

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENISE NICKENS and DEPARTMENT OF VETERANS AFFAIRS,
SYRACUSE VETERANS HOSPITAL, Syracuse, NY

*Docket No. 98-1102; Submitted on the Record;
Issued May 1, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
BRADLEY T. KNOTT

The issue is whether appellant met her burden of proof in establishing that she sustained a recurrence of disability, due to her March 22, 1988 employment injury, beginning October 11, 1996.

The Board has duly reviewed the case record in the present appeal and finds that the Office of Workers' Compensation Programs properly determined that appellant did not meet her burden of proof in establishing that she sustained a recurrence of disability, due to her March 22, 1988 employment injury, beginning October 11, 1996.

The Office accepted appellant's claim for a neck strain resulting from the March 22, 1988 employment injury. Appellant sustained recurrences of the disability on April 7, 1989 and January 3, 1992 which were accepted. She had intermittent periods of disability, the most recent being from October 15, 1996 through May 5, 1997. Since 1991 appellant was on light duty with restricted lifting, pushing, pulling or twisting. The report of appellant's treating physician, Dr. Richard B. Weiskopf, a Board-certified internist, dated July 15, 1997, stated that appellant was in an auto accident on December 28, 1992 which aggravated the pain in her neck, shoulder and arm and was in an accident while working at Dunkin Donuts on March 27, 1996 which resulted in chronic lumbosacral strain with lumbar radicular syndrome.

On October 18, 1996 appellant filed a claim for a recurrence of disability, Form CA-2a, alleging that on October 11, 1996 she sustained a recurrence of disability due to the March 22, 1988 employment injury. She stated that since returning to light duty in 1991 "for no reason at all" the pain would return and at times become unbearable. Appellant stated that the pain had not changed since the March 22, 1988 employment injury. Appellant stopped working on October 15, 1996.

By letter dated February 14, 1997, the Office informed appellant that additional evidence was necessary to establish her claim including a report from her physician with a rationalized explanation as to how her present condition related to the March 22, 1988 employment injury.

The medical evidence in the record dated after October 15, 1996, consists of Dr. Weiskopf's July 15, 1997 report and the report of the second opinion physician, Dr. Anthony J. Nastasi, a Board-certified orthopedic surgeon, dated August 19, 1997. In his July 15, 1997 report, Dr. Weiskopf who treated appellant since April 1988, considered appellant's history of injury and performed a physical examination in which he noted no neurologic changes. He also ordered x-rays of the cervical spine and right shoulder which were normal. Further, Dr. Weiskopf noted that the May 7, 1990 magnetic resonance imaging (MRI) scan and May 11, 1989 and February 22, 1990 computerized axial tomography (CAT) scans of the cervical spine and brain, respectively, were normal. He reiterated his diagnosis of cervical radiculopathy and persistent right sided neck, right shoulder and right arm pain. Dr. Weiskopf stated that appellant's current clinical status was "very much the same as it had been," that she continued to have the same symptoms consisting of right neck, right shoulder and right arm pain, and concluded that due to those symptoms, appellant required restrictions on bending, reaching, twisting or lifting. He opined that appellant's back problem which arose from the March 27, 1996 work accident at Dunkin Donuts was a separate problem from her neck, shoulder and arm problem, although it added to that disability.

In his August 19, 1997 report, Dr. Nastasi considered appellant's history of injury, performed a physical examination, and reviewed diagnostic tests including x-rays, an electromyogram and the MRI scan. He noted that the x-rays of the right shoulder dated December 18, 1996, showed dystrophic calcification secondary to tendinitis or possibly prior avulsion fracture. Dr. Nastasi concluded that appellant's cervical examination was normal with no evidence of cervical radiculopathy or peripheral nerve neuropathy and possible calcific tendinitis involving the supraspinatus tendon per the December 18, 1996 x-ray. He stated, however, that he "was at a loss to confirm the presence" of the calcific tendinitis as appellant did not bring those x-rays for him to review. Dr. Nastasi stated:

"[I]f indeed calcific tendinitis is present in [appellant's] right shoulder involving the supraspinatus tendon, it is a late occurring development and, therefore, cannot be related to the injury date of March 22, 1988. It is further my opinion that it cannot be related to the recurrence of October 11, 1996 as one would only expect to find an acute process of calcific tendinitis occurring in an individual using their upper extremity in a repetitive overhead fashion and without weight restriction either. This patient, being on light duty, obviously was not carrying out that type of activity at work on or before or after the recurrence date of October 11, 1996."

Dr. Nastasi concluded that because there was no objective evidence of residual cervical strain, cervical radiculopathy or peripheral neuropathy, appellant could perform her usual work and had not sustained a recurrence of disability on October 11, 1996.

An individual 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 which compensation is claimed is causally related to the

accepted injury.¹ 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.² As part of this burden, the employee must show a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the injury-related condition.³ This burden 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 disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁴ An award of compensation may not be made on the basis of surmise, conjecture, or speculation or an appellant's unsupported belief of causal relation.⁵

In the present case, appellant has not presented any evidence to show that her alleged recurrence of disability on October 11, 1996 resulted from the March 22, 1996 employment injury. In his July 15, 1997 report, appellant's treating physician, Dr. Weiskopf reiterated his diagnosis of cervical radiculopathy, noted there was no change on the March 1997 x-rays he ordered, and opined that appellant continued to require light-duty work with bending, reaching, twisting and lifting restrictions. Dr. Weiskopf stated that any additional disability appellant had was due to a chronic lumbosacral strain with lumbar radicular syndrome she sustained while working for Dunkin Donuts on March 27, 1996. Since the additional disability is not related to her federal employment, appellant's employment in this regard is not compensable.⁶

Further, in his August 19, 1997 report, the second opinion physician, Dr. Nastasi, found no objective evidence of cervical strain, cervical radiculopathy or peripheral neuropathy. He found that even if the December 18, 1996 x-ray showed calcific tendinitis in appellant's right shoulder involving the supraspinatus tendon, it was a late occurring development and, therefore, not related to the March 22, 1988 employment injury. Dr. Nastasi stated that an acute process of calcific tendinitis would occur in an individual using their upper extremity in a repetitive overhead fashion and without weight restriction and that situation would not have applied to appellant who was performing light work at the time of the alleged October 11, 1996 recurrence of disability. He concluded appellant could perform her usual work and had not sustained a recurrence of disability on October 11, 1996. Inasmuch as the evidence of record does not establish that appellant sustained a recurrence of disability on October 11, 1996 causally related to the March 22, 1988 employment injury, appellant has not established her claim. The Office

¹ *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

² *George DePasquale*, 39 ECAB 295, 304 (1987); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

³ *Id.*

⁴ *See Nicolea Brusio*, 33 ECAB 1138 (1982).

⁵ *See William S. Wright*, 45 ECAB 498, 503 (1994).

⁶ *See Dana Bruce*, 44 ECAB 132, 145 (1992); *Stuart K. Stanton*, 44 ECAB 859, 865 (1989).

advised appellant of the evidence necessary to establish her claim, but appellant did not submit the requisite evidence.

The decision of the Office of Workers' Compensation Programs dated December 30, 1997 is hereby affirmed.

Dated, Washington, D.C.
May 1, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

Bradley T. Knott
Alternate Member