

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSIE M. BAXTER and DEPARTMENT OF THE ARMY,
DIRECTORATE OF LOGISTICS, Fort Benning, GA

*Docket No. 00-2272; Submitted on the Record;
Issued June 12, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant sustained a recurrence of disability causally related to her 1991 employment injury; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

On May 16, 1991 appellant, then a 44-year-old warehouse worker, filed a traumatic injury claim alleging that on May 7, 1991 she hurt her lower back and right shoulder by pushing and pulling on a security door. The Office accepted the claim for strain of the right shoulder. Appellant stopped work on May 8, 1991 and returned to regular duty on May 10, 1991.

On February 25, 1999 appellant filed a notice of recurrence of disability alleging that her shoulder injury was misdiagnosed and that her rotator cuff tear was causally related to her 1991 employment injury. She did not stop work.

On May 5, 1999 the Office requested additional evidence from appellant in support of her claim. Specifically, the Office requested a description of her duties and physical condition on return to work following the original injury, an explanation of why she believed her current condition related to the original injury and a physician's opinion which supported causal relationship between her current condition and the original injury.

In response, appellant submitted a series of physical therapy notes and clinical notes which indicated that she had been treated for right shoulder impingement syndrome with a rotator cuff tear. In a note dated September 26, 1991, Dr. Conchita Ellorenco, an attending physician, discussed symptoms related to appellant's shoulder condition and recorded a history of a shoulder injury in May 1991. In a note dated November 1, 1994, Dr. George Zimmerman, an osteopath, evaluated appellant's continued symptoms and stated that, three years prior, appellant felt a pull in her right shoulder while working in a warehouse for the employing establishment. In an orthopedic note dated February 11, 1997, Dr. Jeff Cartwright, a Board-certified orthopedic surgeon, diagnosed a rotator cuff tear secondary to impingement syndrome. He reported that

appellant sustained a traumatic event in 1991, after which she “sought successfully relief via a subacromial injection.”

By decision dated August 2, 1999, the Office denied appellant’s claim on the grounds that the evidence failed to establish that appellant’s recurrence of disability was causally related to her May 7, 1991 employment injury. She requested reconsideration on January 27, 2000. By decision dated March 17, 2000, the Office denied appellant’s application for review on the grounds that the evidence submitted was insufficient to warrant merit review.

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a recurrence of disability causally related to the 1991 employment injury.

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed recurrence of disability in September 1991 and her May 7, 1991 employment injury.¹ 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.²

The medical evidence submitted to support appellant’s recurrence claim does not establish a causal relationship between her alleged recurrence of disability and her May 7, 1991 accepted employment injury. The physical therapy notes submitted in support of the claim have no probative value, as physical therapists are not considered physicians under the Federal Employees’ Compensation Act.³

The clinical notes from September 26, 1991 to August 4, 1998 did not establish that appellant’s diagnosed shoulder condition was causally related to the accepted right shoulder strain. Specifically, Dr. Ellorencio’s September 26, 1991 report mentioned the 1991 injury did not contain a rationalized medical opinion relating appellant’s ongoing shoulder condition to her May 7, 1991 strain. Dr. Zimmerman simply noted that three years before appellant felt a pull in her right shoulder while working, but failed to discuss a causal relationship.

Dr. Cartwright’s report dated February 11, 1997 also failed to address the issue of whether appellant’s current shoulder condition was causally related to her May 7, 1991 employment injury. He merely provided a brief history of the May 7, 1991 employment incident and noted his diagnoses and treatment. In fact, Dr. Cartwright established that appellant’s employment-related injury had resolved via a subacromial injection. No other evidence of record establishes a causal relationship between appellant’s alleged recurrence of disability and her May 7, 1991 employment injury.

¹ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

² *See Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

³ 5 U.S.C. § 8101 *et seq*; *Thomas R. Horsfall*, 48 ECAB 180 (1996).

The Board further finds that the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a).⁴

Under section 8128(a) of the Act,⁵ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁶ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the [Office].

Section 10.608(b) 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) will be denied by the Office without review of the merits of the claim.⁷

In this case, appellant argued that she was still receiving medical treatment for the injury. She submitted a November 2, 1999 note from Dr. Gene Griffiths, a Board-certified orthopedic surgeon, who indicated that appellant's injuries had been well documented in her medical records and dated back to a right knee injury on July 3, 1991 and right shoulder pain requiring treatment in the orthopedic clinic since September 26, 1991.

Dr. Griffiths' report was repetitive of information already in the record. The Office had previously determined that other notes regularly reported that appellant had shoulder pain related to impingement syndrome and a rotator cuff tear, but did not contain a physician's statement relating appellant's current condition to her employment. Dr. Griffiths' report also failed to provide a medical opinion relating any of appellant's conditions to her employment injury of May 7, 1991.

Inasmuch as appellant neither showed that the Office erroneously applied or interpreted a specific point of law advanced a point of law not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office, the Board finds that the Office acted within its discretion in refusing to reopen her claim for merit review.

⁴ See 20 C.F.R. § 10.606(b)(2)(i-iii)

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b) (1999).

⁷ 20 C.F.R. § 10.608(b).

The March 17, 2000 and August 2, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
June 12, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member