

to a prior employment injury to her neck, shoulder and upper back on May 10, 1990. On February 10, 2004 the Office accepted her claim for temporary aggravation of a preexisting nonwork-related cervical strain and right shoulder strain.¹ The acceptance was based on medical reports and appellant's assertion that she worked continuously between March to December 2002 stamping mail. On February 20, 2004 she filed a claim for compensation from March 12 to December 2002.

In a report dated July 23, 2003, Dr. Michael Accord, an attending physiatrist, indicated that appellant sustained a chronic sprain/strain on the right side of her neck due to her accepted May 10, 1990 cervical strain. He opined that the major reason for her continued symptoms was the failure of the employing establishment to provide work within her medical restrictions. On October 20, 2003 Dr. Accord stated that the worsening of appellant's medical condition was caused by work assigned outside of her medical restrictions.

On December 24, 2003 the Office advised appellant that it would not reconsider her previously denied claims merely because she filed a new claim form. Appellant was advised to follow her appeal rights regarding the previous claims. The Office stated that it would consider only factors of employment that had not previously been decided. It asked appellant to describe any previously unclaimed employment activities which she believed caused or aggravated her condition. Appellant responded that her condition worsened due to repeated use of her arm while stamping mail from March to December 2, 2002. She contended that the employing establishment failed to provide work within her physical restrictions.

In a December 31, 2003 report, Dr. Accord noted that appellant's accepted right cervical strain had developed into myofascial pain involving the right shoulder and neck. He stated:

“An MRI [magnetic resonance imaging] [scan] performed sometime ago demonstrated chronic shoulder changes, which certainly are consistent with deterioration in [appellant's] initial status. I have previously indicated a number of times that in my opinion [her] difficulties are related to the initial injury and were exacerbated both by the failure of the [employing establishment] to accommodate the restrictions which I placed on her over the previous 10 years and the addition of an extended drive, requiring [appellant] to drive from Los Angeles to Ontario and back, though she was rarely permitted to work even when she returned to Los Angeles.

“Specifically, I would like to refer to a communication of [an Office claims examiner], which indicates that [he] claims that [appellant's] injuries were related to work performed over the previous 10 years; this is absolutely false and is a direct result of the failure of the employer to honor medical restrictions placed on [appellant's] accepted injury.

¹ Appellant has three other claims. She filed a claim for a motor vehicle accident on May 10, 1990 that was accepted for a cervical strain. Appellant's compensation benefits were terminated effective March 11, 2002 on the grounds that her condition had resolved. Her claim for an injury to her upper back, shoulder and neck on July 17, 2001 was denied. Appellant's claim for a March 12, 2002 emotional condition was denied. The Board affirmed the denial of appellant's emotional condition claim. *See* Docket No. 05-767 (issued August 12, 2005).

“[Appellant] continues to see me on a weekly basis and is requiring on-going medications....

“I continue to believe that [appellant] could work with the restrictions as [placed] on her multiple times over the prior 10 years and I believe that she wants to return to work. She has indicated on every occasion that she would like to work, but is unable to do so secondary to the conditions which exacerbated her injury.”

On March 11, 2004 the employing establishment provided leave analysis forms showing that appellant worked two and one-half hours on March 12, 2002, did not work at all between March 13 and November 10, 2002 and worked two hours a day between November 11 and December 2, 2002.

By letter dated March 11, 2004, the Office advised Dr. Accord of the evidence showing that appellant did not work continuously between March and December 2002. The Office asked him to provide a report explaining how appellant’s intermittent hours of work between March and December 2002 caused or aggravated a medical condition.

In a March 22, 2004 report, Dr. Accord stated:

“The intermittent hours of work which [appellant] perform[ed] continuously from the time of injury exacerbated her underlying condition, which if you recall, was a workers’ compensation accepted cervical sprain/strain. This was an industrially-related injury and was previously accepted by [the Office].

“I saw [appellant] on a weekly basis during the periods in question and my examination demonstrated spasm, limited range of motion and continuing pain, for which [she] received weekly or semi-weekly trigger point injections with some relief. In addition, [appellant] was placed on [pain medication].

