

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARCIA E. STAMBACK and DEPARTMENT OF DEFENSE,  
DEFENSE DEPOT, Ogden, UT

*Docket No. 99-1349; Submitted on the Record;  
Issued February 1, 2001*

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DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

On March 10, 1976 appellant, a 29-year-old warehouseman, was struck in the head by a 50-pound carton. Appellant filed a claim for benefits, which the Office accepted for severe contusion of the cervical dorsal spine and occipital portion of the skull. She returned to full duty one week after her work accident and worked in that capacity until August 2, 1976, when she was placed on light duty due to continued complaints of pain. Appellant continued to work on light duty until November 10, 1978 when she went off work. Appellant returned to work on September 26, 1986 in a modified position as a material expediter, in which capacity she worked until April 30, 1990, when her position was terminated due to lack of funding. She has not returned to work since that time. The Office paid her appropriate compensation for temporary total disability and placed her on the periodic rolls.

In a work restriction evaluation dated January 6, 1992, Dr. William R. Schmidt, a specialist in neurology and appellant's treating physician, indicated that appellant had the following restrictions: no continuous sitting or walking for more than four hours; no lifting; intermittent squatting for no more than two hours; intermittent climbing for not more than four hours; and intermittent kneeling, twisting and standing for no more than two hours. Dr. Schmidt also restricted appellant from pushing and pulling, reaching or working above the shoulder and working in cold temperatures.

In a report dated March 15, 1993, Dr. Schmidt indicated that appellant could work at a light-duty job for four hours, but would be limited to intermittent standing and sitting for one hour per day, continuous sitting for three hours per day, intermittent walking up to one hour per day, limited, occasional lifting and carrying of zero to ten pounds, occasional bending and reaching with no weight overhead to count inventory, with no climbing, twisting or kneeling.

By letters dated June 6, 1997, the Office referred appellant for a second opinion with Dr. Robert G. Weiner, a Board-certified orthopedic surgeon, in order to determine her current condition. In an opinion dated July 18, 1997, Dr. Weiner reviewed the statement of accepted facts and appellant's medical records, stated findings on examination and concluded that appellant had post-traumatic cervical arthrosis with marked functional overlay. He stated:

"There are no objective findings to substantiate [appellant's] present subjective complaints. [Appellant] has had numerous objective studies, including MRI's [magnetic resonance imaging] and EMG's [electromyelogram], which have failed to demonstrate any organic pathology that would explain her persistent symptoms....

"I feel that [appellant's] injury resulted in some soft tissue damage and possibly intervertebral dis[c] irritation. One would expect those symptoms to have resolved long ago, usually within three months of the injury. Certainly, the injury cannot explain her intermittent episodes of low back discomfort.

"While there are no objective findings that would prevent [appellant] from returning to her previous occupation, in view of her age it would be recommended that she avoid lifting over 50 pounds."

The Office issued a proposed notice of termination on October 7, 1997. The Office found, based on Dr. Weiner's opinion, that appellant no longer had any continuing related disability related to the March 10, 1976 employment injury. The Office indicated that appellant had 30 days in which to submit any additional medical evidence or legal argument in opposition to the proposed termination.

Appellant's attorney submitted a letter to the Office dated October 31, 1997 which contested the proposed termination. Accompanying the letter was an October 31, 1997 report from Dr. Schmidt who stated:

"[Appellant] has [t]horacic [o]utlet [s]yndrome which has been aggravated by her cervical injury at work....

"[Appellant] has ... which results in variable numbness of her hands, forearms, with aching pain and some loss of dexterity. Her symptoms wax and wane according to how much muscle spasm she has. This all is temporally related to her original injury and her restrictions remain the same as they have always been."

By decision dated November 10, 1997, the Office terminated appellant's compensation, effective December 7, 1997, finding that Dr. Weiner's opinion represented the weight of the medical evidence.

By letter dated November 5, 1998, appellant's representative requested reconsideration. In support of the request, appellant submitted a January 26, 1998 report from Dr. Schmidt, who stated:

"When I first saw [appellant] she had [t]horacic [o]utlet [s]yndrome, which I thought was due to her work involving lifting.... Thoracic [o]utlet [s]yndrome is caused by pressure on the neurovascular bundle underneath the anterior scalene muscles below the clavicle and may occur spontaneously, but frequently is caused by physical activity such as lifting as in [appellant's] case. This is a clinical diagnosis and her symptom complex was quite characteristic. There was no question in my mind that the symptoms were work related and I have proscribed her from heavy lifting ever since I first saw her....

"In any case, she remains symptomatic and still has aching in her arms and intermittent numbness and I still feel she should not be doing a job which involves lifting. So far as objective findings are concerned, she has had variable numbness as well as a positive Adson's through the years and her symptoms have been persistent throughout the years and documented in my medical records."

By decision dated December 17, 1998, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence such that it was sufficient to require the Office to review its prior decision.

The Board finds that the Office did not abuse its discretion by refusing to reopen appellant's case for further review on the merits of her claim under 5 U.S.C. § 8128(a).

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her 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>1</sup> 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.<sup>2</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>3</sup>

In the present case, appellant has not shown that the Office erroneously applied or interpreted a point of law; he has not advanced a point of law or fact not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. Dr. Schmidt's January 26, 1998 report is cumulative and repetitive because it essentially reiterates findings from previous reports which indicated that appellant had thoracic outlet symptom, which was not a condition accepted by the Office or established as causally related to the March 10, 1976 work injury. Thus, appellant's request did not contain

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<sup>1</sup> 20 C.F.R. § 10.138(b)(1); *see generally* 5 U.S.C. § 8128(a).

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

<sup>3</sup> *Howard A. Williams*, 45 ECAB 853 (1994).

any new and relevant medical evidence for the Office to review. This is important since the outstanding issue in the case -- whether appellant had residual disability stemming from her accepted March 10, 1976 employment injury -- was medical in nature. All the other medical evidence submitted by appellant was previously of record and considered by the Office in reaching prior decisions.

Additionally, the November 5, 1998 letter from appellant's representative did not show the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. Although appellant generally contended that she continued to have disability resulting from her March 10, 1976 employment injury, she failed to submit new and relevant medical evidence in support of this contention. Therefore, the Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits. The Board therefore affirms the Office's December 17, 1998 decision.

The decision of the Office of Workers' Compensation Programs dated December 17, 1998 is hereby affirmed.

Dated, Washington, DC  
February 1, 2001

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member