

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOYCE S. TOWNSEND and U.S. POSTAL SERVICE,
POST OFFICE, San Antonio, TX

*Docket No. 02-930; Submitted on the Record;
Issued October 7, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant sustained a recurrence of her March 3, 1985 work-related injury on or after July 6, 2000; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds appellant has not met her burden of proof to establish a recurrence of her accepted work.

On March 28, 1985 appellant, then a 37-year-old mailclerk filed a notice of traumatic injury and claim for compensation (CA-1) alleging that she injured her back while lifting bags.

In a December 12, 1985 decision, the claim was accepted for chronic lumbosacral strain, discogram, herniated nucleus pulposus (HNP) at L5-S1. The Office later approved decompression fusion surgery at L4 to sacrum.

Appellant was off work due to low back pain from 1985 through 1988 when she returned to light-duty work, four hours per day.

In a September 13, 1993 report, appellant's treating physician, Dr. James Simmons, a Board-certified orthopedist diagnosed degenerative disc disease L4 and L5, HNP, L5 with extrusion of disc material through left S1 nerve root and L5 and S1 radiculopathy.

In June 1994, appellant underwent an L5-S1 laminectomy and discectomy. A preoperative magnetic resonance imaging (MRI) scan revealed degenerative disc disease at L4-5 and L5-S1. Appellant remained on total temporary disability receiving conservative treatment on her back including weekly physical therapy.

In a November 30, 1994 report, Dr. John Huff, a Board-certified rheumatologist diagnosed appellant with myofascial pain syndrome of the low back and both lower extremities

with right iliotibial band syndrome, chronic fatigue syndrome, poor nonrestorative sleep, goiter and weight gain. He did not opine on any causal relationship between his diagnosed conditions and appellant's accepted conditions.

In a January 13, 1995 report, Dr. Simmons released appellant to light-duty, part-time work. His diagnosis was right hip pain, SI joint arthritis and status post laminotomy and discectomy. Dr. Simmons' restrictions were no repetitive stooping bending, twisting or lifting over 15 pounds (lbs) 4 hours a day, 5 days a week. In two months he opined she could work eight hours per day.

Appellant continued to receive medical treatment while missing intermittent periods of work.

In an unsigned February 26, 1997 progress report, from the Alamo Bone and Joint Clinic it was noted that "[p]rior to this evaluation [appellant] had deep venous thrombosis of the left leg that required anticoagulation, which may be contributory to her delayed return to work."

On March 11, 1997 appellant completed a functional capacity evaluation.

In a June 27, 1997 report, Dr. Simmons approved a modified job description for a general clerk that included sitting for 8 hours per day, lifting up to 10 lbs, grasping and fine manipulation intermittently.

The modified job offer was made and appellant accepted the general clerk position on October 27, 1997.

Appellant continued to work in her light-duty assignment as general clerk.

On July 16, 1999 appellant was reassigned to the main post office, window services. The job description indicated that she would be performing a number of general clerical duties including preparing reports, filling and researching stamp orders and data entry. All duties were to be in compliance with the doctor's restrictions.

On July 26, 2000 appellant filed a Form CA-2A notice of recurrence.

In an accompanying note, she indicated the stamps by mail program became very demanding and caused her to work beyond her restrictions.

Janet Anderson, a coworker submitted an undated statement:

"[Appellant] was reassigned to the [o]ffice of [s]tamps by [m]ail [p]rogram in approximately June of 1999. [Appellant] had a modified desk and special therapeutic chair, which she brought to the office. However, due to the location of the computer, which [s]tamps by [m]ail are processed, she was required to perform her duties away from the modified equipment. The desk and chair were much lower than her equipment. I had to relieve [appellant] often, due to her back condition.

In an August 22, 2000 letter, the Office notified appellant that she needed to supply additional information to establish her recurrence claim.

In a September 27, 2000 decision, the Office denied appellant's claim.

In an October 18, 2000 letter, appellant requested a review of the written record by the Office of Hearings and Review.

In a November 29, 2000 report, Dr. Simmons noted that appellant was having extreme feelings of anxiety and she was having greater power loss on the left and recommended an MRI scan. He diagnosed degenerative disc disease, L4, diskogram, SI joint dysfunction, radiculopathy, L4 to S1, SI joint arthritis, left, carpal tunnel syndrome, history of chronic constipation and depression secondary to chronic pain syndrome.

In an April 10, 2001 decision, the hearing representative remanded the case for further development.

Appellant continued to receive medical benefits for her accepted injuries.

In an April 19, 2001 letter, the Office asked Dr. Simmons for clarification of appellant's medical status and restrictions. A copy of the letter was sent to appellant and she was told it was her responsibility to have the report submitted within 30 days.

No response was received from either Dr. Simmons or appellant and on May 22, 2001 the Office again denied appellant's recurrence claim.

In an April 19, 2001 report, received by the Office on May 26, 2001 Dr. Simmons reported that appellant had pain down both legs, mostly left. He noted that prolonged sitting, standing, lying down exacerbated her pain. Dr. Simmons repeated his last diagnosis and added bilateral knee and ankle pain, right greater than left, secondary to gait alteration due to SI joint pain and dysfunction.

In a May 15, 2001 report, Dr. Simmons wrote:

"In response to your request for more information (letter dated April 19, 2001) [appellant] is able to travel to and from work. She is able to walk without assistance and to feed herself without assistance. [Appellant] is able to dress herself without assistance. [Appellant] says she has trouble bathing herself without assistance. She is able to get out of bed without assistance as well as out of doors. [Appellant] does have difficulty sitting in a chair for any length of time.

