

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHELLE D. BRADSHAW and DEPARTMENT OF VETERANS  
AFFAIRS, LAKESIDE MEDICAL CENTER, Hines, IL

*Docket No. 99-1935; Submitted on the Record;  
Issued May 19, 2000*

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DECISION and ORDER

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

The issues are: (1) whether appellant had any disability after November 5, 1996 causally related to her February 28, 1996 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration.

On February 29, 1996 appellant, then a 27-year-old nursing assistant, filed a claim for compensation alleging that on February 28, 1996 she injured her left leg and foot while in the performance of duty.

In an August 9, 1996 statement of accepted facts, the Office noted that it had accepted appellant's condition of sprained thoracic and lumbar region as having occurred on February 28, 1996. The Office noted that appellant "stopped work on April 18, 1996 intermittently," and was currently not working. The Office referred the claim to the nurse intervention program to assist the Office in determining appellant's work restrictions and in determining when she could return to full duty.

Appellant filed a claim for continuing compensation on account of disability (Form CA-8) dated September 17, 1996, in which she claimed lost wages for the period June 19 to 22, 1996. Thereafter, appellant continued to submit Forms CA-8 claiming wage-loss compensation from June 23, 1996 to January 4, 1997.

In support of her claim for wage loss, appellant submitted a medical report dated October 28, 1996 from Dr. Nancy J. Lance, Board-certified in internal medicine and rheumatology. Dr. Lance stated that upon examination appellant had marked paraspinal muscle spasm primarily in the lumbosacral area; that her joints had good range of motion with no synovitis; that her hips had minimal trochanteric bursitis; that her knees had no effusion or crepitus and that the ankle and subtalar joint "move well." She also noted that a neurologic examination revealed negative straight leg raises with motor testing revealing a grade of five out of five and deep tendon reflexes at two plus. Dr. Lance diagnosed appellant with fibromyalgia and back spasm.

Dr. Charles W. Mercier, a second opinion physician Board-certified in orthopedic surgery, stated in a November 5, 1996 medical report that he was familiar with appellant's history of injury and that he had examined her on that day. He stated:

“On examination of the cervical spine, there is generalized pain to palpation, right greater than left. There is full, nonpainful range of motion of the neck.

“On examination of the lumbosacral spine, there is pain to palpation over both posterior iliac crests, both sciatic notches and L5. Forward flexion is to 10 degrees and there is pain on extension. Lateral bending is equal without muscle spasm. [Appellant] is able to stand on her toes and heels.”

Dr. Mercier noted that he had reviewed x-rays of appellant's pelvis, hips and lumbosacral spine taken on September 11, 1996, undated x-rays of her pelvis, left foot, left hip and cervical spine, and her September 3, 1996 magnetic resonance imaging (MRI) scan of the lumbosacral spine. In the opinion section of the report, he noted that, in spite of appellant's subjective complaints, his examinations of the cervical and lumbosacral spine were normal. Dr. Mercier noted further that appellant had reached maximum medical improvement, was not a candidate for surgery and should be returned to regular duty without restrictions.

By decision dated December 31, 1996, the Office denied appellant's claim for wage loss after November 5, 1996 on the grounds that the weight of the medical evidence established that she had recovered from her February 28, 1996 employment injury.

On January 9, 1997 appellant requested an oral hearing which was held on March 25, 1998.<sup>1</sup> In a decision issued and finalized on June 12, 1998, the hearing representative affirmed the Office's December 31, 1996 decision denying benefits.

On January 29, 1999 appellant filed a request for reconsideration of the hearing representative's June 12, 1998 decision. By decision dated April 27, 1999, the Office denied appellant's application for review finding that the evidence submitted in support of the application was not sufficient to warrant review of the prior decision. The Office noted that the evidence that appellant submitted in support of her request for reconsideration had been submitted previously and considered by the Office in its June 12, 1998 decision.

