

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Philadelphia, PA,
Employer**

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**Docket No. 09-734
Issued: November 16, 2009**

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 22, 2009 appellant, through her attorney, filed a timely appeal from a February 12, 2008 hearing representative's decision of the Office of Workers' Compensation Programs' and May 15 and September 17, 2008 merit decisions, finding that she did not establish a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained a recurrence of disability on September 3, 2006 causally related to her December 18, 2000 employment injury.

FACTUAL HISTORY

On December 18, 2000 appellant, then a 41-year-old mail processor, filed a claim for an injury occurring on that date when she pulled a muscle between her shoulders. The Office

accepted the claim for cervical, thoracic and right shoulder strain. On September 3, 2001 appellant returned to limited-duty employment.

On September 16, 2003 appellant filed a recurrence of disability claim on August 29, 2003 casually related to her December 18, 2000 work injury. She underwent surgery on her cervical spine in May 2004. The Office determined that a conflict in medical opinion existed regarding whether appellant continued to have residuals of her December 18, 2000 work injury.¹ It referred her to Dr. John T. Williams, Sr., a Board-certified orthopedic surgeon, for an impartial medical examination. On August 23, 2004 Dr. Williams discussed appellant's complaints and medical history and listed findings on examination. He noted that she underwent surgery in May 2004 surgery for a cervical disc herniation. Dr. Williams stated:

"I inquired once again if [appellant] had any problems with her neck or her right upper extremity or shoulder girdles prior to this December 18, 2000, incident because the history correlates with an aggravation of a preexisting pathology; that is, degenerative joint disease and degenerative disc disease of the cervical spine, which may have been aggravated by this process to the degree that it may have precipitated herniation of the disc, necessitating surgical intervention, because the mechanism of the injury by history in and of itself does not correlate to disc herniation but may have occurred on preexisting pathology."

Dr. Williams reviewed the diagnostic studies and noted that the studies confirmed that appellant had preexisting pathology that may have been aggravated by the December 18, 2000 work injury. He next reviewed the medical evidence and noted that appellant had a history of a motor vehicle accident 20 years before her work injury that he found accelerated her cervical degeneration. Dr. Williams stated:

"After reviewing these records, it would be my opinion in summary that [appellant], as I stated previously, had preexisting pathology. The accident of December 18, 2000, aggravated the underlying preexisting pathology but my opinion is that the aggravation would be of a temporary and transitory nature, resolving and leaving the patient with her preexisting pathology. [Her] pathology progressed to the point where it became necessary for this patient to have surgical intervention.

"As I have previously stated, the mechanism of injury from the December 18, 2000, incident does not correlate and I have read her description in her handwriting as to what happened, that she felt some pain in between her shoulder blades. This is not cervical spine pathology. As the [physician] who treated her stated that they felt she had a cervical sprain/strain, a thoracic sprain/strain and a right shoulder sprain/strain. These are soft tissue injuries. This patient, unfortunately at a young age, already had advanced degenerative joint and

¹ The Office indicated that Dr. Anthony W. Salem, a Board-certified orthopedic surgeon and referral physician, found that appellant's accepted conditions of cervical, thoracic and right shoulder sprain had resolved while Dr. Stephen Schmidt, an attending osteopath, determined that she was disabled from work due to her employment injury beginning August 29, 2003.

degenerative disc changes on imaging studies. Advanced means that it took years to develop.”

By decision dated October 1, 2004, the Office found that appellant did not establish a recurrence of disability.

On December 29, 2006 appellant filed a recurrence of disability claim on September 3, 2006 casually related to her December 18, 2000 employment injury. She related that she had been working with permanent limitations after her surgery. Management told appellant to leave her limited-duty position because there was no work available.

On May 7, 2007 Dr. Ghassem Kalani, a Board-certified physiatrist, evaluated appellant for complaints of pain in the neck and between the shoulder blades radiating into her right arm. He discussed her history of a work injury on December 18, 2000 and surgery for a herniated disc on May 3, 2004. Dr. Kalani listed findings on examination and diagnosed chronic injuries of the cervical spine due to her work injury, a disc herniation at C5-6, a right rotator cuff injury, radiculopathy on the right at C5 through T1 and bilateral carpal tunnel. He noted that there was also possible lumbar radiculopathy or a peripheral nerve injury. Dr. Kalani recommended physical therapy and further objective testing.

By decision dated June 14, 2007, the Office found that appellant did not establish that she sustained an employment-related recurrence of disability beginning September 3, 2006. It determined that the August 23, 2004 opinion of Dr. Williams constituted the weight of the evidence and established that she had no further residuals of her work injury. On June 28, 2007 appellant, through her attorney, requested an oral hearing.²

On October 1, 2007 Dr. Kalani noted that he had been treating appellant since 2001. He related:

“[Appellant] stated that she was injured on her job as working as a clerk for the [employing establishment] and handling mail.

