

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICKI BROWN and U.S. POSTAL SERVICE,
POST OFFICE, Royal Oak, MI

*Docket No. 98-563; Submitted on the Record;
Issued May 2, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has met her burden of proof in establishing a recurrence of disability on or after July 21, 1997; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on October 22, 1997.

The Board has duly reviewed the case on appeal and finds that appellant failed to meet her burden of proof to establish a recurrence of disability on or after July 21, 1997.

Appellant, a carrier, sustained an injury on August 1, 1994 when she lifted a tray of mail. The Office accepted her claim for acute lumbosacral strain. Appellant returned to light-duty work and on August 7, 1995 sustained a recurrence of disability. She underwent surgery on January 11, 1996, a laminectomy and fusion L4-5. The employing establishment offered appellant a light-duty position which appellant rejected on April 18, 1997. The Office informed appellant that the position was suitable and allowed 30 days for her response. On July 2, 1997 the Office informed appellant that her reasons for refusing the position were not justified and allowed her 15 days to accept the position. Appellant accepted the position of a modified carrier on July 17, 1997. She returned to work on July 17, 1997 and stopped work on July 20, 1998. Appellant filed a notice of recurrence of disability on August 30, 1997 alleging on July 21, 1997 she sustained a recurrence of disability causally related to her accepted employment injuries. By decision dated September 22, 1997, the Office denied appellant's claim for a recurrence of disability. Appellant requested reconsideration on October 6, 1997 and by decision dated October 22, 1997, the Office declined to reopen appellant's claim for review of the merits.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must

show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.¹ Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability commencing July 21, 1997 and her August 1, 1994 employment injury.² This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.³

In this case, the Office found that appellant could return to work in the offered light-duty position based on the May 22, 1997 report of Dr. Michael Krieg, a Board-certified orthopedic surgeon, designated as the impartial medical examiner to resolve a conflict of medical opinion evidence between appellant's attending physician, Dr. Richard W. Easton, a Board-certified orthopedic surgeon and the second opinion physician, Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon. Dr. Krieg opined that appellant could return to work with restrictions and that she did not require physical therapy.

In support of her recurrence of disability on July 21, 1997, appellant submitted a form report dated July 28, 1997 from Dr. Craig D. Pepler, an osteopath, who diagnosed status post-lumbar fusion and indicated with a check marked "yes" that he believed that appellant's current condition was due to her employment. He stated, "I feel it [is] a temporary aggravation due to deconditioning." In a duty status report dated August 8, 1997, Dr. Pepler stated that appellant needed physical therapy to recondition low back muscles. He stated that she had not had any postoperative therapy and that she could return to work with restrictions after therapy. Dr. Pepler completed a narrative report on August 19, 1997. He noted appellant's history of injury in 1994 and reported that she stated that she developed spasms in her back and numbness in her feet on July 17, 1997. Dr. Pepler recommended further evaluation with an electromyogram (EMG). Appellant's EMG was normal as were nerve conduction studies of both lower extremities. Dr. Pepler stated that appellant could return to work, but recommended a physical therapy program for reconditioning of her low back.

The Board finds that Dr. Pepler's reports are not sufficiently well rationalized to meet appellant's burden of proof in establishing a recurrence of total disability. Dr. Krieg, a Board-certified orthopedic surgeon, resolved the existing conflict of medical opinion evidence by concluding that appellant was not totally disabled and that she did not require further physical therapy. In order to establish that appellant's employment-related condition had changed such that she was now totally disabled, Dr. Pepler must offer a medical explanation for her need for physical therapy to perform the duties of the light-duty position. Although he opined that appellant required further physical therapy due to deconditioned low back muscles, he did not explain how and why appellant's condition prevented her from performing her duties and rendered her totally disabled. Furthermore, the diagnostic testing results were normal, negating a

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

³ *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

change in appellant's underlying condition. Without a detailed explanation of why appellant's current condition led him to conclude that she was totally disabled and unable to perform the duties of her light-duty position, Dr. Peppler's reports are insufficient to meet appellant's burden of proof.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits.

Appellant requested reconsideration of the Office's September 22, 1997 decision on October 6, 1997. The Office denied this request by decision dated October 22, 1997.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵

In support of her reconsideration request, appellant submitted a note from Dr. Easton, a Board-certified orthopedic surgeon, stating that he referred appellant to Dr. Peppler. This note does not address the medical issue in the case and is not relevant. Appellant also resubmitted a note dated June 23, 1997 from Dr. Easton as well as the August 19, 1997 report and August 8, 1997 form from Dr. Peppler. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.⁶

Appellant submitted a report dated September 28, 1997 from Dr. Peppler. He again stated that appellant had deconditioning of her low back muscles and recommended physical therapy prior to return to work. This report is merely a restatement of the previous medical evidence submitted by Dr. Peppler and is not sufficient to require the Office to reopen appellant's claim for review of the merits.

Appellant submitted two form reports dated July 29, 1997. Dr. Easton indicated that appellant was totally disabled and recommended a functional capacity evaluation and work hardening. These reports are duplicative of evidence already in the record. Dr. Easton previously submitted a report recommending this testing.

As appellant has failed to submit relevant new evidence, the Office properly declined to reopen her claim for review of the merits.

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ See *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

The October 22 and September 22, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

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

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member