The Board finds that appellant had failed to establish that she has any disability after November 5, 1996 causally related to her February 28, 1996 employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his or her claim including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>3</sup> As part of

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<sup>1</sup> Appellant was unable to attend the initial September 23, 1997 hearing due to sickness.

<sup>2</sup> 5 U.S.C. § 8101.

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

this burden, the claimant must present rationalized medical evidence based upon a complete factual and medical background showing causal relationship.<sup>4</sup>

In the instant case, appellant established that she was an employee of the United States, that her claim was timely filed, and that she sustained a sprain in the thoracic and lumbar region in the performance of duty. She was off work from February 28, 1996 and received continuation of pay to April 15, 1996 and thereafter received wage-loss compensation based on claims for continuing compensation.<sup>5</sup>

Dr. Mercier, a second opinion consultant Board-certified in orthopedic surgery, stated in a November 5, 1996 report that that there was no objective medical evidence to support appellant's continued complaints of cervical and lumbosacral pain. With respect to his findings regarding appellant's cervical spine, he found full, nonpainful range of motion of the neck. With respect to appellant's thoracic spine, he found forward flexion to 10 degrees, lateral bending equal without muscle spasm and noted that appellant was able to stand on her toes and heels. Although he noted pain on palpation of the lumbosacral spine and pain in straight leg raising, he was unable to provide objective findings to support her subjective complaints.

On the other hand, Dr. Lance diagnosed fibromyalgia and back spasm but did not explain her opinion that appellant's February 28, 1996 cervical and lumbosacral sprain caused either appellant's fibromyalgia or her back spasm. Inasmuch as Dr. Lance's report does not include a rationalized medical opinion in support of appellant's claim, her report does not result in a conflict of medical evidence with the report of Dr. Mercier. The weight of the medical evidence is represented by Dr. Mercier's well-reasoned opinion that appellant no longer has residuals of her February 28, 1996 work-related injury.

The medical evidence of record therefore does not support, with rationalized medical evidence, a finding that appellant has a medical condition on or after November 5, 1996 causally related to her February 28, 1996 accepted injury.

In a nonmerit decision dated April 27, 1999, the Office denied appellant's request for modification of the June 12, 1998 hearing representative's decision on the basis that appellant had not submitted any relevant or material evidence in support of her request for reconsideration.

The Board finds that the Office did not abuse its discretion by denying merit review on April 27, 1999.

Section 8128(a) of the Act<sup>6</sup> provides for review of an award for or against payment of compensation. Section 10.138 of the statute's implementing regulation, requires a written request by a claimant seeking review that specifies the issues which the claimant wishes the Office to review and the reasons why the decision should be changed.<sup>7</sup> Thus, a claimant may

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<sup>4</sup> *Joseph T. Gulla*, 36 ECAB 516 (1985).

<sup>5</sup> *See Donald Leroy Ballard*, 43 ECAB 876 (1992).

<sup>6</sup> Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office.<sup>8</sup>

Section 10.138(b)(2) provides that, if a request for review of the merits of the claim does not meet at least one of the three requirements, the Office will deny the request without reviewing the merits. If a claimant fails to submit relevant evidence not previously of record or advance legal contentions or facts not previously considered, the Office has the discretion to refuse to reopen a case for further consideration of the merits pursuant to section 8128.<sup>7</sup>

In this case, the Office properly declined to review the merits of appellant's claim on April 27, 1999. In requesting reconsideration, appellant was required to submit evidence addressing continuing disability after November 5, 1996 causally related to her employment injury. The evidence submitted by appellant in support of her request for reconsideration had been considered previously by the Office. Inasmuch as appellant failed to submit new and relevant evidence probative to the issue of whether her medical condition on or after November 5, 1996 was causally related to her employment injury, the Office acted within its discretion in declining to reopen the claim.

The decisions of the Office of Workers' Compensation Programs dated April 27, 1999 and June 12, 1998 are affirmed.

Dated, Washington, D.C.  
May 19, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>8</sup> *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).