

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

B.G., Appellant

and

DEPARTMENT OF THE NAVY, NAVAL
MEDICAL COMMAND, Washington, DC,
Employer

)
)
)
)
)
)
)
)
)
)

**Docket No. 10-406
Issued: September 15, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 30, 2009 appellant filed a timely appeal from the September 25, 2009 merit decision of the Office of Workers' Compensation Programs denying her recurrence of disability claim. 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 met her burden of proof to establish that she sustained a recurrence of total disability on or after October 3, 2006 due to her accepted work injuries.

FACTUAL HISTORY

The Office accepted that in late 2004 appellant, then a 53-year-old medical records technician, sustained aggravation of bilateral shoulder impingement syndrome, left shoulder

tendinitis and right elbow lateral epicondylitis due to her repetitive work duties.¹ She last worked as a medical records technician on May 4, 2006 as she stopped work on May 5, 2006 and returned to a modified position of information receptionist on August 7, 2006.² In a June 20, 2006 report, Dr. Robert Neviaser, an attending Board-certified orthopedic surgeon, determined that appellant could resume work in a sedentary position with no repetitive use of her arms, no lifting of a copier cover and no carrying boxes. Appellant could engage in writing, using the computer and answering the telephone. She stopped working on October 3, 2006 and filed claims for recurrence of total disability for the periods June 21 to August 4, 2006 and October 3, 2006 to June 20, 2007.³

In an August 10, 2006 report, Dr. John Ellis, an attending Board-certified family practitioner, noted that appellant continued to complain of pain, discomfort, stiffness and tightness in her right shoulder. Appellant's pain radiated down her arm as well as into her upper back and neck area. Dr. Ellis stated that she had some limitation of her arms and neck on examination. He diagnosed impingement syndrome of the right shoulder status post multiple surgeries, rotator cuff tear of the right shoulder postsurgery, right brachial plexus compression, left shoulder girdle strain and disc derangement at C5-6 and C6-7. Dr. Ellis reviewed the descriptions of the medical records technician and information receptionist jobs and stated that appellant was "no longer safely capable of performing the full range of these job duties. [Appellant] is at risk of injuring herself and others. Her conditions are definitely expected to last in excess of 12 months."⁴ On August 10, 2006 Dr. Ellis diagnosed left shoulder girdle strain and left shoulder bicipital tendinitis and stated that these conditions were employment related. He noted, "In my opinion, as a result of this injury, [appellant] was temporarily totally disabled from being able to return to work for an approximate one[-]month period of time."

In an October 3, 2006 report, Dr. Neviaser, an attending Board-certified orthopedic surgeon, stated that appellant reported an episode of bilateral arm pain that required emergency room treatment. He stated, "[Appellant] had to take time off from work and she has been threatened of termination unless she has a [physician's] note. Her physical shows that not much is changed. We have given her the [physician's] note." In an October 3, 2006 note, Dr. Neviaser advised that appellant could perform no work "indefinitely." The October 3, 2006 emergency room note from George Washington University Hospital diagnosed persistent right shoulder and

¹ The Office had previously accepted that in 1998, appellant sustained bilateral adhesive capsulitis of her shoulders, right shoulder impingement and sprains of her neck, right shoulder and right upper arm due to her repetitive work duties as a medical clerk, including lifting heavy files and operating a copy machine. Appellant underwent authorized right shoulder surgery on March 25, 1999 and July 25, 2000.

² Appellant filed a total disability claim covering the period May 5 to August 4, 2006. The information receptionist job required her to answer the telephone, speak with people face to face from a seated or standing position and sometimes use the computer to locate identify information as requested. The job did not require using a copy machine or engaging in any notable lifting or carrying.

³ Appellant resigned from the employing establishment effective October 25, 2007.

⁴ In an August 10, 2006 report, which mostly evaluated appellant's right shoulder, Dr. Ellis stated that as a result of her work injures she "was most recently temporarily totally disabled from being able to return to work on an intermittent basis for an approximate four[-]month period of time."

right upper extremity pain and neuropathic pain and that she was status post multiple shoulder surgery for biceps tendinitis.

