

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KELLY J. BUTLER and U.S. POSTAL SERVICE,  
POST OFFICE, Lakeland, FL

*Docket No. 98-2443 and 99-1218; Oral Argument Held March 16, 2000;  
Issued June 2, 2000*

Appearances: *Jim Butler*, for appellant; *Sheldon G. Turley, Jr., Esq.*,  
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a); and (2) whether appellant has met her burden of proof to establish that she sustained a back injury in the performance of duty on October 30, 1997.

The Board finds that the Office did not abuse its discretion by denying merit review of its January 31, 1997 decision.

On October 16, 1995 appellant, then a 33-year-old flat sorting machine distribution clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her left shoulder and lower back on October 10, 1996 while she was pulling full flat trays.<sup>1</sup> The Office accepted the claim for cervical and thoracic strains. She stopped work on November 21, 1995.

On January 10, 1996 the employing establishment offered appellant a limited-duty job offer which was in accordance with the restrictions noted by appellant's treating physician.

By decision dated May 21, 1996, the Office terminated appellant's entitlement to continuing compensation benefits on the basis that she had refused a suitable job offer by the employing establishment.

By decision dated June 4, 1996, the Office suspended appellant's medical benefits for refusal to submit to a second opinion examination as directed.

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<sup>1</sup> This claim was assigned claim number A06-637537.

By decision dated January 31, 1997, a hearing representative affirmed the decision terminating compensation benefits on the basis that appellant had refused an offer of suitable employment and also affirmed the suspension of benefits.

In a letter dated January 8, 1998, appellant's representative requested reconsideration and submitted an April 3, 1997 report of a telephone call by the Office pertaining to Dr. Diana Dean Carr, a second opinion Board-certified orthopedic surgeon, a February 24, 1997 letter from Dr. Carr, reports dated August 27, October 6, 1997 and reports dated August 27, October 6 and December 2, 1997 by Dr. G.E.Vega, Board-certified orthopedic surgeon, a November 6, 1997 musculoskeletal evaluation by Health South, a copy of a November 5, 1997 CA-1 form, reports from Dr. David M. Wall, an attending Board-certified anesthesiologist, dated February 25, March 26, 1996 and September 9, 1997, a November 12, 1997 letter from the employing establishment regarding appellant's off-duty status. Appellant also requested that she be given differential pay, payment of her medical bills, a new job based upon her physical restrictions, permanent partial disability compensation, punitive damages<sup>2</sup> due to appellant's continued harassment.

Appellant, through counsel's January 27, 1998 letter, subsequently submitted a January 13, 1998 report by Dr. Wall. In this report, he noted he had reviewed Dr. Vega's report and that appellant was permanently partially disabled with lifting restrictions of no more than 10 pounds. Dr. Wall also noted that he had been treating appellant for two years.

By nonmerit decision dated July 20, 1998, the Office denied appellant's request for modification on the basis that the evidence submitted by appellant was immaterial and repetitious.<sup>3</sup> In its decision the Office also noted that it had received material regarding a new injury claim filed by appellant, a subsequent investigation by the employing establishment, an equal employment opportunity (EEO) complaint filed by appellant and a union grievance contesting her dismissal, and found this material to be immaterial to the issue of whether appellant had refused a suitable job offer.

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<sup>2</sup> The Federal Employees' Compensation Act has no provision for punitive damages regardless of circumstances; it, therefore, is unnecessary for the Board to pass upon contention that she is entitled to punitive damages.

<sup>3</sup> Subsequent to the July 20, 1998 decision, the Office responded to a July 13, 1998 letter from appellant regarding Dr. Wall's January 13, 1998 report. In the July 22, 1998 decision, the Office advised appellant that this report had been considered in the July 20, 1998 decision although it was not specifically mentioned.

The only decision before the Board on appeal for docket number 98-2443<sup>4</sup> is the Office's nonmerit decision dated July 20, 1998. As more than one year has elapsed from the date of the Office's most recent merit decision to the date this appeal was filed, the Board lacks jurisdiction to consider the merits of this claim and lacks jurisdiction over the July 20, 1997 merit decision of the Office.<sup>5</sup>

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.<sup>6</sup> Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),<sup>7</sup> the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on the merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen 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 her claim by a written request to the Office identifying the decision and 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:

- “(i) Showing that the Office erroneously applied or interpreted a point of law; or
- “(ii) Advancing a point of law or fact not previously considered by the Office; or
- “(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”<sup>8</sup>

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>9</sup>

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<sup>4</sup> Appellant filed an appeal from the July 20, 1998 nonmerit Office decision on August 3, 1998. This appeal was docketed as No. 98-2443. For purposes of this decision, the cases in Docket No. 99-1218 and 98-2443 have been consolidated on appeal.

<sup>5</sup> 20 C.F.R. § 501.3(d)(2).

<sup>6</sup> See *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>7</sup> See *Charles E. White*, 24 ECAB 85 (1972).

