

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

S.H., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
COMMISSARY AGENCY, McGUIRE AIR
FORCE BASE, NJ, Employer**

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**Docket No. 08-947
Issued: October 2, 2008**

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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 12, 2008 appellant filed a timely appeal from a September 19, 2007 merit decision of the Office of Workers' Compensation Programs that affirmed the denial of her claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met her burden of proof in establishing that she experienced a recurrence of disability on May 11, 2005, causally related to her August 30, 2004 employment injury.

FACTUAL HISTORY

On August 30, 2004 appellant, then a 51-year-old management support clerk, was injured when she strained her right arm and shoulder while removing a folder from a file cabinet. She stopped work on August 30, 2004 and returned to her regular-duty job on September 1, 2004.

The Office accepted appellant's claim for sprain of the neck and of the right shoulder and upper arm.

In a December 13, 2004 note, Dr. Steven Valentino, an osteopath, advised that appellant would be out of work for one month. On January 20, 2005 he reported that appellant had continuing neck pain radiating to the right arm with paresthesias and weakness as well as right shoulder pain. Dr. Valentino diagnosed cervical protrusion creating right cervical radiculopathy with facet syndrome, rule out primary shoulder pathology. A January 27, 2005 magnetic resonance imaging (MRI) scan report was found unremarkable for, right shoulder pathology. In a February 7, 2005 report, Dr. Valentino noted that appellant had right shoulder and arm pain with paresthesias on August 30, 2004, after removing a file from a cabinet. He explained that a November 4, 2004 electromyogram (EMG) confirmed chronic mild right C7 radiculopathy and mild right cubital syndrome and a November 24, 2004 MRI scan showed that appellant was status post C5-6 fusion with a mild central protrusion at C4-5. On examination Dr. Valentino found that appellant had diminished range of motion about the cervical spine with marked facet synovitis and some right shoulder weakness with a positive impingement sign. He concluded that appellant had a right shoulder strain and right cervical radiculopathy that were related to her August 30, 2004 work injury and advised that her disability was ongoing. On March 3, 2005 Dr. Valentino diagnosed cervical protrusion with right cervical radiculopathy with facet syndrome and mild right cubital tunnel syndrome. He stated that appellant did not feel capable of working at the present time.

On February 16, 2005 appellant's attorney requested that the Office accept cervical radiculopathy as related to her August 30, 2004 injury.

In an April 14, 2005 report, Dr. Valentino noted that appellant complained of left neck pain in addition to her right shoulder pain. He diagnosed cervical protrusion creating right cervical radiculopathy with facet syndrome and recommended that appellant remain off work until the following Monday, at which point she could return to part-time sedentary duties for one month. Dr. Valentino advised that appellant could return to sedentary duty for four hours per day, with a five-pound lifting restriction. Appellant returned to work for four hours per day effective April 12, 2005.

On May 12, 2005 Dr. Valentino removed appellant from work for one month. He reported that appellant's symptoms were aggravated by activity and prolonged posture. Dr. Valentino found significantly limited cervical range of motion as well as spasm on palpation. He suggested that she undergo a functional capacity evaluation. On May 23, 2005 Dr. Valentino noted that appellant continued to complain of neck pain with radiation to the upper back and occasional radiation to the right arm. He indicated that appellant reported that the employing establishment was questioning whether the medical evidence was sufficient for her to remain off work and that this was stressful. Dr. Valentino stated that appellant's diagnosis was unchanged and recommended a consult regarding her neck pain and stress. On June 20, 2005 he again noted appellant's complaints and diagnosed cervical radiculopathy. Dr. Valentino stated that appellant remained off work.

In a May 27, 2005 notice of recurrence of disability, appellant claimed disability as of May 11, 2005. She stated that she had experienced ongoing pain since her original injury and

stopped work on May 11, 2005. The employing establishment noted that it had offered to accommodate appellant and that her normal job was sedentary. In a June 21, 2005 work capacity evaluation, Dr. Valentino opined that appellant was unable to work eight hours per day because appropriate treatment had not been authorized. He stated that appellant's condition was caused by her employment activities and that her disability was ongoing. In notes dated July 7 and 11, 2005, Dr. Valentino stated that appellant would remain off work pending reevaluation after injections.

