

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GRACE M. SHIN and U.S. POSTAL SERVICE,
POST OFFICE, Cincinnati, OH

*Docket No. 00-1654; Submitted on the Record;
Issued April 12, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant established that she was disabled from work on or after June 20, 1998 due to her accepted work injury.

On March 13, 1995 appellant, then a 49-year-old letter carrier, filed a notice of occupational disease and claim for compensation alleging that she suffered from right arm pain, left shoulder pain and left arm pain due to typing, mailing and filing in the performance of duty. She noted that the first day she realized her condition was caused or aggravated by her federal employment was February 20, 1995. The Office of Workers' Compensation Programs accepted the claim for right arm tendinitis, left shoulder tendinitis and cervical strain. Appellant stopped work on March 9, 1995. She was approved for limited duty with a five-pound lifting restriction effective March 20, 1995.

At the time appellant filed her March 13, 1995 claim, she was working limited duty as a clerk with a 10-pound lifting restriction. The record indicates that she sustained a work injury in 1991, which was accepted by the Office for right arm tendinitis. Appellant submitted medical records dating from January to October 21, 1991, which report that appellant was treated for right arm tendinitis, a cervical strain of the left shoulder and pain in the left shoulder and left arm possibly related to a pinched nerve in the cervical spine.

In a report dated April 28, 1992, Dr. Kyu Hwan Kim, a general practitioner, noted that appellant was first seen for right arm tendinitis on February 11, 1991. He noted that appellant was also treated for left shoulder and arm pain related to a cervical strain which developed about one month after the right arm condition. Dr. Kim related that appellant never had any of her symptoms until she started working as a letter carrier and was required to carry heavy bags. He stated:

“Patient claims that she feels much better when she does work within her restricted limitations as far as lifting, carrying, etc up till (sic) 5 pounds to 10 pounds; however, when she went back to her regular job pattern, which

happened on many occasions, then the conditions had gotten aggravated. (Due to workload, she was told to perform her regular job).”

He recommended that appellant continue to work within the weight limitation of 5 to 10 pounds.

In a September 27, 1995 statement, appellant stated:

“Stricken with [tendinitis] in the right arm in January 1991. However, at that time my left shoulder and arm was fine, so I went back to work two weeks later as a letter carrier using my left shoulder and arm even though I am right handed. Three months later I damaged my left shoulder and elbow.”

Appellant indicated that after her original right arm injury she worked limited duty whenever she was in pain. She noted that, in November 1991, her treating physician advised her to no longer work as a carrier so she transferred to an office job. Appellant indicated that after returning to her regular letter carrier duties, she tried to protect her right arm by using her left arm and eventually had problems in that arm as well as her left shoulder. She discussed her job duties as an office clerk and argued that the proper date of her injury was January 1991 and not March 13, 1995. She noted that around February 20, 1995 her “pain in the left elbow and shoulder got aggravated to the point of equivalency with my right side.”

In a report received by the Office on October 6, 1995, Dr. Alan R. Kightlinger, a Board-certified orthopedic surgeon, noted that appellant began having right elbow pain working as a clerk in the employing establishment and that she had previously injured her left shoulder and arm while carrying heavy bags as a letter carrier. He reported physical findings and noted that x-rays of the “right elbow, left shoulder and cervical spine showed minimal degenerative changes in the right elbow, minimal degenerative changes in the left acromioclavicular joint, [and] flattening of the greater tuberosity.” According to Dr. Kightlinger, appellant suffered from cervical myositis, rotator cuff tendinitis and arthritis of the left shoulder. He further diagnosed lateral epicondylitis of the right elbow and degenerative changes of the right elbow. Dr. Kightlinger stated that appellant’s condition was “primarily a soft tissue problem characterized by lateral epicondylitis of the elbow and myofascial syndrome of the left cervical and shoulder areas.” He recommended anti-inflammatory agents, physical therapy, strategic injections of trigger areas and a consultation with a rheumatologist to rule out fibromyalgia as an underlying syndrome.

