

**United States Department of Labor
Employees' Compensation Appeals Board**

DENISE A. SABOURIN, Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Rochester, NY, Employer**

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**Docket No. 04-1653
Issued: March 15, 2005**

Appearances:
Denise A. Sabourin, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On June 15, 2004 appellant timely filed an appeal from a May 28, 2004 decision by the Office of Workers' Compensation Programs which denied her request for reconsideration of its April 14, 2004 decision. In an April 14, 2004 decision, the Office denied appellant's request for modification of its January 7, 2004 decision. In a January 7, 2004 decision, the Office denied appellant's claim for a recurrence of total disability beginning September 9, 2003 on the grounds that she had not established that the recurrence was causally related to her September 1, 1991 decision. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether appellant has established that she sustained recurrences of disability on September 9, 2003 and February 10, 2004 from her light-duty position that were causally related to the April 27, 1989 employment injury; and (2) whether the Office properly denied appellant's request for reconsideration on May 28, 2004.

FACTUAL HISTORY

On April 27, 1989 appellant, then a 31-year-old mail handler, was pitching flats and lifting bundles when she developed cervical pain. In an April 28, 1989 report, Dr. Jay I. Pomerantz, a Board-certified internist, diagnosed an acute upper back strain sustained while appellant was working. In a June 12, 1989 report, Dr. Pomerantz stated that appellant gave a history of pitching mail on April 26, 1989 when she felt a tightness and numbness in her upper shoulder and arm. The Office accepted appellant's claim for neck and trapezius strain. Appellant returned to work on September 25, 1989 for four hours a day with restrictions on her activity. She resumed full-time duties on October 7, 1989 with no restrictions.

On February 24, 1990 appellant filed a claim for a recurrence of disability. She indicated that her shoulder and neck pain were still present. She also noted that she had a diagnosis of fibrositis. Appellant stated that she could not move her neck and the pain was in her right shoulder, arm and hand. In a March 12, 1990 report, Dr. Elias N. Nicolas, a Board-certified orthopedic surgeon, stated that appellant had no neurologic deficit but had difficulty and tenderness in the trapezius and the cervical spine at C4-5 and C5-6. He recommended a magnetic resonance imaging (MRI) scan. In a May 5, 1990 report, Dr. Boris Shmigel, a specialist in emergency medicine, indicated that appellant had tenderness and slight spasms in the trapezius muscles, extending into the right shoulder. He noted that appellant had full range of motion in the right shoulder and circulation, sensation and motion were intact in the arm, including the shoulder and the elbow. He commented that, if appellant's pain persisted, she should be referred for a computerized tomography (CT) scan and possibly an MRI scan.

The Office referred appellant and the case record to Dr. Franklin V. Peale, a Board-certified orthopedic surgeon, who in an October 3, 1990 report, diagnosed cervical neuritis causally related to appellant's employment. He indicated that this was a single condition relating back to appellant's April 26, 1989 employment injury which never completely resolved. He stated that appellant had a high likelihood for a herniated cervical disc, probably at the C6-7 level. In an October 16, 1990 report, Dr. Kenneth D. Pearsen stated that the MRI scan was positive for a C4-5 central and right disc protrusion-herniation. The Office accepted appellant's claim for a recurrence of disability and for a herniated C4-5 disc.

Appellant had several subsequent recurrences of disability, usually returning to a light-duty assignment varying from four to eight hours a day. In a June 18, 2002 letter, the employing establishment offered appellant a position of general clerk, modifying a job offer made on June 20, 1998.¹ The employing establishment indicated that appellant's duties may consist of standing and sorting through utility carts, removing damaged magazines and plastic covers, matching magazines with plastic covers and placing them in an envelope. Appellant would also be required to sit at a table and repair damaged flat mail. She would also be required to complete verification of mail and preparing mailings for other units. She would also perform miscellaneous duties within her medical restrictions. Appellant accepted the position.