In a June 30, 2005 functional capacity evaluation Kristen M. Mandl, a physical therapist to whom appellant was referred by Dr. Valentino, noted that her job was sedentary and did not require her to perform physically demanding work. She explained that appellant's job consisted of paperwork, computer work and lifting files. Ms. Mandl noted that appellant was initially injured in August 2004 and had been out of work since then, except for a brief period in April 2005 when she returned to work. Appellant reported that she was in too much pain to continue working and was making mistakes due to her discomfort and medications. Ms. Mandl noted that appellant could perform sedentary work for eight hours per day. She noted that appellant exhibited symptom and disability exaggeration and showed poor effort during examination. Therefore, the test results were unreliable.

In a July 23, 2005 report, Dr. Guy W. Fried, a Board-certified physiatrist, noted that appellant reported neck and right arm pain. Diagnostic testing showed mild right C7 radiculopathy, mild right tubular tunnel slowing of the ulnar nerve, status post fusion at C5-6 and a probable slight increase in a moderate central disc protrusion at C4-5. On physical examination he found mild weakness and decreased sensation and some diminished motion. Dr. Fried diagnosed cervical radiculopathy and advised that appellant remained out of work while she tried to decrease her pain.

On August 25, 2005 Dr. Valentino suggested that appellant return to her previous sedentary position for half-days.

By decision dated September 20, 2005, the Office denied appellant's claim for a recurrence of disability beginning on May 11, 2005. A copy of the decision was sent to appellant's representative.

On September 13, 2005 Dr. Valentino noted appellant's history of injury and attempts to return to work. He stated that appellant became disabled effective December 13, 2004 due to flare-ups of her symptoms. Dr. Valentino attributed appellant's disability to repetitive activities performed on the job and opined that her recurrence of disability was directly related to her work injury. On September 30, 2005 he stated that appellant was capable of working four hours per day in a sedentary position.

On March 6, 2006 appellant requested reconsideration. Counsel asserted that he was not sent a copy of the September 20, 2005 decision. In a March 2, 2006 report, Dr. Valentino stated that appellant's condition was unchanged and she continued to complain of neck and shoulder pain aggravated by activity and prolonged posture. In a March 20, 2006 report, Dr. Ronald Krasnick, a Board-certified orthopedic surgeon, noted appellant's history of rotator cuff repairs in 1993 and a cervical fusion at C5-6 in 2001. He advised that appellant's x-rays indicated an

intact fusion at C5-6 and recommended that she consult the physician who treated her for her work-related injury for pain management. On May 1, 2006 Dr. Irving P. Ratner, a Board-certified orthopedic surgeon, advised that Dr. Krasnick referred appellant to him for cervical pain management. He stated that appellant's present cervical spine condition was related to both her 2004 work injury and to previous problems and surgeries. Dr. Valentino advised that appellant continued to complain of neck pain aggravated by activity or prolonged posture and ameliorated by rest and recumbency.

By decision dated June 2, 2006, the Office denied modification of its September 20, 2005 decision. A copy of the decision was sent to appellant's representative. By correspondence dated June 16, 2006, counsel indicated that he had not yet received a decision concerning appellant's request for reconsideration.

Appellant subsequently submitted a May 23, 2006 report from Dr. Valentino, who discussed appellant's history of injury on August 30, 2004 and subsequent return to her full-duty sedentary job. Dr. Valentino explained that appellant complained of severe neck pain with intermittent radiation into her right arm and stopped work on May 11, 2005. He noted that the pain appeared to be aggravated by certain employment activities, including keying and using an adding machine, both repetitive motion activities which she performed after returning to work. Dr. Valentino diagnosed cervical protrusion creating right cervical radiculopathy with facet syndrome and characterized her condition as a recurrence with increased symptoms and positive findings on physical examination.

By correspondence dated July 27, 2006, counsel indicated that he did not receive the Office's June 2, 2006 decision until July 14, 2006. He requested that the Office reissue its decision.

By decision dated September 19, 2007, the Office denied modification of its June 2, 2006 decision. It found that the medical evidence of record did not support that appellant's claimed May 11, 2005 recurrence of disability was related to her August 30, 2004 employment injury. The Office noted that, although counsel stated that he had not received the September 20, 2005 or June 2, 2006 decisions, he was sent both decisions and it was presumed that he had received both decisions.

