

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. MAYERS and U.S. POSTAL SERVICE,
REMOTE ENCODING CENTER, Kearny, NJ

*Docket No. 00-1601; Submitted on the Record;
Issued April 20, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement and entitlement to medical benefits effective March 6, 1997 on the grounds that she had no further disability or injury residuals, causally related to her accepted employment injury; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On May 17, 1996 appellant, then a 28-year-old data conversion operator, filed a notice of occupational disease (Form CA-2) alleging that on May 10, 1996 she first became aware that pain in her right and left arms and wrists and numbness in fingers of both hands and both elbows were attributable to her federal service.

In a medical report dated May 24, 1996, Dr. David E. Gross, Board-certified in orthopedic surgery, stated that he had examined appellant that day and reported findings. He noted that appellant had normal range of motion of the right elbow but with pain, normal range of motion of the right wrist, a negative Phalen's test and no atrophy or swelling along her flexor or extensor tendons. Dr. Gross also noted appellant's complaints of pain in the forearms and some diminished sensibility to a light touching throughout the hand and weakness secondary to pain. He stated that appellant had tendinitis of the right hand, nonspecific and possible carpal tunnel syndrome. Dr. Gross added that appellant's history included "some occupational cause." Appellant was ordered off work pending a follow-up examination.

In a medical report dated May 31, 1996, Dr. Gross noted appellant's subjective complaints of pain in spite of her stopping all work and all repetitive use of the right hand. Upon examination, he noted a positive Phalen's test at 15 seconds, but noted no findings of the neck, elbow or forearm. Dr. Gross requested authorization for an electromyography (EMG) test to determine whether appellant had carpal tunnel syndrome and kept her off work.

In a medical report dated June 25, 1996, Dr. Gross stated that he had examined appellant that day noting subjective complaints of numbness in her right hand causing pain to her shoulder. Upon examination, he noted diminished sensibility in the right hand, no atrophy and a negative Tinel's sign and negative Phalen's sign. Dr. Gross stated: "Presumed right carpal tunnel syndrome" and "pains throughout the right upper extremity and shoulder. I think there is some tendinitis. The history concludes some causal relationship."

In a medical report dated July 9, 1996, Dr. Gross stated that appellant remained symptomatic with pain in her right upper extremity including her shoulder, elbow and hand. He provided the following range of motion measurements for loss of use of the right shoulder; abduction of 140 degrees, forward elevation 150 degrees, extension 30 degrees, internal and external rotation about 70 degrees. He noted that her right wrist and hand showed full active range of motion noting subjective pain but noted that her "pains do seem out of proportion to the physical findings." Dr. Gross further stated that an EMG test was a necessity and kept her off work.

In a medical report dated July 23, 1996, he stated that he had examined appellant that day and noted essentially negative findings. He stated that appellant's complaints "remain impossible to localize," noting subjective complaints around the shoulder, elbow, frequently around the wrist and hand but on that day around dorsal area of the wrist. Right shoulder range of motion findings were active abduction of 140 degrees, internal rotation 70 degrees and external rotation of 80 degrees and no weakness noted. Dr. Gross noted, however, that when flexing 90 degrees in the right wrist she complained of pain in the dorsal wrist. He also reported that her right elbow and right wrist had full range of motion, negative Tinel's sign and negative Phalen's sign. Dr. Gross also noted that her physical examination showed marked improvement in her right upper extremity with no pertinent objective abnormal findings. He added that based on his negative findings appellant "was capable of returning to her regular work ... and she agreed." Dr. Gross then noted that appellant "was not otherwise in active treatment." He noted a final diagnosis as nonspecific tendinitis to the right upper extremity with possible carpal tunnel syndrome.

On August 20, 1996 the Office accepted appellant's claim for right hand tendinitis and authorized a right hand EMG test.