¹ The job offer of June 20, 1998 was for a position in the customer services support office, which included call backs to customers regarding customer service cards, keeping a record of calls made and the disposition of the calls, envelope stuffing and distribution of mailing projects, and other various administrative duties.

On September 9, 2003 appellant reduced her work to six hours a day and filed a claim for a recurrence of disability. She complained of increased pain in her neck due to her job duties. In an October 16, 2003 report, Dr. Robert J. Brandon, a Board-certified family practitioner, stated that appellant suffered from chronic neck pain, upper back muscular pain, and spasms as of her most recent examination on September 24, 2003. He indicated that appellant's condition was directly related to her accepted employment injury. Dr. Brandon commented that appellant's current job at the employing establishment was aggravating her chronic pain condition.

In a December 12, 2003 letter, appellant stated that before September 9, 2003 she had suffered from chronic cervical disc disease and a herniated C4-5 disc. She indicated that the repetitive motion in her new light-duty assignment caused the pain and spasms to escalate. Appellant commented that she could not work more than six hours a day due to pain. She noted that in July 1996 she was assigned to the customer service center on limited duty. Appellant stated that she could perform her duties because they did not involve repetitive motion of her arms and shoulders. In June 2002, the job she held was abolished and she was transferred into the mail recovery unit which consisted entirely of repetitive motion such as taping, wrapping mail and continuous sitting for eight hours where she had to bend her neck down.

In a January 7, 2004 decision, the Office denied appellant's claim for a recurrence of disability because the evidence of record did not show a change in the nature or extent of her employment-related disability or a change in the nature or extent of her light-duty position.

In a February 3, 2004 report, Dr. Brandon stated that appellant's pain in her neck and shoulders were related to her fibromyalgia syndrome and her C4-5 herniated disc. He indicated that on her September 3, 2003 office visit she was considered partly disabled and was restricted to six hours of work per day as more than six hours would result in significant worsening of her symptoms and pain. He commented that both conditions were chronic and permanent and resulted from appellant's employment injury. Dr. Brandon stated that appellant continued to have work restrictions to avoid aggravating her conditions.

On February 10, 2004 appellant filed a claim for recurrence of disability as of that date. She stopped work on the day she filed her claim.

In a March 2, 2004 report, appellant requested reconsideration of the January 7, 2004 decision. She submitted a copy of Dr. Brandon's February 3, 2004 report and a January 12, 2004 report from Dr. Benjamin A. Caruso, a chiropractor. He stated that he had been treating appellant for neck pain she sustained on the job. Dr. Caruso noted that she had responded to treatment. He indicated that on examination appellant had a reduced range of motion, muscle spasms of the trapezius and rhomboid muscle groups, foraminal compression and spinous percussion tenderness at C5-6 and C6-7.

In an April 14, 2004 merit decision, the Office denied appellant's request for modification of the prior decision. In an April 27, 2004 decision, the Office denied appellant's claim for a recurrence of disability as of February 10, 2004 on the grounds that she had not submitted any factual or medical evidence to show that her job changed or her condition worsened due to her claimed recurrence of disability.

In an April 30, 2004 report, Dr. Brandon stated that appellant's pain in her neck and shoulders were related to her fibromyalgia syndrome and her C4-5 herniated disc. He indicated that in 1998 appellant was out of work due to her work-related injuries which included the fibromyalgia, carpal tunnel syndrome and herniated C4-5 disc. He reported that appellant was able to return to work for four hours a day because of a rehabilitating job assignment. She was eventually able to increase her hours to a full eight-hour day with no increase in pain or symptoms. Dr. Brandon noted that appellant was reassigned on June 29, 2002 to the mail recovery unit. He stated that appellant's new assignment came with new duties which included extensive repetitive motion such as piecing together mail where she had to keep her head bent for long periods. Her other duties included pulling tape to mend mail, putting mail in an envelope or care bag to be taped again. Dr. Brandon noted that appellant was also required to sort and verify letters. He indicated that appellant immediately began to have a flare-up of symptoms and pain from her employment injury. Dr. Brandon changed and increased appellant's medications to help with the pain and calm inflammation. Appellant also received physical therapy until the Office stopped paying for it. Dr. Brandon stated that, as of September 3, 2003, his only alternative was to reduce appellant's work hours from eight to six hours to give her some relief from the pain and calm down the flare-up. He concluded that appellant's new assignment was a direct cause of the recurrence of disability and she could not work more than six hours a day.

