

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHYLLIS N. MATLACK and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 02-441; Submitted on the Record;
Issued July 3, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant sustained a recurrence of disability on or after September 8, 1997.

On January 7, 1991 appellant, then a 38-year-old part-time flexible clerk, sustained an employment-related left shoulder strain and left shoulder fibromyalgia. The Office of Workers' Compensation Programs also accepted that, on January 24, 1997, she sustained employment-related cervical and bilateral trapezius strains. In January 1998, appellant filed a claim alleging that she sustained a recurrence of disability on September 8, 1997 due to "post-traumatic fibromyalgia." She stopped work on September 8, 1997 and did not return.¹ The Office treated this claim as a claim for a new injury and, by decision dated April 8, 1998, denied appellant's claim on the grounds that she did not sufficiently detail the work duties which she believed caused her condition.² In February 1998, appellant filed a claim alleging that she sustained bilateral carpal tunnel syndrome due to work factors such as repetitively lifting and sorting mail. By decision dated April 23, 1998, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained employment-related carpal tunnel syndrome.

The Board issued a decision and order³ on July 6, 2000 in which it affirmed the April 23, 1998 decision of the Office on the grounds that appellant did not meet her burden of proof to establish that she sustained employment-related carpal tunnel syndrome. The Board set aside the April 8, 1998 Office decision regarding appellant's claim that she sustained a recurrence of

¹ Appellant was working in a limited-duty position when she stopped work.

² In its April 8, 1998 decision, the Office misinterpreted appellant's January 1998 claim as a claim for a new fibromyalgia injury. However, her January 1998 claim should properly be interpreted as a claim for recurrence of total disability on September 8, 1997 due to her accepted employment-related conditions, including fibromyalgia.

³ Docket No. 98-2158.

disability on September 8, 1997 and remanded the case for further development of the medical evidence. The Board found that there was a conflict in the medical evidence on the issue of whether appellant sustained a recurrence of total disability on or after September 8, 1997 due to employment-related conditions, including fibromyalgia.⁴

Appellant was referred to Dr. George Shybut, a Board-certified orthopedic surgeon, for an impartial medical examination on whether she sustained a recurrence of disability. By decision dated November 21, 2000, the Office denied appellant's claim.⁵ By decision dated and finalized September 14, 2001, an Office hearing representative affirmed the Office's November 21, 2000 decision.

The Board finds that appellant did not establish that she sustained an employment-related recurrence of total disability on or after September 8, 1997.

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 reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such limited duty. 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.⁶

In the present case, there was a conflict in the medical opinion regarding whether appellant sustained a recurrence of disability. In order to resolve the conflict, the Office referred appellant, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to Dr. Shybut, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.⁷ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the

⁴ In a report dated September 1, 1997, Dr. Edward J. Berghausan, a Board-certified orthopedic surgeon acting as an Office referral physician, indicated that appellant continued to have employment-related left shoulder fibromyalgia and left shoulder strain. He determined, however, that appellant could perform work duties, which were within the restrictions of the light-duty job she performed when she stopped work on September 8, 1997. In a report dated April 8, 1998, Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon acting as an Office referral physician, determined that appellant did not have employment-related fibromyalgia or otherwise have residuals of her January 1991 employment injury; he further determined that appellant could return to her job as a clerk. In contrast, Dr. Thomas Romano, an attending Board-certified internist, determined in an April 23, 1998 report that appellant continued to have employment-related fibromyalgia which prevented her from performing the repetitive muscle tasks of both her regular job and her light-duty assignment.

⁵ The Office also indicated that appellant had not established that she sustained employment-related carpal tunnel syndrome. In its July 6, 2000 decision, the Board determined that the Office had properly found appellant did not establish her claim that she sustained employment-related carpal tunnel syndrome. The Board did not direct the Office to further develop this matter and it is not currently before the Board on appeal.

⁶ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁷ Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁸

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Shybut, the impartial medical specialist selected to resolve the conflict in the medical opinion. The October 30, 2000 report of Dr. Shybut establishes that appellant did not sustain a recurrence of disability on or after September 8, 1997.

In his report, Dr. Shybut indicated that a magnetic resonance imaging scan exhibited essentially normal results. He indicated that on examination there was no evidence of spinal deformity and that he could not detect any musculature spasm. Dr. Shybut noted that there was no gross deformity of the lower extremities and that there was no evidence of any significant motor deficit. He indicated that appellant had complaints consistent with fibromyalgia but that the objective findings revealed that she did not have any residuals of her employment injuries. Dr. Shybut stated, “[o]bjectively, however, [appellant] does not demonstrate any sensory, motor or other neurologic deficits that can be directly linked to her inability to function at some level of activity.” He concluded that appellant was not prevented by any employment-related condition from performing the limited-duty job she had when she stopped work on September 8, 1997.⁹

The Board has carefully reviewed the opinion of Dr. Shybut and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Shybut’s opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹⁰ He provided medical rationale for his opinion by explaining that appellant did not exhibit any objective evidence of employment residuals which would cause her to sustain a recurrence of total disability on or after September 8, 1997. Dr. Shybut further indicated that nonwork-related problems could be responsible for appellant’s self-limitation of activity.

⁸ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁹ Dr. Shybut indicated that “psychosocial issues” might limit appellant’s activities, but he did not indicate that these were caused by employment injuries.

¹⁰ *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

The September 14, 2001 and November 21, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
July 3, 2002

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member