By letter dated October 22, 1996, the Office advised appellant that she had been placed on the periodic compensation rolls to receive compensation benefits for temporary total disability of her right hand tendinitis. The Office also advised appellant that she would be referred to a second opinion physician. In a statement of accepted facts also dated October 22, 1996, the Office noted that Dr. Gross was appellant's physician of record, that he had returned her to regular duty, but that the employing establishment declined to assign her work until her claim was adjudicated by the Office.

In a medical report dated September 20, 1996 and received by the Office on October 29, 1996, Dr. Bernard Schanzer, Board-certified in neurology, stated that he read appellant's EMG studies taken that day as normal, revealing no evidence of carpal tunnel syndrome or cervical radiculopathy.

In a medical report dated October 4, 1996 and received by the Office on October 29, 1996, Dr. Gross stated that his examination of appellant's right wrist noted normal active motion in all directions, that sensibility to light touch and pinprick was normal, that her Tinel's and Phalen's test results were normal. He found no atrophy or weakness.

In a medical report dated October 15, 1996 and received by the Office on November 7, 1996, Dr. Gross noted that he had reviewed Dr. Schanzer's report of the EMG test, which he noted had revealed no evidence of carpal tunnel syndrome. He also noted that results from an examination that day remained nonspecific, stating that he could find no positive physical findings; however, Dr. Schanzer stated that appellant had tendinitis of the right upper extremity.

In a memorandum for the file dated November 14, 1996, Elizabeth Hartshorn, a registered nurse, assigned to work with appellant, noted that a second opinion physician should be done.

On January 29, 1997 the Office issued a notice of proposed termination of compensation for wage loss. The Office determined that the weight of the evidence, resting with the opinion of Dr. Gross in orthopedic surgery, who established that appellant no longer had any continuing disability or residuals related to her accepted right hand injury.

In a decision dated March 4, 1997, the Office terminated appellant's compensation and medical benefits effective that date.

By letter dated February 5, 1998, appellant, through counsel, requested reconsideration. In support of her request for reconsideration, appellant submitted a medical report dated March 17, 1999 from Dr. Andrew Carollo, Board-certified in orthopedic surgery.¹ In his report, Dr. Carollo stated that appellant had been seen initially on October 16, 1996. Appellant's records revealed that she was found to have had a tense right trapezial muscle border and a tender right shoulder. She also had discomfort around the cervical region, diminished triceps reflexes on the right side and a weak right grip as opposed to the left. X-rays of the cervical spine and right shoulder were normal. Appellant was diagnosed with acute inflammation of the right girdle and right upper extremity, with accompanying right subdeltoid bursitis on the right as well as bicipital tendinitis. It was noted that appellant had symptomology compatible with carpal tunnel syndrome. Dr. Carollo then noted that appellant was seen for a follow-up appointment on October 30, 1996² where she reported pain radiating from her right shoulder into her right hand and pain in her right trapezius with spasm. He noted that a magnetic resonance imaging (MRI) scan had been recommended but had not been authorized, then stated that appellant from that time "was lost to follow-up." Dr. Carollo based on an examination that day, determined that

¹ The Board notes that appellant's attorney requested that the Office postpone its decision on appellant's request for reconsideration until additional medical evidence was submitted. Thus Dr. Carollo's report is dated more than a year from the date of appellant's request for reconsideration.

² Dr. Carollo noted that appellant returned for a follow-up appointment on October 10, 1996. However, it appears that appellant was seen on October 30, 1996 by Dr. Donald J. Holtzman, who was in practice with Dr. Carollo at the Elizabeth Orthopaedic Group. Dr. Holtzman's reports dated October 30, 1996, consisted of a diagnosis of cervical sprain and strain, bursitis and tendinitis of the right shoulder, a treatment plan and a prescription for a cervical spine MRI scan.

appellant had pain on the right upper extremity and pain and spasm involving the cervical spine. He stated that neurologically appellant demonstrated diminished triceps reflex on the right side and that her right hand condition was “compatible with a degree of carpal tunnel syndrome.”

