

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELISE A. WILLIAMSON and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 00-132; Submitted on the Record;
Issued October 3, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence of disability for periods from July 17, 1995 through September 28, 1998 as a result of her accepted employment injury; (2) whether appellant's left shoulder and chest conditions are causally related to her federal employment; and (3) whether the Office of Workers' Compensation Programs properly denied appellant's December 22, 1998 request for reconsideration on the grounds that it was untimely filed with respect to its December 2, 1997 decision and failed to show clear evidence of error.

Appellant injured her hands and wrists as a result of repetitive motion in the course of her federal employment as a mail clerk. The Office accepted that she sustained bilateral tendinitis and tenosynovitis of the hands and wrists. Appellant received compensation for temporary total disability on the periodic rolls. On July 23, 1993 she returned to limited duty as a modified distribution clerk.

In a decision dated December 2, 1997, the Office denied appellant's claim that she sustained a recurrence of disability on or about March 10, 1994. The Office found that the evidence failed to establish that the claimed recurrence was causally related to appellant's December 22, 1988 employment injury.

In a decision dated October 8, 1998, the Office denied compensation for wage loss for the period July 17, 1995 through September 28, 1998. The Office found that the medical evidence of record failed to demonstrate that appellant was disabled for that period. None of the evidence indicated a change in the nature and extent of appellant's accepted work-related diagnosis of bilateral hand and wrist tendinitis that would have prohibited her from performing her limited-duty position. There was no evidence demonstrating a change in her limited-duty job requirements. Further, there was no probative medical evidence to support that the diagnosed de Quervain's tendinitis, both hands, left shoulder and chest pain were causally related to the accepted conditions or to the limited duties.

On December 22, 1998 appellant requested reconsideration. In support thereof she submitted an August 17, 1998 report from Dr. Deborah Basile, her attending internist; an October 2, 1995 electrocardiogram (EKG); a January 12, 1998 radiology report, January 28, 1998 magnetic resonance imaging (MRI) scan, an October 29, 1998 MRI scan, a December 4, 1998 corrected MRI scan, a December 9, 1998 notice of proposed separation a December 7, 1998 letter from the employing establishment regarding a deferred step increase due to accumulation of leave without pay, a December 1, 1998 leave request, a December 9, 1998 functional capacity evaluation (FCE), October 6 and a November 25, 1998 reports from Dr. Basile. The Office also received a December 20, 1998 report from Dr. Basile and photographs of appellant's work area.

The Office issued two decisions on February 8, 1999. In one, the Office denied appellant's December 22, 1998 request for reconsideration because it was not dated within one year of the Office's December 2, 1997 decision denying appellant's claim that she sustained a recurrence of disability on or about March 10, 1994. The Office found that the evidence submitted in support of appellant's request did not show clear evidence of error in the Office's decision.

In the other decision issued on February 8, 1999, the Office found that the medical and factual evidence was insufficient to establish that appellant was totally disabled as a result of her accepted work-related condition during the period July 17, 1995 through September 28, 1998 or that the claimed conditions of tendinitis of the left shoulder and chest pain were causally related to her federal employment. The Office noted that appellant failed to present any evidence to demonstrate a change in her limited-duty job requirements or to support her allegations that she was forced to work outside of her restrictions.

On February 26, 1999 appellant requested reconsideration. She argued that the Office had committed error under 20 C.F.R. § 10.607(b) and that she had in fact filed her request for reconsideration in a timely fashion. She submitted 68 exhibits to support her request.

In a decision dated May 28, 1999, the Office denied modification of the February 8, 1999 decision that denied compensation for wage loss during the period July 17, 1995 through September 28, 1998. The Office found that the evidence submitted failed to establish that appellant's accepted work-related conditions had changed to such a degree that she was unable to perform the limited-duty position. The Office also found that the evidence failed to demonstrate that the limited-duty job requirements had changed to such a degree that appellant was unable to perform the required tasks. The Office further found that the evidence failed to establish that the claimed left shoulder and chest conditions were medically connected to any specific employment factors or to accepted work conditions.

