

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TAMMY L. SMITH and DEPARTMENT OF THE TREASURY,
U. S. CUSTOMS SERVICE, San Ysidro, CA

*Docket No. 99-2463; Submitted on the Record;
Issued August 6, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant continuation of pay; and (2) whether the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.¹

On March 10, 1999 appellant, then a 35-year-old canine enforcement officer, filed a notice of traumatic injury alleging that on March 8, 1999 she pulled neck and shoulder muscles while playing tug-of-war in training her dog. Appellant stopped work on March 9, 1999 and returned on March 11, 1999.

Accompanying the claim was a March 10, 1999 attending physician's report by Dr. John H. Serocki, a Board-certified orthopedic surgeon, who diagnosed neck pain and possible cervical radiculopathy and recommended a magnetic resonance imaging (MRI) scan. Dr. Serocki stated that appellant gave no specific history of injury and that her symptoms developed gradually over the past four years while working as a canine enforcement officer. In a March 17, 1999 follow-up evaluation, Dr. Serocki stated that a March 15, 1999 MRI found no evidence of a disc herniation.

In April 1999, the Office requested a narrative medical report from appellant's attending physician, which included a history of injury, examination findings, test results, diagnosis, treatment provided, prognosis, period and extent of disability and an opinion on the relationship of the diagnosed condition to her federal employment activity.

On April 8, 1999 Dr. Serocki stated: "Specific activities that worsened [appellant's] condition included lifting the dog as well as playing tug-of-war with a towel." He added that "forceful pulling, pushing and lifting are all activities that can cause increased stresses on the cervical spine." Dr. Serocki concluded: "Based upon available information, it, therefore,

¹ 5 U.S.C. §§ 8101-8193.

appears that [appellant's] current disability as it is related to her neck both arose out of and in the course of her employment as a canine enforcement officer for the [employing establishment]."

By decision dated April 26, 1999, the Office accepted appellant's claim for cervical strain. That same date the Office notified appellant that based on Dr. Serocki's April 8, 1999 report, her claimed condition was the result of performing her federal job duties for more than one work shift and, therefore, she was not entitled to continuation of pay during her absence from work.²

In an April 21, 1999 report, Dr. Serocki stated: "[Appellant] appears to have sustained a neck injury that arose out of and during the course of her duties as a canine enforcement officer for the [employing establishment]. Her current diagnosis is cervical sprain with radiculopathy." He added that at that time appellant was temporarily totally disabled for work and recommended that appellant see a neurologist and spinal specialist for additional evaluation.

In a May 3, 1999 Office referral for nurse intervention, the Office in a statement of accepted facts stated that appellant sustained an injury to her neck on March 8, 1999.

In a May 12, 1999 report, Dr. Julio Zonis, a Board-certified neurologist, to whom Dr. Serocki had referred appellant, stated:

"On March 8, 1999 after pulling a heavy dog while at work, she suddenly felt a sharp pain in the right shoulder and neck area. The pain spread down the arm. She also had a feeling of numbness and tingling in the right hand. Since the initial injury, she has had the same type symptoms."

Dr. Zonis mentioned that the MRI revealed central focal disc protrusions at the C3-4, C4-5 and C5-6 levels with some mild degree of spinal stenosis and diagnosed cervical radiculopathy with elements of carpal tunnel syndrome.

Appellant was referred to Dr. Broslav Stojic, a Board-certified orthopedic surgeon, for a second opinion evaluation. The Office instructed the second opinion physician to base his medical opinion only on the June 1, 1999 statement of accepted facts and not on previous medical reports.³

On June 3, 1999 the record was supplemented with appellant's May 24, 1999 letter, disagreeing with the Office's April 26, 1999 decision denying continuation of pay and requesting a hearing.

By decision dated June 14, 1999, appellant was awarded payment for lost wages from May 29 to August 14, 1999.

² In an April 29, 1999 memorandum to file, a senior claims examiner determined that based on the medical evidence of record, the claim was accepted as an occupational disease.

³ The June 1, 1999 statement of accepted facts treated the claim as a traumatic injury with a date of injury of March 8, 1999.

In a June 7, 1999 report, Dr. Alan Horowitch a Board-certified orthopedic surgeon, stated that “[Appellant] was training with her dog on March 8, 1999 when she felt a sudden pull in her neck and a burning sensation.” He diagnosed cervical strain and right carpal tunnel syndrome.

By decision dated July 26, 1999, the Office denied appellant’s request for a hearing on the grounds that it was not filed within 30 days of the Office’s last merit decision on April 26, 1999. The Office stated that it had considered the matter in relation to the issue involved and further denied appellant’s hearing request on the basis that the case could be resolved by submitting additional evidence on reconsideration to establish that she was entitled to continuation of pay as a result on her work injury on March 8, 1999.

The Board finds that this case is not in posture for decision.

Appellant filed a claim for a traumatic injury that she alleged occurred on March 8, 1999. The Office after reviewing the medical evidence of record and determining that appellant’s condition occurred from performing her duties as a canine enforcement officer over a period of time, accepted the case as an occupational disease claim. By another decision dated April 26, 1999, the Office notified appellant that she was not entitled to continuation of pay. In June 1999 the Office referred appellant for a second opinion and prepared a statement of accepted facts dated June 1, 1999 stating that appellant sustained a neck injury on March 8, 1999. The Office specifically instructed the second opinion physician to ignore the previous medical reports and rely on the June 1, 1999 statement of accepted facts as the factual framework in rendering a decision.

The record supports that the Office at one point treated this case as an occupational disease claim, but later treated it as a traumatic injury claim. After receiving the second opinion report, the Office took no further action concerning the type of case or whether appellant was entitled to continuation of pay. Until the question of whether this case is a traumatic injury or occupational disease claim is resolved, the issue of entitlement to continuation of pay is not in posture for decision. Therefore, the case must be remanded for clarification and further development as necessary.

On remand the Office should state whether this case is an occupational disease or traumatic injury claim and make a determination on the issue of continuation of pay.

The July 26 and April 26, 1999 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.⁴

Dated, Washington, DC
August 6, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁴ In view of the Board's decision, it is unnecessary to address the second issue in this case.