

On October 23, 2008 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim for an injury to her right shoulder on October 20, 2008 when she reached up to retrieve mail from a shelf. An October 20, 2008 x-ray revealed a normal right shoulder with no evidence

of traumatic osseous pathology or bony abnormality. The Office accepted her claim for right bicipital tenosynovitis.¹

Appellant filed a claim for a November 5, 2008 recurrence of disability, due to the October 20, 2008 right shoulder injury. She stated that she had to carry her mail bag on her right shoulder, which caused right shoulder pain and aggravated her left shoulder condition. On the claim form, Eddie Morgan, Jr., a supervisor, denied that appellant was required to carry mail on her shoulder. He indicated that her inability to work was due to residuals of left breast cancer. In a January 15, 2009 letter, Catherine Williamson, an employing establishment supervisor, advised that appellant returned to full duty on November 3, 2008 after being released by her physician who found that her accepted right arm condition had resolved. Her disability for work was due to left arm restrictions. On February 2, 2009 Mr. Morgan noted that appellant was provided a mail bag that was designed to be carried around the waist, not her right shoulder. Appellant was never required to carry mail on her right shoulder.

On October 28, 2008 Dr. Maurey R. Ellenberg, a Board-certified internist and physiatrist, reviewed the medical history and provided findings on physical examination. He noted tenderness over appellant's upper right trapezius muscle and right bicipital tendon. Right arm reflexes and strength were normal. Appellant's right upper extremity pain appeared to be a combination of myofascial pain with trapezius and bicipital tendinitis. On October 31, 2008 Dr. Ellenberg advised that appellant's bicipital tendinitis had improved and she could perform full-time regular work duties with her right arm as of November 3, 2008. Appellant continued to have a 25 pound lifting limit on her left side. On November 11, 2008 Dr. Ellenberg advised that appellant could perform full-time regular work as of November 3, 2008.

On November 19, 2008 Dr. Eric A. Kovan, a Board-certified physiatrist and an associate of Dr. Ellenberg reviewed the medical history and provided findings on physical examination. After developing right bicipital tendinitis on October 20, 2008, appellant began using her left shoulder to compensate and exacerbated the left arm condition. As a result, she had pain in both shoulders. Dr. Kovan diagnosed bilateral shoulder pain secondary to exacerbation of carrying mail at work. Appellant could work with a weight limit of 25 pounds for both arms. On January 14, 2009 Dr. Kovan reviewed the medical history and provided findings on physical examination. He noted appellant's right shoulder was doing well and the physical examination was within normal limits. She had no work restrictions on use of her right shoulder. Left arm restrictions included no grasping and no lifting greater than ten pounds. On February 11, 2009 Dr. Kovan advised that appellant was unable to work due to her left shoulder condition.

By decision dated May 4, 2009, the Office denied appellant's claim for a recurrence of disability on November 5, 2008, finding that the medical evidence failed to establish that her disability was causally related to the October 20, 2008 accepted right shoulder condition.

On August 12, 2009 Dr. Kovan stated that appellant was off work until January 1, 2009 due to her left arm condition. Appellant could perform sedentary work using her right arm only. On September 2, 2009 Dr. Kovan provided findings on physical examination and advised that

¹ Appellant has a separate claim accepted for aggravation of left bicipital tenosynovitis on March 1, 2002 under OWCP File No. xxxxxx8464. The Office accepted a November 13, 2008 recurrence of disability under this claim.

appellant's right shoulder condition was within normal limits. Regarding her work status, she had full activity of her right arm.

Appellant requested a hearing before an Office hearing representative.

By decision dated November 13, 2009, the Office denied her claim for a November 5, 2008 recurrence of disability causally related to her October 20, 2008 right bicipital tenosynovitis. Appellant and her attorney did not attend the hearing scheduled for August 14, 2009. Consequently, the Office hearing representative performed a review of the written record.

On November 28, 2009 appellant again requested a hearing.

By decision dated December 8, 2009, the Office denied appellant's request for a hearing, finding that she was not entitled to a second hearing as a matter of right. It further found that the issue in the case, whether she had a recurrence of disability causally related to her accepted October 20, 2008 right bicipital tenosynovitis, could be addressed equally well through a reconsideration request and additional medical evidence.²

LEGAL PRECEDENT -- ISSUE 1

A 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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."³ An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for he or she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound reasoning.⁴ Where no such rationale is present, medical evidence is of diminished probative value.⁵

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent, intervening cause attributable to the employee's own intentional conduct.⁶

² Subsequent to the December 8, 2009 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. See 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

³ *R.S.*, 58 ECAB 362 (2007); 20 C.F.R. § 10.5(x).

⁴ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁵ See *Ronald C. Hand*, 49 ECAB 113 (1957); see also *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁶ *S.M.*, 58 ECAB 166 (2006); *John R. Knox*, 42 ECAB 193, 196 (1990).

