

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN A. MAYNARD and DEPARTMENT OF DEFENSE,
TRACY DEFENSE DEPOT, Tracy, CA

*Docket No. 99-793; Submitted on the Record;
Issued June 15, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay, and (2) whether the Office abused its discretion in refusing to reopen appellant's claim for a merit review under 5 U.S.C. § 8128(a).

On February 3, 1998 appellant, then a 44-year-old supply clerk, filed a notice of recurrence (Form CA-2a) alleging that as a result of working on the computer, she sustained pain in her back, left neck and shoulder and down to the tip of her fingers.

In response to the Office's April 21, 1998 request for further information, appellant submitted a medical report dated February 11, 1998, in which Dr. Vivien C. Abad, a Board-certified neurologist, found that she had pain in the posterior cervical and left shoulder region with pain radiating into the left arm suggestive of shoulder/hand syndrome secondary to possible bursitis/tendinitis of the left shoulder. In addition, appellant noted that she had myofascial pain, and also noted that "with radiation of pain into her second, third and fourth fingers, the possibility of a cervical radiculopathy at multiple levels in the left C5-6 and the [C]7-8 regions."

On May 15, 1998 the Office accepted that appellant sustained a new injury on February 4, 1998 and converted the claim for recurrence (Form CA-2a) to a notice of traumatic injury and claim for continuation of pay compensation (Form CA-1). The Office also accepted this claim for cervical strain.

After this decision, appellant submitted a nerve conduction study (NCS) and electromyogram (EMG) report dated May 20, 1998. Dr. Abad interpreted the NCS as not showing any evidence of carpal tunnel entrapment of the left median nerve. "There is borderline prolongation of left ulnar F wave latency suggesting a delay in proximal conduction either in the brachial plexus or secondary cervical radiculopathy." Dr. Abad noted a normal EMG of the left upper extremity.

By letter dated May 27, 1998, the Office informed Dr. Abad that appellant was absent from work on February 4 through 6, 11, March 16, 27, April 6, May 5 through 8 and May 20 (5½ hours) and asked him for a clarification of appellant's status on those dates and to provide medical rationale to support her opinion. In her response dated June 15, 1998, Dr. Abad noted that appellant had been treated by her for this injury since February 11, 1998 and that the examination of that date showed that appellant's absences on the dates in question were based on a subjective complaint of severe pain. She continued that the physical examination of February 11, 1998 showed that appellant was experiencing constant muscle spasms, that the neurological examination showed diminution in pin sensation in the entire left arm and that she also had impaired pin sensation in the ovalar and dorsal aspect of the right hand and had a stocking distribution of diminished pin sensation plus spotty diminution of pin sensation in her thighs. Dr. Abad further noted that appellant had a restricted range of motion in her left upper extremity to 60 degrees.

In a June 8, 1998 medical report, Dr. Vincent C. Leung, a Board-certified orthopedic surgeon, found that appellant had a left shoulder contusion and left neck pain with no definite evidence of disc herniation or neurological deficit. He opined that appellant should be able to continue to work.

By decision dated July 1, 1998, the Office determined that appellant was not entitled to continuation of pay during her absence from work from February 4 to February 6, February 11, March 16, March 27 and April 6, 1998 and all dates from May 6, 1998 forward. The Office reasoned that appellant was not seen by a physician on those dates and that as Dr. Abad did not examine appellant any time between February 4 and May 3, 1998, she had no way of certifying that she was totally disabled. The Office also noted that as continuation of pay has to be used within 90 days of the date of injury, appellant would not be entitled to any continuation of pay after May 5, 1998 regardless.

After this decision, appellant submitted a copy of the June 4, 1998 magnetic resonance imaging (MRI) scan of her left shoulder, which was interpreted by Dr. Dennis D. Jacobsen, a Board-certified radiologist, as a normal MRI scan of the left shoulder. He interpreted the MRI scan of the same date on the cervical spine as showing minimal central bulging of the C5-6 disc that should be of no clinical significance, with no other abnormalities noted.

On July 24, 1998 appellant requested reconsideration of the Office's decision and attached a July 13, 1998 medical report by Dr. Abad, in which she noted:

“[Appellant] has been disabled and unable to perform her usual work on the following dates: February 4 [through] February 6, February 11, 1998, March 16 -- March 27, 1998, May 4 [through] May 8, 1998 and she was absent 5½ hours on May 20, 1998 due to severe pain in her left shoulder which she described as frequent (meaning at least 75 percent of the time). During this period, she was prescribed a muscle relaxant, Soma, which she states sedated her. Physical therapy had been requested but authorization for this was not received despite multiple requests until May 1998.