In an April 10, 1997 report, Dr. Mathew Burton, a Board-certified internist specializing in rheumatology, related that appellant began experiencing discomfort in the arms six years ago and had to quit carrying the mail. He indicated that appellant’s left shoulder and left arm pain developed as a consequence of appellant having to favor the right arm. Dr. Burton stated that magnetic resonance imaging (MRI) scans of the shoulder and neck were basically negative, “consistent with the diagnosis of tendinitis.”¹ He opined that appellant had tendinitis of the forearms and shoulder for which he prescribed a therapeutic corticosteroid injection at C6-7.

¹ An MRI scan of the cervical spine dated September 9, 1991 was interpreted as normal.

In a letter dated April 10, 1997, the Office requested a report from appellant's treating physician regarding the nature of appellant's work-related medical condition and her work restrictions.

In a work evaluation sheet received by the Office on April 15, 1997, Dr. Kim indicated that appellant could work 8 hours with lifting limited to 2 hours per day and no more than 10 pounds. He also recommended that appellant avoid pushing and pulling activities.

On October 3, 1997 appellant filed a claim for a recurrence of disability beginning April 1, 1997. The date of the original injury was listed as "January 1997." Appellant described her work duties as requiring that she case mail with her left arm, perform one hour of typing, use the computer, perform mailing and filing.

Appellant subsequently submitted treatment notes from Dr. Bill J. Karas, a Board-certified physician in internal medicine, dated October 1 and 15, 1997.² Dr. Karas advised that appellant was to work only four hours per day for two weeks or until October 15, 1997 due to left shoulder and arm pain.

In an October 2, 1997 treatment note, Dr. Burton reported the following: "Left shoulder and arm pain for six to seven years since 1991, chronic, recurrent pain." He noted that appellant was on light duty with a 10-pound lifting restriction.

In an October 28, 1997 letter, the Office advised appellant of the factual and medical evidence required to establish a claim for a recurrence of disability.

In a November 24, 1997 treatment note, Dr. Karas recommended that appellant restrict her hours at work to four hours per day for one month due to worsening pain of the arms and shoulders.

In a November 25, 1997 report, Dr. Burton discussed appellant's history of injury beginning in 1991 and her work duties as a mail carrier versus a sedentary office clerk. He diagnosed "tendinitis and left upper extremity pain of uncertain etiology." Dr. Burton noted that appellant continued to complain of pain even though she worked a sedentary job. He stated that appellant would continue to have pain from time to time in either the left or right arm, but he did not believe she was causing any permanent damage with her work activities. Dr. Burton opined that appellant would be more "comfortable" if she were to avoid lifting over five pounds and not perform any overhead work. He concluded: "Clearly, she had bilateral upper extremity discomfort with the original injury in 1991 and I have no reason to believe otherwise that her present work capacities did not aggravate the underlying injury in 1991."

In a decision dated January 8, 1998 and finalized on January 9, 1998, the Office denied appellant's claim for a recurrence of disability on the grounds that the medical evidence was insufficient to establish that her restricted duties had aggravated her accepted work conditions or

² The record indicates that appellant's insurance company required her to change her family physician from Dr. Kim to Dr. Karas.

that the claimed recurrence of disability was causally related to the accepted work-related conditions.

Appellant next submitted a February 5, 1998 report from Dr. Burton that stated:

“I have been treating her for left shoulder pain, as well as pain in her left arm. I feel this is the same problem that she had back in 1991, and the problem never really subsided at all. However, for whatever reason, she continues to have a worsening of problems due to the left shoulder and bilateral arm tendinitis. She uses her arms for typing and filing, as well as lifting of baskets weighing ten pounds or more. It appears that using her arms in this nature causes pain, and this basically is the same symptoms that she presented with in 1991 and she should be allowed treatment for this work injuries which never resolved in the first place.... I am concerned that the shoulder pain is actually coming from the neck and what was diagnosed back in 1991 as shoulder tendinitis may in fact be referred pain from a cervical or neck condition.