“Going through the history and physical exam[ination], the impression was that she was suffering with persistent cervical spine sprain and strain and myoligamentous injuries secondary to her job accident and persistent dorsal and lumbosacral spine sprain and strain with myoligamentous injuries secondary to the accident. There was the impression of sprain and strain of the right shoulder and milder left shoulder and traumatic myofasciitis of bilateral trapezius, right supraspinatus muscle and also evidences suggesting ruling out cervical radiculopathy and possible rotator cuff impairment.”

Dr. Kalani noted that appellant stopped work on September 3, 2006 because of “more persistent pain and aggravation of her condition.” He asserted that based on the finding on examination, history and the results of diagnostic studies she continued to “suffer from all stated symptomatology directly as a result of the accident on December 18, 2000.”

² The record contains progress reports from Dr. Kalani dated July 2007 through January 2008.

At the hearing, held on November 29, 2007, appellant's attorney argued that appellant established a recurrence of disability because the employing establishment withdrew her limited-duty employment. He further argues that the medical evidence showed that she continued to have residuals of her work injury.

By decision dated February 12, 2008, the hearing representative affirmed the June 14, 2007 decision. She found that there was no evidence that the employing establishment accommodated appellant's condition due to her work injury and thus withdrawing the light duty did not support a recurrence of disability.

On April 1, 2008 appellant, through her attorney, requested reconsideration. He submitted a report dated December 14, 2006 from Dr. Kingsley Chin, a Board-certified orthopedic surgeon, who described appellant's history of a work injury on December 18, 2000 while lifting a tray of mail. Dr. Chin initially examined her on February 27, 2004 for neck pain radiating into her thoracic spine and right shoulder with intermittent radiation down the left shoulder and intermittent shooting pain into both arms. He reviewed a magnetic resonance imaging scan study, which showed a midline disc protrusion at C5-6. Dr. Chin believed that appellant also had a paracentral herniation at C5-6 and a right-sided herniation at C6-7 causing cord compression. He described his treatment of appellant from 2004 through 2006 and diagnosed a herniated disc and cervical spondylosis at C5-6 and C6-7. Dr. Chin asserted that appellant's "condition especially her symptoms were precipitated (hastened) by her injury on the condition of her employment as described by her." He based his conclusion on the "chronology of her complaints and her injury as well as the physical exam[ination] and radiologic data." Dr. Chin opined that appellant was totally disabled by her symptoms both before and after her cervical surgery.

In a decision dated May 15, 2008, the Office denied modification of its February 12, 2008 decision. On June 12, 2008 appellant, through her attorney, requested reconsideration. He submitted progress reports dated November 19, 2007 and January 7, 2008 from Dr. Kalani, who diagnosed right shoulder strain due to her work injury with evidence of a rotator cuff tear, a herniated cervical disc at C4 to C6, right radiculopathy at C5 through C7, right carpal tunnel syndrome and left L3-4, L5-S1 and right S1 radiculopathy. By decision dated September 17, 2008, the Office denied modification of the May 15, 2008 decision.

LEGAL PRECEDENT

When an appellant claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing by the weight of the reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports this conclusion with sound medical reasoning.³

³ *Ricky S. Storms*, 52 ECAB 349 (2001).

Section 10.5(x) of the Office's regulations provide in pertinent part:

"Recurrence of disability means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."⁴

Section 8123(a) provides that, 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 The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁶

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the 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.⁷

ANALYSIS

The Office accepted that appellant sustained cervical, thoracic and right shoulder strain due to a December 18, 2000 work injury. She worked limited duty following her injury until August 29, 2003, when she stopped work. Appellant underwent surgery for a cervical herniated disc in May 2004. The Office determined that a conflict in medical opinion existed on the issue of whether she continued to have residuals of her December 18, 2000 employment injury and referred her to Dr. Williams for resolution of the conflict.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the 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 opinion of Dr. Williams, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Williams accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions

⁴ 20 C.F.R. § 10.5(x).

⁵ 5 U.S.C. § 8123(a).

⁶ 20 C.F.R. § 10.321.

⁷ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

⁸ *Id.*

about appellant's condition, which comported with his findings.⁹ In a report dated August 23, 2004, he reviewed the medical reports and diagnostic studies and found that appellant had a preexisting degenerative disc disease. Dr. Williams found that her December 18, 2000 work injury caused only soft tissue injuries. He concluded that appellant's work injury aggravated her preexisting condition but that the aggravation was temporary and resolved. Dr. Williams provided as rationale that the mechanism of injury does not correlate with "cervical spine pathology." As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.¹⁰ Based on his report, the Office found that appellant had not established that she sustained a recurrence of disability on August 29, 2003.