By merit decision dated August 16, 1999, the Office denied appellant’s request for reconsideration on the basis that the evidence submitted was insufficient to warrant modification of the prior decision.

By letter dated October 28, 1999, appellant again requested reconsideration. In support of her request, appellant submitted two narrative statements describing her positions with her private sector employer and the employing establishment as well as her counsel’s argument that appellant should have been referred to a second opinion physician.

In a nonmerit decision dated January 14, 2000, the Office denied appellant’s application for review finding that, as the evidence submitted in support of the application neither raised substantive legal issues nor included new and relevant evidence, it was insufficient to warrant review of the prior decision.

The Board finds that the Office properly terminated appellant’s entitlement to compensation and medical benefits on March 6, 1997 on the grounds that the medical evidence failed to establish that appellant had any disability or medical residuals causally related to her May 10, 1996 employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁵ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁶

In this case, Dr. Gross, appellant’s physician of record, stated in medical reports dated July 9 and 23, 1996 and October 4 and 15, 1996, that appellant had full range of motion of the right wrist and hand, that her Tinel’s and Phalen’s tests were negative and that he could find no objective basis for appellant’s pain in her right hand, opining that her pain was out of proportion to her symptoms. Both he and Dr. Schanzer, Board-certified in neurology, noted that appellant’s EMG study revealed no objective findings to support a neurological condition. Dr. Carollo’s

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁶ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

report, on the other hand, noted several medical conditions including an acute inflammation of the right shoulder girdle and right upper extremity, however, he did not attribute these conditions to appellant's employment nor were any of the conditions accepted by the Office.

The Office properly found that Dr. Gross' medical reports were thorough, complete and well rationalized and was based upon a proper factual and medical background and that it, therefore, represented the weight of the medical opinion evidence in establishing that appellant's employment-related disability due to a 1996 right-hand tendinitis had ceased, that she had no further employment-injury related residuals and that any continuing medical conditions were not related to her employment.

Consequently, the Office has discharged its burden of proof to justify termination of appellant's compensation and medical benefits effective March 4, 1997.

Further, the Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

Section 8128(a) of the Act⁷ 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.⁸ Although it is a matter of discretion on the part of the Office of whether to reopen a case for further consideration under section 8128(a), the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration.⁹ By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.606 and 10.607 of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹⁰ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.¹¹ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.¹² When a claimant fails to

⁷ 5 U.S.C. § 8128(a).

⁸ *Jeanette Butler*, 47 ECAB 128, 129-30 (1995).

⁹ *Id.*

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ 20 C.F.R. §§ 10.606(b)(2).

¹² 20 C.F.R. § 10.607(a).

meet one of the above-mentioned 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.¹³

Section 10.608 provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.¹⁴

Evidence which does not address the particular issue involved, or evidence which is repetitive or cumulative of that already in the record, does not constitute a basis for reopening a case.¹⁵ However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence, which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.¹⁶

In support of her request for reconsideration, appellant submitted statements describing her private sector and federal positions as well as her counsel's argument that the Office should have referred her to a second opinion physician. However, appellant's claim was based on medical evidence, which established that she no longer had residual medical conditions as a result of her May 10, 1996 work-related right hand tendinitis. Consequently, the evidence submitted by appellant did not meet the requirements set forth at 20 C.F.R. § 10.608, noted above.¹⁷ For these reasons, the Office's refusal to reopen the case for a merit review did not constitute an abuse of discretion.

¹³ *Joseph W. Baxter*, 36 ECAB 228 (1984).

¹⁴ 20 C.F.R. § 10.608.

¹⁵ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

¹⁶ *Id.*

¹⁷ *See Alton L. Vann*, 48 ECAB 259, 269 (1996) (evidence that does not address the particular issue involved does not constitute a basis for reopening a case).

The decisions of the Office of Workers' Compensation Programs dated January 14, 2000 and August 16, 1999 are affirmed.

Dated, Washington, DC
April 20, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member