"[Appellant] has continued to have difficulty with chronic pain secondary to multiple factors related to her industrial injury of September 3, 1985 as noted above. [Appellant] has *incapacitating pain* (emphasis in the original) from sacroiliac joint dysfunction. She responds fairly well to physical therapy and SI joint injections... It is anticipated [appellant] will need ongoing care ... and will be permanently disabled because of the need to attend therapy to get some relief from pain."

In response to a reconsideration request that included Dr. Simmons' May 15, 2001 report sent by appellant's congressional representative, the Office conducted another merit review.

In a May 23, 2001 decision, the Office denied modification of appellant's recurrence claim finding appellant's new position in the stamp by mail program was consistent with her medical restrictions and even Dr. Simmons indicated that she was capable of getting to her therapy sessions.

In a June 20, 2001 letter, appellant requested reconsideration.

In an August 2, 2000 report received by the Office on June 27, 2001, Dr. Simmons wrote that appellant experienced an onset of pain three weeks ago and contacted the clinic for medication. Appellant reported that she restarted therapy on the SI joint and it was being manipulated, she became sore and unable to sit or work. She has been unable to walk for three weeks secondary to pain in her right lumbosacral region and hip and the pain is radiating down her right leg.

In a July 31, 2001 merit review, the Office denied appellant's recurrence claim finding the medical evidence lacked a rationalized evidence causally relating the claimed recurrence to the original work-related injury.

In an August 21, 2001 letter, appellant requested reconsideration.

In support of her request, appellant submitted an August 6, 2001 report from Dr. Simmons in which he diagnosed degenerative disc disease, L4, SI joint dysfunction, radiculopathy, L4 to S1, SI joint arthritis, left, carpal tunnel syndrome, right SI joint osteoarthritis, history of chronic constipation, bilateral knee and ankle pain, right greater than left, secondary to gait alteration due to SI joint pain and dysfunction and depression secondary to chronic pain syndrome. He added that we would "try to comply with Department of Labor[']s] letter regarding the relationship of her longtime therapy and surgery being related to her 1985 injury."

Appellant also submitted treatment notes from her physical therapist.

In an October 18, 2001 report, the Office denied modification.

In an October 1, 2001 report, Dr. Simmons reviewed appellant's medical history and noted that "[b]y history her recurrence on or about July 6, 2000 of her low back pain and right sacroiliac pain is related to the September 3, 1985 injury. She has been treated for all that all along."

In a November 26, 2001 letter, appellant requested reconsideration submitting Dr. Simmons' October 1, 2001 report and more treatment notes from her physical therapist.

In a December 21, 2001 decision, the Office denied appellant a merit review.

The Board finds appellant has not met her burden of proof to establish her alleged injury of July 6, 2000 was causally related to 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 light-duty position or the medical evidence of record establishes that she can perform the light-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 show that she cannot perform such light 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 light-duty job requirements.¹

The medical evidence appellant submitted, primarily reports from Dr. Simmons her treating physician, consistently supported that appellant suffered from multiple medical conditions including degenerative disc disease, L4, SI joint dysfunction, radiculopathy, L4 to S1, SI joint arthritis, left, carpal tunnel syndrome, right SI joint osteoarthritis, history of chronic constipation, bilateral knee and ankle pain, right greater than left, secondary to gait alteration due to SI joint pain and dysfunction and depression secondary to chronic pain syndrome.

While Dr. Simmons stated in his October 1, 2001 there was a relationship by history between appellant's ongoing medical conditions and the original injury of September 9, 1985, he did not provide in this or any other report, a rationalized explanation of how or why appellant's accepted medical condition worsened. Nor does he discuss appellant's inability to work beyond references to her subjective complaints of pain. A rationalized explanation is especially important in light of appellant's multiple medical conditions that were not accepted by the Office.

Appellant argues that her reassignment to the stamp by mail program caused her to work outside her medical restrictions, in particular because she was not able to use her therapeutic chair and desk. However, use of a specific chair and desk was not included in her medical restrictions and there is otherwise no evidence suggesting that she was required to work outside her medical restrictions. The new job assignment was substantially similar to the one Dr. Simmons approved, no repetitive stooping, bending, twisting or lifting over 15 lbs 4 hours a day, 5 days a week. It was also indicated, in the job description, that her restrictions would be complied with. Other than the use of the chair and desk, appellant has not shown that she worked outside her restrictions.

In addition, appellant has not explained with rationalized medical evidence how she worked for approximately a year in her new position before sustaining a recurrence.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.² Appellant failed to submit rationalized medical evidence establishing that her claimed recurrence of disability is causally related to the accepted employment injury and, therefore, the Office properly denied her claim for compensation.

¹ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

² *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

Under section 8128(a) of the Federal Employees' Compensation Act,³ 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,⁴ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office], or

“(iii) 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 fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.⁵

In the present case, appellant has not established that the Office abused its discretion in its December 21, 2001 decision by denying her request for a review on the merits of its decision under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office. Dr. Simmons' October 1, 2001 report included the phrase that appellant's recurrence was related by history to her original injury, this statement is essentially repetitive of earlier statements. It is not a rationalized explanation necessary for appellant to meet her burden of proof.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b) (1999)

⁵ 5 U.S.C. § 10.608(b).

The decisions of the Office of Workers' Compensation Programs dated September 27, 2000, May 22, May 23, July 31, October 18 and December 21, 2001 are hereby affirmed.

Dated, Washington, DC
October 7, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member