On January 2, 2007 Dr. Neviasser stated that appellant had requested further information about the aggravation of her shoulder problem based on her return to work in either 2003 or 2004. He advised, "That job entails [appellant] using a copier, which has required her to reach up and over repetitively and to carry heavy medical records. These activities did indeed aggravate the preexisting work-related shoulder problem and may continue to be difficult for her to perform." In a January 23, 2007 report, Dr. Neviasser discussed appellant's work prior to working as an information receptionist.

In a (Form CA-20) dated March 16, 2007, Dr. Neviasser indicated that appellant had right shoulder pain and cervical disc disease. He stated that she was partially disabled as of August 2006. In another form report dated March 16, 2007, Dr. Neviasser stated that appellant was unable to work her usual job because "[she] experiences pain with the repetitive use she has to do at work." In an April 17, 2007 note, he stated that she was to remain out of work.

In an April 17, 2007 report, Dr. Warren Yu, an attending Board-certified orthopedic surgeon, made no mention of disability for work. He stated that Dr. Neviasser felt that there was nothing more that could be done for appellant's shoulder and that a neck reevaluation was needed as her symptoms were predominantly central in the neck without radiation. In a July 10, 2007 report, Dr. Neviasser stated that she could perform limited duty of "no lifting, reaching above shoulder, pushing or pulling with right arm."

In an August 28, 2007 report, Dr. Steven Hughes, a Board-certified orthopedic surgeon serving as an Office referral physician, noted that appellant had a permanent restriction of no reaching above the shoulder and no lifting or pulling above 35 pounds. He found that she could resume working full time eight hours a day with these restrictions. On November 12, 2007 Dr. Vincent Desiderio, an attending Board-certified orthopedic surgeon, indicated that appellant "would be capable of doing some form of light duty."

In an October 15, 2008 decision, the Office denied appellant's claim for recurrences of total disability covering the periods June 21 to August 4, 2006 and October 3, 2006 to June 20, 2007. It found that she had not submitted sufficient medical evidence to meet her burden or proof.⁵

Appellant submitted medical progress reports, the results of diagnostic testing and physical therapy reports. The medical reports did not contain any discussion of the claimed periods of disability. In an August 16, 2009 statement, appellant requested reconsideration of her claim asserting that the reports of attending physicians showed that she could not work since October 2006.

In a September 25, 2009 decision, the Office accepted that appellant had work-related disability from May 5 to August 4, 2006, *i.e.*, the period between the time she stopped working

⁵ Appellant submitted additional medical reports, but the documents did not contain any discussion of the claimed periods of disability. In a January 28, 2009 decision, the Office denied her request for merit review of her claim.

as a medical records technician and when she started working as an information receptionist. However, it found that appellant did not submit sufficient medical evidence to meet her burden or proof to establish that she sustained a recurrence of total disability on or after October 3, 2006 due to her accepted work injuries.

LEGAL PRECEDENT

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.⁶

ANALYSIS

The Office accepted that in late 2004 appellant, then working as a medical records technician, sustained aggravation of bilateral shoulder impingement syndrome, left shoulder tendinitis and right elbow lateral epicondylitis due to her repetitive work duties as a medical records technician overtime.⁷ Appellant last worked as a medical records technician on May 4, 2006 and returned to a modified position of information receptionist on August 7, 2006. She stopped work on October 3, 2006 and filed a claim for recurrence of total disability beginning October 3, 2006.⁸

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability commencing October 3, 2006 due to her accepted work injuries.

In an August 10, 2006 report, Dr. Ellis, an attending Board-certified family practitioner, advised that appellant continued to complain of pain, discomfort, stiffness and tightness in her right shoulder. He reported that she had some limitation of her arms and neck on examination

⁶ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986). 20 C.F.R. § 10.5(x) provides, “*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. This term also means an 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 when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.”