Appellant returned to modified employment. She worked until September 3, 2006, when the employing establishment sent her home because it did not have work available within her restrictions. She filed a recurrence of disability claim beginning September 3, 2006. The evidence does not establish that appellant was working limited duty on September 3, 2006 due to her accepted work injury. The weight of the medical evidence, as represented by the August 23, 2004 opinion of Dr. Williams, established that she had no residuals of her work injury. Consequently, the employing establishment's withdrawal of her modified employment does not constitute a recurrence of disability as she was not at that time working limited duty as a result of her work injury.¹¹ Appellant must submit medical evidence sufficient to show that she was disabled from work beginning September 3, 2006 due to her accepted condition.

On May 7, 2007 Dr. Kalani discussed appellant's history of a December 18, 2000 work injury and surgery for a herniated cervical disc on May 3, 2004.¹² He diagnosed a disc herniation at C5-6, a right rotator cuff injury, right radiculopathy and bilateral carpal tunnel syndrome and possible lumbar radiculopathy or a peripheral nerve injury. Dr. Kalani provided treatment recommendations. He did not, however, address the relevant issue of whether appellant was disabled for work beginning September 3, 2006 and thus his opinion is of little probative value.

On October 1, 2007 Dr. Kalani described his treatment of appellant since 2001. He noted that she related that she sustained an injury while working for the employing establishment. Dr. Kalani diagnosed cervical sprain, right shoulder strain and mild left shoulder strain, traumatic shoulder myofasciitis, lumbosacral strain and myoligamentous injuries of the cervical and lumbar injuries due to appellant's work injury. He further found possible cervical radiculopathy. Dr. Kalani opined that appellant stopped work on September 3, 2006 because of "more persistent

⁹ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁰ *See Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹¹ A recurrence of disability includes the inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, except for when such withdrawal occurs for reasons of misconduct, nonperformance of the job duties or a reduction-in-force. 20 C.F.R. § 10.5(x); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

¹² The record contains progress reports from Dr. Kalani throughout 2007 and the beginning of 2008. He did not address disability in his progress reports.

pain and aggravation of her condition” and concluded based on his examination, her history and objective testing that she continued to “suffer from all stated symptomatology directly as a result of the accident on December 18, 2000.” He did not, however, explain how the December 18, 2000 work injury caused continued symptoms such that appellant was disabled from work beginning September 3, 2006. A medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship that is unsupported by medical rationale.¹³ The remaining progress reports from Dr. Kalani do not address disability and thus are of diminished probative value.

On December 14, 2006 Dr. Chin noted that appellant sustained an employment injury on December 18, 2000 when she lifted a tray of mail. He described in detail his treatment of her beginning February 27, 2004. Dr. Chin diagnosed a herniated disc and cervical spondylosis at C5-6 and C6-7. He found that appellant’s symptoms were precipitated by her work injury as described and noted that his conclusion was based on the “chronology of her complaints and her injury as well as the physical exam[ination] and radiologic data.” Dr. Chin asserted that she was totally disabled by her symptoms and had been disabled both before and after her cervical surgery. He related appellant’s condition to her work injury based in part on the “chronology of her complaints.” A medical opinion, however, that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.¹⁴ Dr. Chin did not explain how appellant’s work injury caused disability beginning September 3, 2006; instead, he found that she was totally disabled both before and after May 2004, the date of her cervical surgery. His opinion is thus insufficiently rationalized to show that appellant sustained an employment-related recurrence of disability or overcome the weight afforded to Dr. Williams on the issue of whether she had continuing residuals of her work injury.

On appeal, appellant’s attorney argues that the employing establishment withdrew appellant’s limited-duty assignment. As discussed, however, appellant was not working limited duty as a result of her work injury at the time of her alleged recurrence of disability. Counsel also contends that the reports of Dr. Kalani establish that appellant continued to have residuals of her employment injury. As found by the Board, however, Dr. Kalani did not provide a rationalized opinion that she became disabled on September 3, 2006 due to her December 18, 2000 work injury.

Counsel also maintains that Dr. Chin’s December 4, 2006 report establishes that appellant’s cervical herniated disc and surgery were causally related to her accepted work injury. As noted, however, Dr. Chin did not provide a reasoned opinion that her herniated cervical discs and need for cervical surgery were due to her December 18, 2000 employment injury.

Counsel also contends that Dr. Williams found that appellant’s work injury may have aggravated her preexisting cervical condition such that she required surgery. After consideration, however, Dr. Williams concluded that she sustained a temporary aggravation of

¹³ *T.M.*, 60 ECAB ____ (Docket No. 08-975, issued February 6, 2009).

¹⁴ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

her preexisting condition on December 18, 2000 that had resolved and that the natural progression of her preexisting condition resulted in the need for surgery.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability in September 2006 causally related to her December 18, 2000 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 17, May 15 and February 12, 2008 are affirmed.

Issued: November 16, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board