<sup>8</sup> 20 C.F.R. § 10.138(b)(1).

<sup>9</sup> 20 C.F.R. § 10.138(b)(2).

The evidence and argument submitted after the January 31, 1997 Office hearing representative decision did not meet the criteria of 20 C.F.R. § 10.138(b)(1). The report of Dr. Carr dated February 24, 1997 and the report of Dr. Wall dated March 26, 1996 had been considered in previous decisions and, thus, properly were considered to be repetitious. Dr. Wall's reports dated February 26 and September 9, 1997 were immaterial as they fail to address the relevant issue, whether appellant had refused a suitable job offer and her capability to perform the duties of the position in 1996. His January 13, 1998 report is similarly of an irrelevant nature as the report also fails to address whether appellant had the capability to perform the job which the Office had found to be suitable in 1996. The remainder of the evidence submitted by appellant, *i.e.*, April 3, 1997 report of telephone call by the Office, a CA-1 form dated November 1, 1997, a November 12, 1997 letter from the employer which placed appellant in an off-duty status and other evidence received by the Office concerning an investigation by the employing establishment, an EEO complaint filed by appellant and a union grievance on her dismissal, are irrelevant to the issue of whether appellant refused suitable employment. Thus, the Office properly determined that they were insufficient to require a merit review.

Appellant has failed to provide any relevant evidence regarding the issue of whether she had refused a suitable job or whether the suspension of benefits was proper and, therefore, has not submitted new and relevant evidence that would entitle her to a merit review of her claim. In addition, she did not show that the Office erroneously applied or interpreted a point of law or advance a point of law or fact not previously considered. The Board therefore finds that appellant did not meet the requirements of section 10.138(b)(1) and the Office properly denied her request for reconsideration without merit review of the claim.

The Board further finds appellant has met her burden of proof to establish a back injury in the performance of duty on October 30, 1997.

On October 30, 1997 appellant filed a traumatic injury claim alleging that, on that date she strained or pulled her left shoulder, neck and lower left back while lifting trays of mail and/or sacks of mail.<sup>10</sup> On the reverse side of the form, Michael J. Marsh, appellant's supervisor, noted that the only knowledge he had of the incident was what appellant told him and that there were no witnesses to the injury.

In hospital discharge instructions dated October 30, 1997, appellant was instructed to have bed rest, heating pads and medicines as prescribed with no driving until Monday and no work.

In a Lakeland Regional Medical Center emergency department and assessment sheet dated October 30, 1997, it was noted that appellant injured her back and shoulder that night at work while lifting heavy mail. A diagnostic impression of left cervical and left trapezius muscle sprain was also noted.

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<sup>10</sup> This was assigned claim number A06-689647.

In an October 30, 1997 report, by Dr. David T. Jones<sup>11</sup> diagnosed left cervical and left trapezius muscle sprain. He, based upon a physical examination, noted tenderness "over the left paracervical muscles" which extended "down onto the anterior border of the trapezius and then posteriorly down the mid back along the medial border of the left scapula." Dr. Jones also noted that appellant's scapula movements were painful and she was "significantly tender along the body of the trapezius muscle." Under the history of the injury, he noted that appellant had been lifting some heavy mailbags that evening "when she felt something pull in her left neck and left shoulder muscles." Dr. Jones instructed appellant to take "three days off from work to rest, use heat" and take one ibuprofen every eight hours as need for pain along with Soma and Darvocet N-100. Appellant was instructed to see Dr. Brian Smith<sup>12</sup> for a follow-up and to "avoid aggravating movements."

The employing establishment submitted an investigative report dated November 6, 1997 by Postal Inspector C.M. Ross concerning possible fraud on the part of appellant in filing her October 30, 1997 injury claim and attached copies of patient discharge instructions and other documents.

In an addendum dated November 11, 1997, Dr. Jones, in response to Postal Inspector Ross requested to review certain records, indicated that portions of medical records he completed had been altered.

By decision dated November 28, 1997, the Office found the evidence of record failed to establish fact of injury. The Office found the facts of the case, *i.e.*, the alteration of medical records and the investigative report by Postal Inspector Ross, cast serious doubt on the validity of appellant's claim.

By letter dated December 4, 1997, appellant's representative requested a review of the written record and disputed the report made by Postal Inspector Ross.

In a decision dated March 4, 1998, the hearing representative affirmed the November 28, 1997 Office decision which found that appellant had not established that she sustained an injury on October 30, 1997. In finding that fact of injury was not established, the hearing representative found that the forms completed by Dr. Jones had been altered so that his opinion was not based on a complete and accurate history and appellant's actions were not consistent with having sustained an injury.<sup>13</sup>

An employee seeking benefits under the Act<sup>14</sup> has the burden of establishing the essential elements of his or her claim including the fact that the injury was sustained in the performance of

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<sup>11</sup> A physician with a primary specialty of emergency room medicine and a secondary specialty of general surgery.