An MRI scan was performed on March 18, 1998 of the cervical spine and demonstrated C3-4 central disc protrusion and/or bony spur with mild spinal stenosis, C5-6 diffuse posterior disc bulge and/or spur with mild spinal stenosis with no definite focal nerve root impingement seen.

In a March 19, 1998 report, Dr. Karas noted that appellant had long-standing pain in her arms and shoulders and opined that she had become disabled due to the overuse of her arms and shoulders at work. He stated, “I feel if she continues to perform her current duties at work, she will continue to have more pain.... I do not feel that she [i]s able to continue her duties due to the chronic pain in her shoulders and arms from tendinitis.”

In a report dated March 30, 1998, Dr. Burton noted that although appellant only worked four hours per day she still complained of pain related to tendinitis and bilateral upper extremity discomfort. He recommended that appellant continue with her work restrictions.

In an April 22, 1998 report, Dr. Richard T. Sheridan, a Board-certified orthopedist and Office referral physician, noted that appellant had been working 2 hours per day doing clerical work with a lift, push, pull or carry restriction of under 10 pounds since April 1998. He noted appellant’s history of a cervical strain, right arm strain, left shoulder and right arm tendinitis. Dr. Sheridan further discussed the results of an MRI scan report dated March 18, 1998 that showed a C3-4 central disc protrusion and/or bony spur with mild stenosis. The physician opined that appellant’s diagnoses relative to her right and left upper extremities were subjective complaints without objective findings. He concluded that appellant was not totally disabled and could perform the normal job duties of a letter carrier. Although Dr. Sheridan found some evidence suggestive of carpal tunnel syndrome in the left wrist, he noted that the Office had not indicated carpal tunnel syndrome to be an accepted condition on the statement of accepted facts that were provided to him.

Appellant subsequently submitted four CA-8 claim forms alleging total disability for the period of June 20 to August 14, 1998.

In a July 20, 1998 report, Dr. Burton diagnosed degenerative disc disease in the neck with tendinitis in the shoulders and arms. He related that appellant felt she could work 4 hours per day at telephone work, which would include 1 hour of writing and 1 hour of picking up 5 to 10 pounds intermittently. He agreed that such limitations were reasonable and that the restrictions should be followed for three to six months.

In a September 10, 1998 letter, the Office asked Dr. Sheridan whether or not appellant's MRI scan findings of degenerative disease in the cervical spine were related to factors of her employment and whether appellant's accepted claim should be expanded to include those conditions. The Office further inquired whether appellant was disabled from work based on the MRI scan findings.

In a report dated September 15, 1998, Dr. Sheridan stated:

"The MRI [scan] changes of March 18, 1998 are not a direct result of [appellant's] work injury of February 20, 1995 and they were not precipitated, aggravated or accelerated by the work injury of February 20, 1995. There is no clinical evidence to show that her accepted occupational disease claim should be explained to include the conditions found on her MRI [scan]. Those conditions seen on her MRI [scan] would not cause her to be totally or partially disabled because she does not have any objective findings on clinical exam[ination] reflective or expressive of those changes."

In a report dated March 8, 1999, Dr. Karas stated:

"This patient is a 53[-]year[-]old female who worked as a mail carrier in 1991, and because of her repetitive weight lifting, reaching and pushing heavy objects at work during that time, she developed pain in her neck and arms. She has continued with this pain, especially in her left shoulder and left arm which has slowly gotten worse.... It is my personal opinion that her work injury in 1991 caused and exacerbated the findings on her MRI [scan] of her cervical disc protrusion at two different levels, leaving the patient with chronic pain over the past several years. The objective findings on her MRI [scan] show a medical relationship between her injuries in 1991 and the reason for her continued pain over the past several years. It is my professional opinion that the injury she suffered in 1991 with her right and left arm pain and neck pain continue to bother the patient ever since, and are explained by the MRI [scan] findings."