The Board finds that the evidence of record fails to establish that appellant sustained a recurrence of disability for periods from July 17, 1995 through September 28, 1998 as a result of her accepted employment injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-duty position, the employee has the burden to

establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.¹

Appellant has shown neither. The record contains a doctor's note dated July 17, 1995 indicating that appellant was seen for synovitis of the right thumb and asking that she be excused from work that day. A November 2, 1995 note states that appellant has severe tendinitis and is unable to perform her duties but may return to work on November 9, 1995. An April 4, 1996 note states that appellant has chronic rheumatic symptoms from her hands and wrists that seem exacerbated by repetitive physical activity and that she can no longer case the mail. An April 10, 1996 note states that appellant had a flare-up the previous weekend and could not work for four days. An April 18, 1996 note states that she may return to work on April 18, 1996. Disability certificates on January 10 and January 20, 1997 indicate that appellant was off work. A June 21, 1997 note states that appellant was unable to work since June 17, 1997 and that she could return to work for four hours a day for 10 days. In a July 8, 1997 form report, Dr. Basile indicated that appellant's costochondritis and tendinitis were related to employment because repetitive tasks aggravated her discomfort. On January 14, 1998 Dr. Basile reported that appellant was experiencing pain in her hands, especially the right hand and wrist. She stated that appellant was unable to perform her duties "at this time." Dr. Basile's February 5, 1998 note indicates that appellant was able to return to work that day. On September 28, 1998 Dr. Basile noted that appellant had suffered with tendinitis since 1994 and had been unable to work due to this problem from July 28 to September 28, 1998. Appellant, she added, had other complications.

This medical evidence fails to discuss, with sound medical reasoning, how the accepted bilateral tendinitis and tenosynovitis conditions² changed such that appellant could no longer perform her limited-duty assignment on the specific days or during the specific periods for which she seeks compensation.³ Disability certificates, form reports and brief notes are insufficient to discharge appellant's burden of proof. Radiology reports, MRIs, EKGs and FCEs are also insufficient, as they offer no reasoned medical opinion addressing how appellant's bilateral tendinitis and tenosynovitis conditions had changed to cause disability for the limited-duty assignment.⁴ Photographs and other nonmedical evidence are irrelevant to the medical question raised in this case.

¹ See *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

² The Office has not accepted osteoarthritis, fibromyalgia, costochondritis, de Quervain's syndrome or psychological stress as an employment-related condition.

³ See *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954) (probative value of conclusions unsupported by medical rationale).

⁴ The FCE was prepared by a physical therapist. The reports of physical therapists have no probative value on medical questions because a physical therapist is not a physician as defined by 5 U.S.C. § 8101(2) and, therefore, is not competent to render a medical opinion. *Barbara J. Williams*, 40 ECAB 649, 657 (1988).

In an August 17, 1998 report,⁵ Dr. Basile related appellant's history and complaints. She noted that appellant was required to perform repetitive hand movements at work, which caused pain and swelling of the hands and wrists and even visits to the emergency room because of chest pain. Dr. Basile listed, according to appellant's account, the days that appellant missed from work. She stated that appellant required total disability: Despite various medications, treatments and job changes, appellant continued to experience disabling pain over several years that had now taken a psychological toll.

On December 20, 1998 Dr. Basile related appellant's complaints and appellant's personal belief that these complaints were significantly related to her job. She again reported that appellant's job demanded repetitive motion and that appellant was unable to perform repetitive tasks using her left hand, specifically her left thumb and was unable to keep her arm elevated above her head for any specific period of time. Dr. Basile recommended either half-time duties or placement in a position where constant repetitive motion and use of the left arm were not required.

These narrative medical reports are also insufficient to discharge her burden of proof. Dr. Basile attributed appellant's complaints to the repetitive hand movements that her work required. The record, however, does not establish that appellant's limited-duty assignment required constant repetitive hand movements. Dr. Basile, therefore, appears to have relied on an inaccurate or at least unproven factual premise, which diminishes the probative value of her report.⁶

Because the record fails to establish a change in the nature and extent of appellant's injury-related condition or a change in the nature and extent of her limited-duty job requirements, the Board must affirm the Office's May 28 and February 8, 1999 merit decisions denying compensation for wage loss during the period July 17, 1995 through September 28, 1998.