“Aggravation was involved, though you must recall that [appellant] was sent home most days after being told that there was no work for her within her restrictions. She was returned to work on more than a dozen occasions with the restrictions specified; however, her employer refused to honor these. In my opinion, the lack of respect for medical restrictions negates the employer’s complaints that [appellant] did not return to work.”

On April 23, 2004 the Office advised appellant of its proposed termination of her compensation benefits based on evidence that she misrepresented the laws she worked between March to December 2002. It noted that the employing establishment provided evidence that she did not work between March 13 to November 10, 2002 and had worked for only two hours a day from November 11 to December 2, 2002.

In a May 10, 2004 report, Dr. Accord stated that he treated appellant on a weekly basis for several years. He indicated that she reported to work between March to December 2002 but the employing establishment did not provide work within her medical restrictions. Dr. Accord stated: “Please be advised that [appellant] was attempting to work during this time period, that

the work allowed was in conflict with her restrictions and that her failure to continue to work was caused by the failure of her employer to accommodate her.”

By decision dated May 2, 2006, the Office rescinded its acceptance of a temporary aggravation of a preexisting cervical strain and a preexisting right shoulder strain. It found that the factual evidence established that she had misrepresented her work activity between March to December 2002 and the medical evidence failed to establish that she had any condition causally related to her work activity for that period.

On May 5, 2006 appellant requested a hearing. A telephonic hearing was held on November 14, 2006.

In a report dated November 20, 2006, Dr. Accord reiterated stated that he had treated appellant for several years for an accepted cervical sprain that progressed to right shoulder tendinitis as demonstrated on the MRI scan. She performed work that included repetitive use of her right upper extremity, including repetitive stamping mail, casing mail and picking up trays of mail which violated her medical restrictions. Appellant was told to go home after working for as little as five minutes when her cervical and right shoulder symptoms returned. Dr. Accord stated that the significant deterioration of her condition was caused by excessive use of her upper extremities as a direct result of working outside her medical restrictions.

By decision dated January 19, 2007, an Office hearing representative affirmed the May 2, 2006 decision rescinding its acceptance of appellant’s claim for a temporary aggravation of a preexisting cervical strain and a preexisting right shoulder strain.

On February 6, 2007 appellant requested reconsideration. In a January 29, 2007 report, Dr. Accord indicated that her work in March 2002 and between November to December 2002 caused a material worsening of her condition. He stated that working for even five minutes exacerbated her pain especially when she did not perform work within her medical restrictions. Dr. Accord advised that appellant attempted to return to work on numerous occasions but failure of the employing establishment to provide work within her medical restrictions caused a deterioration of her status. Her accepted cervical sprain evolved into myofascial pain of the neck and shoulder and then into periarthrititis of the shoulder.

By decision dated September 25, 2007, the Office denied appellant’s request for reconsideration on the grounds that the evidence was insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

The Board has upheld the Office’s authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.² The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the

² See *Andrew Wolfgang-Masters*, 56 ECAB 411 (2005); *Linda L. Newbrough*, 52 ECAB 323 (2001); see also 20 C.F.R. § 10.610.

manner provided by the compensation statute.³ It is well established that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁴ This holds true where the Office later decides that it has erroneously accepted a claim for compensation.⁵ In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.⁶

ANALYSIS -- ISSUE 1

The Office advised appellant that it proposed to rescind the acceptance of her claim for injury based on new evidence that she misrepresented her actual work history between March to December 2002. Appellant asserted that she worked continuously between March to December 2002. However, the employing establishment provided evidence that she worked from March 4 to 12, 2002, did not work at all from March 13 to November 10, 2002 and worked for only two hours a day from November 11 to December 2, 2002. In light of this new evidence, the Office asked Dr. Accord to provide a report further explaining how appellant's intermittent hours of work between March to December 2002 caused or aggravated her medical condition.