In a letter received by the Office on May 7, 2004, appellant requested reconsideration of her claim for a recurrence of injury on September 9, 2003. She discussed her new assignment, indicating that her supervisor allowed her to change positions and walk around the building. In July 2003, the unit was moved to another part of the building. Appellant was not allowed to change positions, worked at a table too low for comfort with her head continuously. When she stopped to rest her arms and shoulders, she was instructed to get back to work. She stated that this change aggravated her symptoms. A new supervisor would deny her requests for two hours of leave each day, forcing her to work the full eight hours a day in excruciating pain.

In a May 28, 2004 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was repetitive and therefore insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

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 that she sustained a recurrence of partial or 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.²

² *Barry C. Peterson*, 52 ECAB 120, 125 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

ANALYSIS

In her claims for a recurrence of disability, appellant demonstrated that there had been a change in her job duties in 2002. Her light-duty position in the customer support unit was abolished. As a result, she was assigned to the mail recovery unit which had different duties that required repetitive motion to complete. Dr. Brandon, in his October 16, 2003 report, stated only that appellant's duties aggravated her employment-related condition, requiring a reduction in her hours of work. In his February 3, 2004 report, Dr. Brandon stated that he reduced appellant's work hours to six hours a day to avoid aggravating her employment-related conditions. Dr. Brandon did not state in either report how the new light-duty assignment resulted in an aggravation of appellant's employment-related conditions to the point that he had to reduce her hours of work. Dr. Brandon failed to explain the physiological mechanisms by which the new light-duty assignment for appellant affected her employment-related conditions. His reports therefore were insufficient to establish that appellant's claimed recurrences of disability were causally related to her April 16, 1989 employment injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant. Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.608(b) 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.³ 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.⁴ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.⁵

ANALYSIS -- ISSUE 2

The Office denied appellant's request for reconsideration on the grounds that the April 30, 2004 report of Dr. Brandon was repetitive of the evidence of record and therefore insufficient to warrant modification of the prior decisions denying appellant's claims for recurrences of disability. The April 30, 2004 report provided rationale that the previous reports lacked. Dr. Brandon stated that the assignment of appellant to the mail recovery unit required her to engage in extensive repetitive motions with her head bent for long periods. He noted that appellant immediately had a flare-up of pain due to the new duties. Dr. Brandon concluded that the new assignment was a direct cause of appellant's recurrence of disability on

³ 20 C.F.R. § 10.608(b).

⁴ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁵ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

September 9, 2003. Dr. Brandon, for the first time, related appellant's change in light-duty tasks to the aggravation in her employment-related conditions. This report therefore constitutes new evidence that was not properly considered by the Office. The case must therefore be remanded to the Office for a merit review of the Office's prior decisions, which denied appellant's claims for recurrences of disability.

CONCLUSION

This case is not in posture for decision. The Office improperly denied appellant's most recent request for reconsideration because appellant submitted new medical evidence that addressed the issue of causal relationship between appellant's employment injury and the change in her light-duty assignment. The case therefore will be returned to the Office for a merit review based on Dr. Brandon's April 30, 2004 report.

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs, dated April 27 and 14, and January 7, 2004 are affirmed. The Office's May 28, 2004 decision is hereby reversed and the case returned to the Office for further proceedings as set forth in this decision.

Issued: March 15, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member