The Board also finds that appellant has not met her burden of proof to establish that her left shoulder and chest conditions are causally related to her federal employment.

A claimant seeking benefits under the Federal Employees' Compensation Act⁷ has the burden of proof to establish the essential elements of her claim by the weight of the evidence,⁸ including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.⁹

⁵ The report is dated August 17, 1997, but references to subsequent dates support that the year was mistyped.

⁶ See *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

⁹ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

Because the Office accepts that appellant sustained an injury in the performance of duty, it remains for appellant to establish that her left shoulder and chest conditions, for which she claims compensation are causally related to that employment injury.

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between her claimed condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the claimed condition is related to the injury.¹⁰

The record contains no such medical opinion evidence. Appellant reported pain extending up her left arm to the area of the shoulder and the chest wall and Dr. Basile noted that appellant has some emergency room visits for chest wall pain to rule out a myocardial infarction. She, however, has not explained how appellant's diagnosed left shoulder or chest wall condition is causally related to the accepted employment injury. Without a sound medical explanation of causal relationship, based on an accurate factual and medical history, the medical record is insufficient to discharge appellant's burden of proof. The Board will affirm the Office's May 28 and February 8, 1999 merit decisions denying compensation for a left shoulder and chest condition.

The Board further finds that the Office properly denied appellant's December 22, 1998 request for reconsideration on the grounds that it was untimely filed with respect to its December 2, 1997 decision and failed to show clear evidence of error.

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."¹¹

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607 provides that an application for reconsideration must be sent within one year of the date of the Office decision for which review is sought. The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most

¹⁰ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

¹¹ 5 U.S.C. § 8128(a).

recent merit decision. The application must establish, on its face, that such decision was erroneous.¹²

On February 8, 1999 the Office issued a nonmerit decision finding that appellant's December 22, 1998 request for reconsideration was not dated within one year of the Office's December 2, 1997 decision, which denied appellant's claim that she sustained a recurrence of disability on or about March 10, 1994. The Office was correct: Appellant's December 22, 1998 request is untimely with respect to the Office's December 2, 1997 decision. The question for determination, therefore, is whether this request for reconsideration shows clear evidence of error in the December 2, 1997 decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.¹³ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.¹⁴ Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁶ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁷ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the face of such evidence.¹⁹

The Board has reviewed appellant's December 22, 1998 request for reconsideration, together with all of the evidence submitted in support thereof and finds that it fails to show clear evidence of error in the Office's December 2, 1997 decision. That decision denied appellant's claim that she sustained a recurrence of disability on or about March 10, 1994 that was causally related to her accepted employment injury. None of the evidence submitted with appellant's December 22, 1998 request for reconsideration addresses this particular issue. Dr. Basile noted

¹² 20 C.F.R. § 10.607.

¹³ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁴ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁵ See *Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁶ See *supra* note 14.

¹⁷ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁸ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁹ *Gregory Griffin*, 41 ECAB 458, 466 (1990).

in her November 25, 1998 report that appellant had suffered with tendinitis since 1994. In her August 17, 1998 report she noted that appellant had additional complaints in her left shoulder and neck in 1994, started physical therapy, saw a second rheumatologist and worked three days a week in the Spring.²⁰ These references, which are the only medical references to appellant's condition in 1994, do not establish on their face that appellant's disability on or about March 10, 1994 was causally related to her accepted employment injury. In no respect do they show clear evidence of error in the Office's December 2, 1997 decision. The other evidence submitted with appellant's request has no bearing on the issue. The Board will affirm the Office's February 8, 1999 nonmerit decision denying appellant's December 22, 1998 request for reconsideration.

The May 28 and both February 8, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 3, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

²⁰ The Office has not accepted a left shoulder or neck condition as an employment-related condition.