<sup>12</sup> A physician Board-certified in hand surgery and orthopedic surgery.

<sup>13</sup> Copies of appellant's arrest for drunk driving and leaving the scene of the accident were submitted and accepted by the Office on June 25, 1998, which was subsequent to the hearing representative's decision.

<sup>14</sup> 5 U.S.C. §§ 8101-8193.

duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>15</sup> These are the essential elements of each and every claim regardless of whether the claim is predicated upon a traumatic injury due to one single incident or an occupational disease due to events occurring over a period of time.<sup>16</sup> As part of this burden, the claimant must present rationalized medical opinion evidence, based on a complete and factual medical background, showing causal relationship.<sup>17</sup> Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician.<sup>18</sup>

In order to establish an injury, an employee must show that the injury occurred at the time, place and in the manner alleged by a preponderance of the reliable, probative and substantial evidence.<sup>19</sup> An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action. Such circumstances as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established a *prima facie* case.<sup>20</sup> However, an employee's statement alleging that an injury occurred at a given time and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.<sup>21</sup>

The Office found that appellant had not established fact of injury because there was conflicting evidence regarding whether the October 30, 1997 incident occurred, as alleged.

The Board finds that the record does not contain inconsistencies sufficient to cast serious doubt on appellant's version of the employment incident. The record establishes that appellant notified her supervisor that evening that she had injured herself while lifting heavy mailbags and sought medical treatment that evening. The medical reports of record contain a history of injury generally consistent with appellant's account of events. The fact that the employing establishment instituted an investigation into whether appellant had actually sustained an injury on October 30, 1997 because her leave request for October 31, 1997 was denied and the subsequent drunk driving and leaving the scene of an accident criminal charges, did not render

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<sup>15</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>16</sup> The Office's regulations clarify that a traumatic injury refers to an injury caused by a specific event or incident or series of events or incidents occurring within a single workday or work shift whereas occupational disease refers to an injury produced by employment factors which occur or are present over a longer period than a single workday or shift; see 20 C.F.R. §§ 10.5(a)(15), (16).

<sup>17</sup> See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Lucrecia M. Nielson*, 42 ECAB 583 (1991).

<sup>18</sup> *Gary L. Fowler*, 45 ECAB 365 (1994); *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

<sup>19</sup> *Bill H. Harris*, 41 ECAB 216 (1989); *Charles B. Ward*, 38 ECAB 667 (1987).

<sup>20</sup> *Merton J. Sills*, 39 ECAB 572 (1988).

<sup>21</sup> *Thelma Rogers*, 42 ECAB 866 (1991); *Thelma S. Buffington*, 34 ECAB 104 (1982).

the claim factually deficient. Appellant informed her supervisor of the employment incident that evening, October 30, 1997. The record contains no contemporaneous factual evidence indicating that the claimed incident did not occur as alleged.<sup>22</sup> The fact that appellant may have experienced administrative and personal problems involving the employing establishment subsequent to October 30, 1997 does not establish that the claimed incident of October 30, 1997 did not occur as alleged.

Under the circumstances of this case, the Board finds that appellant's allegations have not been refuted by strong or persuasive evidence. The Board, therefore, finds that the evidence of record is sufficient to establish an incident as alleged on October 30, 1997.

The remaining issue is whether the medical evidence establishes an injury causally related to the employment incident. In a report dated October 30, 1997, which noted that it had been electronically authenticated by the physician, Dr. Jones noted that appellant related injuring herself at work that night while lifting some heavy mailbags and diagnosed left cervical and left trapezius muscle sprain. This same report instructed appellant to take "three days off from work to rest, use heat" and prescribed ibuprofen, Soma and Darvocet N-100. Appellant was also instructed to see Dr. Brian Smith for follow-up or if she felt worse to see Dr. Smith or return to the emergency room. While the record does appear to contain a CA-17 form which appears to have some alterations made to it, the alleged alterations do not concern the date appellant sought medical treatment nor does it affect the diagnosis made by Dr. Jones or his indication that an injury occurred as alleged on October 30, 1997.

The Board finds that the reports of Dr. Jones are sufficient to find that appellant sustained a left cervical and left trapezius injury causally related to her October 30, 1997 employment injury. However, the case must be remanded for further development to determine the extent of appellant's injury and to make a determination any period of disability associated with the above injury.<sup>23</sup>

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<sup>22</sup> See *Thelma Rogers*, 42 ECAB 866 (1991)

<sup>23</sup> In any event, appellant would be entitled to reimbursement of initial medical expenses; see *Id.*, *Elaine Pendleton*, 40 ECAB 1143 (1989).

The decision of the Office of Workers' Compensation Programs dated July 20, 1998 is hereby affirmed. The decisions of the Office dated March 4, 1998 and November 28, 1997 are set aside and the case is remanded to the Office for further development on the period of disability and the extent of injury, as directed by the Board.

Dated, Washington, D.C.  
June 2, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member