ANALYSIS -- ISSUE 1

Appellant has the burden to provide medical evidence establishing that she sustained a recurrence of disability on November 5, 2008 causally related to her October 20, 2008 accepted right bicipital tenosynovitis.

Appellant alleged that she was made to carry her mailbag on her right shoulder, and therefore aggravated both her right and left shoulder conditions. The employing establishment denied that appellant was required to carry mail on her shoulder. It provided her with a mail bag that was designed to be carried around the waist, not her shoulder. The employing establishment advised that appellant returned to full duty on November 3, 2008 after being medically released by her physician who found that her accepted right arm condition had resolved.

An October 20, 2008 x-ray revealed a normal right shoulder with no evidence of traumatic osseous pathology or bony abnormality. On October 31, 2008 Dr. Ellenberg advised that appellant could perform fulltime regular work duties with her right arm as of November 3, 2008. On November 11, 2008 he again advised that she could perform fulltime regular work as of November 3, 2008. There are no reports from Dr. Ellenberg to establish a November 5, 2008 recurrence of disability causally related to appellant's October 20, 2008 accepted right bicipital tenosynovitis.

On November 19, 2008 Dr. Kovan noted that, after developing right bicipital tendinitis on October 20, 2008, appellant began using her left shoulder to compensate and exacerbated her left arm condition. As a result, appellant had pain in both shoulders. Dr. Kovan diagnosed bilateral shoulder pain secondary to exacerbation due to carrying mail at work. A consequential left shoulder condition could be compensable if it arose because of the accepted the right shoulder condition. Dr. Kovan's opinion however is based upon an incomplete history and an inadequate medical explanation as appellant stated that she continued to carry the mailbag on her right shoulder. There is no evidence of record that appellant carried or distributed the mail with her upper left extremity. Dr. Kovan did not explain how appellant's carrying and handling of the mail on her right shoulder caused her left shoulder to compensate or exacerbated her left shoulder condition.

Moreover, Dr. Kovan did not find that appellant was disabled on November 5, 2008 due to her accepted right shoulder condition. On January 14, 2009 he noted that her right shoulder was doing well and the physical examination was within normal limits. Appellant had no work restrictions on the use of her right shoulder. Dr. Kovan's reports do not establish that appellant sustained a recurrence of disability on November 5, 2008 causally related to her October 20, 2008 accepted right shoulder condition.

The Board finds that appellant failed to meet her burden of proof in establishing that she sustained a recurrence of disability on November 5, 2008 causally related to her October 20, 2008 accepted right bicipital tenosynovitis.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."⁷ A claimant is not entitled to an oral hearing, however, if he has already received a hearing on the same issue or set of issues.⁸ Nonetheless, the Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and has held that the Office must exercise its discretion in such cases.⁹ The Office shall determine whether a discretionary hearing should be granted and, if not, shall so advise the claimant with reasons.¹⁰ The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when no legal provision is made for such hearings, are a proper interpretation of the Act and of Board precedent.¹¹

ANALYSIS -- ISSUE 2

Having already been granted an oral hearing before an Office hearing representative on the issue of whether she had a November 5, 2008 recurrence of disability causally related to her October 20, 2008 right bicipital tenosynovitis, appellant was not entitled to another hearing on the same issue as a matter of right. The Office correctly made this finding in its December 8, 2009 decision. The Office considered whether to grant a discretionary hearing but denied such a hearing on the grounds that the issue could be resolved equally well through the reconsideration process. As appellant may pursue this issue through an alternative procedure, by submitting to the Office a request for reconsideration and by supporting that request with well-reasoned medical evidence on whether she had a November 5, 2008 recurrence of disability causally related to her October 20, 2008 right bicipital tenosynovitis, the Board finds that the Office did not abuse its discretion in denying appellant's request for a second hearing on the same issue.¹²

⁷ 5 U.S.C. § 8124(b)(1).

⁸ See *Charles D. Watson*, 35 ECAB 1068 (1984) (if a claimant has received a hearing on an issue or set of issues and the hearing representative affirms the Office's decision, the claimant is not entitled to another hearing on that issue or set of issues even if he proffers new evidence; he may receive a second hearing only if the Office, in its discretion, grants him a second hearing).

⁹ *Johnny S. Henderson*, 34 ECAB 216 (1982) (request for a second hearing).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4.b(3) (June 1997).

¹¹ See *Jeff Micono*, 39 ECAB 617 (1988).

¹² See *L.D.*, 58 ECAB 344 (2007).

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she had a recurrence of disability on November 5, 2008 causally related to her October 20, 2008 accepted right bicipital tenosynovitis. The Board further finds that the Office properly denied appellant's request for a second hearing on the same issue.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 8 and November 13, 2009 are affirmed.

Issued: February 17, 2011
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