“For the period stated above, [appellant] was disabled on the basis of severe, frequent pain. Pain is by necessity a subjective complaint, as there is no way of measuring this objectively. Workers['] Compensation recognizes subjective factors for disability. Her objective factors for disability included spasm in the posterior cervical muscles and trapezius with trigger points, impaired pin sensation in the left arm and pain on abducting her left shoulder consistent with myofascial pain, and tendinitis of the left shoulder. [Appellant’s] pain is due to her work injury.”

Dr. Abad recommended referral to St. Joseph’s Anesthesia Department for trigger point injection into her left shoulder and posterior cervical region. This cervical epidural steroid injection was given by Dr. Edward Herold, an internist, on August 5, 1998.

Appellant also resubmitted evidence that was already in the record.

By decision dated October 19, 1998, the Office decided that a merit review of her case was not warranted on the basis of her request for reconsideration. The Office noted that although a medical report was submitted with her request for reconsideration, the information was cumulative and repetitive and no medical evidence taken at the time of each claimed disability was submitted.

The Board finds that appellant is not entitled to continuation of pay.

Section 8118(a) of the Federal Employees’ Compensation Act provides for payment of continuation of pay, not to exceed 45 calendar days of disability, to an employee “who has filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title.”¹ Section 8122(a)(2) provides that written notice of the injury shall be given within 30 days.”² The context of section 8122 makes clear that this means within 30 days of the date of the injury.³

The Board notes that the Office correctly determined that as appellant’s date of injury was February 4, 1998 and period of time for continuation of pay is not to exceed 45 days from the date of injury,⁴ the Office properly denied all continuation of pay for the dates after May 5, 1998. The Office also denied continuation of pay because although Dr. Abad found appellant disabled on the dates in question, the Office determined that she did not examine appellant between February 4 and May 3, 1998, so she had no way of certifying that appellant was totally disabled. Although this statement is incorrect in that there is a February 11, 1998 report by Dr. Abad in the record, the Board notes that this report does not relate appellant’s medical condition to her work-related injury of February 4, 1998. Accordingly, as no medical report

¹ 5 U.S.C. § 8118(a).

² 5 U.S.C. § 8122(a)(2).

³ *Thomas A. Faber*, 50 ECAB ____ (Docket No. 97-2212, issued September 28, 1999).

⁴ 20 C.F.R. § 10.201(b).

established that appellant was disabled due to her work-related injuries on February 4 through 6, February 11, March 16 and 27 and April 6, 1998 the Board will affirm the Office's decision to deny continuation of pay on these dates.

The Board finds that the Office improperly denied appellant's request for reconsideration.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,⁵ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁶ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁷ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁸

Appellant timely requested review of the Office's July 1, 1998 decision on July 29, 1998. In support of her request for consideration, she submitted, *inter alia*, a medical report by Dr. Abad. The Office found that this report was not contemporaneous to the dates for which continuation of pay was requested and was therefore cumulative and repetitious. Dr. Abad's report listed the dates for which continuation of pay was requested, stated that appellant was disabled on these dates and that during this period appellant was prescribed a muscle relaxant which sedated her. She noted that appellant was disabled on the basis of severe, frequent pain, which is subjective and also based on spasm in the posterior cervical muscles and trapezius and trigger points, impaired pin sensation in the left arm and pain on abducting her left shoulder consistent with myofascial pain, and tendinitis of the left shoulder. Dr. Abad also noted for the first time that appellant's pain was due to her work injury. This report constitutes "relevant and pertinent evidence not previously considered by the Office." Because appellant submitted relevant and pertinent evidence not previously considered by the Office, the Board finds that she is entitled to a merit review of her claim.⁹

⁵ 48 ECAB 314, 319 (1997).

⁶ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ *Linda I. Sprague*, 48 ECAB 386 (1997).

⁹ *Willie H. Walker, Jr.*, 45 ECAB 126, 132 (1993).

The decision of the Office of Workers' Compensation Programs dated July 1, 1998 is affirmed. The decision of the Office of Workers' Compensation Programs dated October 19, 1998 is set aside and this case is remanded to the Office to review appellant's case on the merits.¹⁰

Dated, Washington, D.C.
June 15, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ Appellant submitted evidence after the Office's October 19, 1998 decision. Evidence may not be reviewed for the first time on appeal that was not before the Office at the time it issued its final decision. 20 C.F.R. § 501.2(c); *Donald Jones-Booker*, 47 ECAB 785, 786 (1996); *George A. Hirsch*, 47 ECAB 520, 526 (1996).