⁷ The Office had previously accepted that in 1998 appellant sustained bilateral adhesive capsulitis of her shoulders, right shoulder impingement and sprains of her neck, right shoulder and right upper arm due to her repetitive work duties as a medical clerk. Appellant underwent authorized right shoulder surgery on March 25, 1999 and July 25, 2000.

⁸ Appellant also filed a claim for total disability for the period June 21 to August 4, 2006. The Office accepted this claim in its September 25, 2009 decision and the matter is not before the Board.

and diagnosed various neck and upper extremity conditions. Dr. Ellis indicated that he had reviewed the descriptions of the medical records technician and information receptionist jobs and stated that appellant was “no longer safely capable of performing the full range of these job duties. [Appellant] is at risk of injuring herself and others. Her conditions are definitely expected to last in excess of 12 months.”⁹ In two August 10, 2006 reports, Dr. Ellis diagnosed neck and upper extremity conditions and indicated that appellant was disabled due to these injuries for one to four months.

These reports do not establish appellant’s claim as Dr. Ellis did not provide a rationalized medical opinion explaining whether she sustained a recurrence of total disability commencing October 3, 2006 due to her accepted work injuries. Dr. Ellis did not provide a complete factual and medical history or describe her accepted work injuries in any detail or explain how total disability arose due to these injuries. He did not adequately explain how the limited objective findings on examination showed that appellant could not perform any work, particularly given the limited duties of the position she left on October 3, 2006. Dr. Ellis appears to have based his disability opinion on the fear that she would be injured in the future, but it is well established that the possibility of future injury constitutes no basis for the payment of compensation.¹⁰

In an October 3, 2006 report, Dr. Neviasser, an attending Board-certified orthopedic surgeon, stated that appellant reported an episode of bilateral arm pain that required her going to the emergency room. He noted, “[Appellant] had to take time off from work and she has been threatened of termination unless she has a [physician’s] note. Her physical shows that not much is changed. We have given her the [physician’s] note.” In an October 3, 2006 note, Dr. Neviasser stated that appellant could perform no work “indefinitely.” These reports are of limited probative value on the issue of the present case. Dr. Neviasser did not provide any opinion that appellant’s work stoppage on October 3, 2006 constituted a recurrence of total disability due to her accepted employment injuries.¹¹

In a March 16, 2007 CA-20 form, Dr. Neviasser indicated that appellant had right shoulder pain and cervical disc disease. He stated that she was partially disabled as of August 2006, but he did not identify the reason for her disability from work or indicate that she was totally disabled on or after October 3, 2006. In another form report dated March 16, 2007, Dr. Neviasser stated that appellant was unable to work her usual job because “[she] experiences pain with the repetitive use she has to do at work.” In an April 17, 2007 note, he stated that she was to remain out of work. These reports would not establish appellant’s claim as Dr. Neviasser did not provide any indication that these periods of disability were due to a recurrence of total disability related to the accepted work injuries. In an August 28, 2007 report, Dr. Hughes, a Board-certified orthopedic surgeon serving as an Office referral physician, indicated that appellant had a permanent restriction of no reaching above the shoulder and no lifting or pulling above 35 pounds. He posited that she could resume working full time eight hours a day with these restrictions. The Board notes that these work restrictions are within the duties of the

⁹ *Supra* note 4.

¹⁰ *Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988).

¹¹ The emergency room notes do not identify a work related cause to appellant’s problems.

limited-duty position appellant left on October 3, 2006 and this report does not show that she sustained a recurrence of total disability as alleged.¹²

For these reasons, appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability on or after October 3, 2006 due to her accepted work injuries.

CONCLUSION

The Board finds that appellant did not meet her burden or proof to establish that she sustained a recurrence of total disability on or after October 3, 2006 due to her accepted work injuries.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 15, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹² In a July 10, 2007 report, Dr. Neviasser stated that appellant could perform limited duty of "no lifting, reaching above shoulder, pushing or pulling with right arm." However, he did not identify what condition or conditions necessitated these restrictions.