration of the patellofemoral joint, residual weakness of the left lower leg secondary to compartment syndrome and low back strain. He opined that appellant could work four hours per day with no bending, kneeling, squatting, climbing, standing and only minimal walking. He further stated that appellant could only lift five pounds. He stated that all the limitations stemmed from appellant's employment injury.

On January 9, 1995 the employing establishment offered appellant a limited-duty position as a modified carrier within the exact restrictions outlined by Dr. Irving.

On January 24, 1995 Dr. Michael D. Butcher, appellant's treating physician and a Board-certified orthopedic surgeon, examined appellant and diagnosed chondromalacia patella, history of chronic low back strain and history of peroneal tendon subluxation, left ankle. He indicated that he had reviewed the limited-duty job offer from the employing establishment and that appellant was able to perform the work. On January 31, 1995 Dr. Butcher stated that he encouraged appellant to return to work within the restrictions outlined.

Appellant returned to limited duty on February 8, 1995.

On March 6, 1995 Dr. Butcher repeated his earlier diagnoses, but stated that he would now give appellant the benefit of the doubt and excuse her from work as she felt she needed reconditioning.

On March 20, 1995 appellant filed a claim for continuing compensation, Form CA-8, alleging total disability beginning March 7, 1995.

On March 20, 1995 Dr. Butcher again indicated that appellant was not totally disabled and he repeated that appellant's limitations were no prolonged standing and walking, and no squatting, kneeling or bending.

On March 27, 1995 Dr. Butcher indicated that he agreed with Dr. Irving's opinion regarding disability. However, he stated that he was giving appellant the benefit of the doubt and trying to get her reconditioned for work.

By decision dated April 12, 1995, the Office found that appellant failed to establish that her total disability beginning March 7, 1995 was causally related to her work injury. The Office indicated that the weight of the medical evidence, as represented by the report of Dr. Irving, established that appellant could work four hours per day with the restrictions he provided.

On April 18, 1995 Dr. Butcher stated that there was no orthopedic contraindication to appellant returning to the limited work provided by the employing establishment. On May 15, 1995 he opined that appellant was capable of returning to limited work if she avoided prolonged standing, bending, lifting, squatting and kneeling.

On July 13, 1995 Dr. Ernest M. Thomas, an internist, diagnosed significant left leg pain, due to either lumbar radiculopathy and/or discogenic disease. On August 2 and 30, September 5, and November 30, 1995, he indicated that appellant should be considered disabled due to constant pain.

Appellant subsequently requested a hearing, which was held on December 14, 1995.

On December 12, 1995 Dr. Thomas indicated that, if appellant had the necessary equipment, she could return to work for four hours per day.

By decision dated April 4, 1996, an Office hearing representative found that appellant failed to establish a change in the nature and extent of her injury-related condition which precluded her from performing her light-duty position four hours per day. The hearing representative noted that the reports from appellant's treating physician, Dr. Butcher, contained no findings on examination to substantiate total disability nor did they contain adequate rationale explaining how the total disability was related to the employment injury.

On May 31, 1996 Dr. Thomas again indicated that appellant remained disabled from work.

In a report received by the Office on July 29, 1996, Dr. Wendell D. Ferguson, a Board-certified orthopedic surgeon, reviewed appellant's medical history and conducted a physical examination of appellant's knee. He concluded that he did not know the etiology of the chronic pain and weakness in the left lower extremity.

On November 5, 1996 Dr. Bruce Arnow, a clinical psychologist, examined appellant and diagnosed a pain disorder associated with psychological factors and a general medical condition.

On November 6, 1996 Dr. William C. Longton, an internist, examined appellant and found that she continued to suffer from residual peroneal nerve weakness and a limitation regarding the extension of her left knee. He indicated, however, that it was appropriate for her to work every day in nonambulatory jobs.

In a letter received April 2, 1997, appellant requested an extension of time in which to file reconsideration. She further stated that she was unable to provide current medical evidence to support her total disability.

By decision dated May 9, 1997, the Office refused to reopen appellant's claim for a merit review because she did not submit any medical evidence establishing a change in the nature and extent of her injury-related condition, which precluded her from continuing her light-duty assignment. In an accompanying memorandum, the Office stated that, in a letter it received on April 2, 1997, appellant requested an extension of time to file for reconsideration. The Office indicated that it could not grant such an extension and treated the letter as a request for reconsideration.

The only decision before the Board on this appeal is that of the Office dated May 9, 1997 in which the Office declined to reopen appellant's case on the merits because she failed to submit any medical evidence establishing a change in the nature and extent of her injury-related condition. Since more than one year elapsed from the date of issuance of the Office's April 4, 1996 and April 12, 1995 decisions to the date of the filing of appellant's appeal on May 6, 1998, the Board lacks jurisdiction to review those decision.<sup>1</sup>

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on May 9, 1997.

Under section 8128(a) of the 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

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

<sup>2</sup> 5 U.S.C § 8128(a).

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

“(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, the Office hearing representative, in his April 4, 1996 decision, denied appellant’s claim for additional compensation on the basis that appellant failed to establish a change in the nature and extent of her injury-related condition which precluded her from performing her light-duty position four hours per day. In particular, the hearing representative indicated that appellant failed to submit any medical evidence substantiating total disability or containing adequate rationale explaining how the total disability was related to the employment injury. Although appellant submitted additional medical evidence following the hearing representative’s decision from Drs. Thomas, Ferguson, Arnow and Longton, none of this evidence contained any rationale addressing how the total disability was related to the employment injury. In this regard, Dr. Thomas, a general practitioner, only opined on May 31, 1996 that appellant was disabled from work. Dr. Ferguson, a Board-certified orthopedic surgeon, stated that he did not know the etiology of appellant’s symptoms. Dr. Arnow, a clinical psychologist, did not address the issue of appellant’s total disability. Finally, Dr. Longton, an internist, opined that appellant was capable of performing nonambulatory work every day. Accordingly, because none of the evidence appellant submitted following the Office hearing representative’s April 4, 1996 is relevant to the essential medical issue of this case, whether appellant established a change in the nature and extent of her injury-related condition which precluded her from performing her light-duty position four hours per day, the Office properly determined that the evidence was insufficient to warrant a merit review.

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

The decision of the Office of Workers' Compensation Programs dated May 9, 1997 is affirmed.

Dated, Washington, D.C.  
July 12, 2000

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member