LEGAL PRECEDENT

Section 10.5(x) of the Office's regulation provides, 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."¹

The Board has held that in order to establish a claim for a recurrence of disability, a claimant must establish that she suffered a spontaneous material change in the employment-

¹ 20 C.F.R. § 10.5(x) (2002).

related condition without an intervening injury.² A claimant's burden of proof includes the necessity of furnishing medical evidence from a 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 that conclusion with sound medical rationale. Where no such rationale is present, the medical evidence is of diminished probative value.³

ANALYSIS

The Office accepted appellant's claim for a neck sprain and sprain of the right shoulder and upper arm after removing a folder from a file cabinet. The record reflects that appellant had preexisting cervical conditions for which she underwent surgery. On April 14, 2005 Dr. Valentino found that appellant was capable of returning to her regular sedentary job for four hours per day. Appellant stopped work again on May 11, 2005, claiming a recurrence of disability. The employing establishment noted that appellant's regular duties were sedentary.⁴

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability in the performance of duty on May 11, 2005. Appellant submitted numerous reports from Dr. Valentino, who indicated that she had ongoing symptoms of pain and weakness in her neck with radiation into her right shoulder and arm. On May 12, 2005 he noted that appellant had stopped work at his recommendation due to a significant increase in symptoms that were aggravated by activity and prolonged posture. However, Dr. Valentino did not specifically relate her symptoms to the August 30, 2004 work injury. On May 23, 2004 he explained that appellant had experienced some relief with injections but that her symptoms had returned. However, Dr. Valentino did not explain how appellant's current condition was related to her August 30, 2004 work injury or why she was totally disabled from performing sedentary work due to her accepted strain. The Board notes that appellant has several preexisting conditions, including a 1993 rotator cuff repair and a 2001 cervical fusion according to Dr. Krasnick. However, Dr. Valentino did not provide a full medical history or explain how the accepted injury would cause or contribute to any preexisting condition.

On September 13, 2005 Dr. Valentino advised that appellant's claimed recurrence of disability was directly related to her work injury. However, he also related appellant's pain to employment activities such as keying and using an adding machine. Dr. Valentino suggested that repetitive activities as performed on the job had caused or contributed to the flare-ups in her symptoms. The Board notes that a recurrence of disability is a spontaneous material change in a claimant's injury-related condition without an intervening injury.⁵ Dr. Valentino's opinion that appellant's symptoms were due in part to repetitive activities performed after she returned to her

² *Carlos A. Marrero*, 50 ECAB 117 (1998).

³ *Mary A. Ceglia*, 55 ECAB 626, 629 (2004).

⁴ The employing establishment also noted that it offered appellant work within her restrictions. To the extent that appellant's regular duties may have exceeded restrictions set forth by her physician that were due to her work injury, there is no evidence that appropriate light duty was not made available. See *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ See *supra* note 1.

regular job implicates a possible new injury, not a recurrence of disability. Appellant must show that her recurring symptoms and subsequent disability for work were spontaneous, not related to activities on the job after she returned to work. Dr. Valentino did not adequately address the issue of causal relationship as to whether appellant's disability was due to a new injury or a spontaneous change in the injury-related condition without an intervening injury. On May 23, 2006 Dr. Valentino supported that appellant had a recurrence of disability but he reiterated that her pain appeared to be aggravated by her employment activities. He offered no medical rationale in support of his opinion on causal relationship between the work stoppage beginning May 11, 2005 and the August 30, 2004 sprain injuries caused by moving a folder from a file cabinet. Without a detailed explanation or rationale explaining why appellant's present inability to work is related to her August 30, 2004 employment injury, particularly in light of her preexisting right shoulder and cervical spine conditions his opinion lacks probative value.⁶ Other reports from Dr. Valentino do not specifically address causal relationship between appellant's disability and her August 30, 2004 injury. Therefore, the Board finds that Dr. Valentino's reports are insufficient to establish appellant's claim for a recurrence of disability beginning on May 11, 2005.

Appellant also submitted reports of other physicians, including Drs. Fried, Krasnick and Ratner. However, these physicians did not specifically support that appellant had disability for work, beginning May 11, 2005, causally related to her August 30, 2004 employment injury. The Board has held that a medical report which does not address causal relationship is of no probative value on that issue.⁷ Therefore, these reports are insufficient to establish that appellant sustained a recurrence of disability causally related to her August 30, 2004 employment injury.

The Board notes that counsel asserts that he did not receive a copy of either the September 20, 2005 or the June 2, 2006 decisions. However, the record reflects that a copy of each decision was mailed to his correct address. There is no evidence indicating that the decisions were returned as undeliverable. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office's daily activities, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.⁸ The record reflects that the Office mailed copies of the September 20, 2005 and June 2, 2006 decisions to counsel's address of record and it is presumed that they arrived in due course.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability on May 11, 2005, causally related to her August 30, 2004 employment injury.

⁶ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

⁷ See *A.D.*, 58 ECAB ____ (Docket No. 06-1183, issued November 14, 2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

⁸ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 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