On March 22, 2004 Dr. Accord stated: "The intermittent hours of work which [appellant] perform[ed] continuously from the time of injury exacerbated her underlying condition...." He noted that she had spasm, limited range of motion and continuing pain. Dr. Accord did not provide a detailed description of physical findings or explain how his findings demonstrated a material worsening of appellant's accepted temporary aggravation of her preexisting cervical strain and right shoulder strain. He provided insufficient explanation as to how appellant's limited work activity between March to December 2002 caused or contributed to her condition. Dr. Accord stated that her work activity, "since the time of injury," *i.e.*, May 10, 1990, caused her disability between March to December 2002. However, in a separate claim, the Office found that appellant's disability causally related to her original May 10, 1990 claim had resolved as of March 11, 2002. Dr. Accord did not provide a clear explanation as to whether the period of work activity between March to December 2002 caused her spasm, limited range of motion and pain and how these findings constituted a material worsening of appellant's preexisting cervical and right shoulder conditions.

On May 10, 2004 Dr. Accord indicated that the employing establishment did not provide appellant with work within her medical restrictions and sent her home early. However, he did not discuss her actual work activities on the actual days that she worked between March to December 2002 or provide a rationalized opinion on whether such work activity caused a material worsening of her preexisting conditions.

On November 20, 2006 Dr. Accord essentially repeated his previous assertion that the employing establishment did not provide work within appellant's medical restrictions. He stated

³ *Doris J. Wright*, 49 ECAB 230 (1997).

⁴ *Linda L. Newbrough*, *supra* note 2.

⁵ *Id.*; *Gareth D. Allen*, 48 ECAB 438 (1997).

⁶ *Delphia Y. Jackson*, 55 ECAB 373 (2004); *Belinda R. Darville*, 54 ECAB 656 (2003).

that she performed work that included repetitive use of her right upper extremity, including repetitive stamping mail, casing mail and picking up trays of mail which violated her medical restrictions. Dr. Accord stated that the significant deterioration of appellant's condition was caused by excessive use of her upper extremities as a direct result of working outside her medical restrictions. However, he provided insufficient medical rationale explaining how her brief period of employment in March 2002 and between November to December 2002 caused a material worsening of her preexisting cervical spine and right shoulder conditions.

In rescinding acceptance of the claim, the Office provided a clear explanation of its rationale for the rescission. It explained that its acceptance of her claim was premised on her misrepresentation that she worked continuously between March to December 2002 and on medical reports that relied on this erroneous factual history. It explained that Dr. Accord's subsequent reports failed to adequately explain how appellant's claimed worsening of her condition was caused by her brief period of work in March 2002 and between November to December 2002. For these reasons, the Board finds that the Office met its burden of proof in rescinding its acceptance of a temporary aggravation of a preexisting cervical strain and a preexisting right shoulder strain.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act⁷ vests the Office with discretionary authority to determine whether it will review an award for or against compensation. The Act states:

“(a) The Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application. The Secretary, in accordance with the facts found on review may--

- (1) end, decrease, or increase the compensation previously awarded; or
- (2) award compensation previously refused or discontinued.”

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by setting forth arguments that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and new pertinent evidence not previously considered by the Office.⁸ When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.⁹

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 2

In a January 29, 2007 report, Dr. Accord opined that appellant's work activity in March 2002 and between November to December 2002 caused a material worsening of her cervical back and right shoulder conditions because the employing establishment did not provide work within her medical restrictions. This report is merely a repetition of Dr. Accord's opinion in his earlier reports. Therefore, it does not constitute relevant and pertinent evidence or relevant legal argument not previously considered by the Office.

The Board finds that appellant did not submit arguments or evidence showing that the Office erroneously applied or interpreted a specific point of law, advancing a relevant legal argument not previously considered or constituting relevant and new pertinent evidence not considered previously by the Office. Therefore, the Office properly denied her request for reconsideration.

CONCLUSION

The Board finds that the Office met its burden of proof in rescinding its acceptance of appellant's temporary aggravation of a preexisting cervical strain and a preexisting right shoulder strain. The Board further finds that the Office did not abuse its discretion in denying her request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 25 and January 19, 2007 are affirmed.

Issued: June 2, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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