In a report dated March 25, 1999, Dr. Burton stated:

"She has a [w]orkers' [c]ompensation claim for right arm [tendinitis], left shoulder [tendinitis] and cervical strain. She has had problems dating back to 1991. Despite efforts to modify her job, she continued to experience symptoms of left arm and left upper back pain, consistent with the diagnosis of [tendinitis] and cervical strain. She has had imaging studies, which defined degenerative disc disease in the cervical spine.

“Her symptoms, which she complains of presently are basically the same as they were back in 1991 and that is why the diagnoses still apply. She had significant job modifications, yet her symptoms remain the same. This is best explained on the basis of her condition actually worsening.”

In a decision dated January 27, 1999, the Office denied appellant’s claim for lost wages beginning June 20, 1998 on the grounds that her disability on or after June 20, 1998 was not causally related to her accepted work-related conditions.

On March 23, 1999 appellant requested a hearing, which was held on July 21, 1999. She testified that from June 1998 to January 23, 1999 she worked about four hours per day based on the medical restrictions provided by her treating physician. Appellant further testified that the employing establishment refused to give her work after January 13, 1999 because she was still required to work limited duty.

In a decision dated February 28, 2000, an Office hearing representative affirmed the Office’s January 27, 1999 decision.

The Board finds that this case is not in posture for a decision.³

A person who claims benefits under the Federal Employees’ Compensation Act⁴ has the burden of establishing the essential elements of his claim, including the fact that an injury occurred in the performance of duty as alleged and that disability for employment was sustained as a result thereof.⁵ To establish entitlement to continuation of pay or monetary compensation benefits, an employee must establish through competent medical evidence that the disability from work resulted from the employment injury.⁶

The Board finds that a conflict exists in the record between Drs. Karas and Burton, appellant’s treating physicians, and the Office referral physician, Dr. Sheridan as to whether appellant’s diagnosis of cervical disc protrusion is causally related to or aggravated by factors of appellant’s employment. Furthermore, the physician’s opinions are in conflict over whether appellant is capable of working regular or light duty, and whether she should be working four or eight hours per day as a result of her work-related condition of tendinitis.

³ The Board does not have jurisdiction to consider the Office’s January 8, 1998 decision that was finalized on January 9, 1998. The Board’s jurisdiction is limited to those decisions issued by the Office within one year of the date of appellant’s appeal filed on April 6, 2000. See 20 C.F.R. § 501.3(d)(2).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ See *Charlene R. Herrera*, 44 ECAB 361 (1993); *Dean E. Pierce*, 40 ECAB 1249 (1989).

⁶ *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990); *Daniel R. Hickman*, 34 ECAB 1220 (1983). As used in the Act, the term “disability” means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-related impairment prevents the employee from engaging in the kind of work he was doing when he was injured. See *Frazier V. Nichol*, 37 ECAB 528, 540 (1986).

Section 8123(a) of the Act 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.”⁷

On remand, the Office should refer appellant along with a copy of the complete medical record⁸ and a statement of accepted facts to a Board certified medical specialist for an impartial evaluation. The impartial medical specialist should evaluate appellant and determine whether appellant’s disability on or after June 20, 1998 was causally related to or aggravated by the work-related conditions of right arm, left shoulder tendinitis or cervical strain. Thereafter, the Office should issue a *de novo* decision.

The decisions of the Office of Workers’ Compensation Programs dated February 28, 2000 and January 27, 1999 are hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
April 12, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁷ 5 U.S.C. § 8123.

⁸ The Board notes that the Office neglected to associate any of the relevant evidence from appellant’s prior claim files with the instant claim file. *See* FECA Bulletin 97-10 (issued February 15, 1997) (provides for doubling of case file where “[a] new injury case is reported for an employee who has filed a previous injury claim for a similar condition or the same part of the body”).