

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ELAINE SPIEWAK and ENVIRONMENTAL PROTECTION AGENCY,  
Philadelphia, PA

*Docket No. 03-57; Submitted on the Record;  
Issued February 11, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on April 3, 2000 causally related to her December 15, 1999 employment injury.

Appellant, a 47-year-old environmental protection specialist, filed a notice of traumatic injury on December 24, 1999 alleging that on December 15, 1999 she injured her right shoulder and arm moving files in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for cervical strain on March 6, 2000.

Appellant filed a notice of recurrence of disability on April 25, 2000 alleging that on April 3, 2000 she stopped work due to a recurrence of her December 15, 1999 employment injury. The Office denied this claim on August 8, 2000 finding that the medical evidence did not establish a causal relationship between appellant's current condition and her accepted employment injury. Appellant, through her attorney, requested an oral hearing. By decision dated December 12, 2000 and finalized January 2, 2001, the hearing representative set aside the Office's August 8, 2000 decision and remanded for additional development of the medical evidence.

The Office referred appellant for a second opinion evaluation with Dr. Steven Valentino, an osteopath. Based on this report, the Office denied appellant's claim for a recurrence of disability by decision dated March 12, 2001. Appellant requested an oral hearing on March 20, 2001. By decision dated October 29, 2001, the hearing representative affirmed the Office's March 12, 2001 decision. Appellant's attorney initially requested review by the Board on January 31, 2002. However, in a letter dated June 18, 2002, appellant's attorney requested that the Board dismiss the appeal in order to pursue a request for reconsideration before the Office. In an order dismissing appeal, dated June 28, 2002, the Board dismissed docket number 02-844 at appellant's request. By decision dated August 26, 2002, the Office reviewed the new evidence submitted and declined to modify its October 29, 2001 decision.

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

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability commencing April 3, 2000 and her December 15, 1999 employment injury.<sup>1</sup> 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 employment factors and supports that conclusion with sound medical reasoning.<sup>2</sup>

Appellant's treating physician, Dr. Charles E. Wilkins, Jr., a Board-certified internist, first examined appellant on December 29, 1999 and noted a 10-year history of intermittent neck difficulties. He reported that appellant experienced an increase of symptoms on December 15, 1999 and diagnosed cervical radiculitis. On April 3, 2000 Dr. Wilkins stated that appellant noted an abrupt onset of pain radiating into her upper extremities and diagnosed a recurrence of her cervical radiculitis. In a report dated July 21, 2000, Dr. Wilkins reviewed appellant's electromyogram and diagnosed cervical radiculitis compatible with appellant's history of injury. He stated that on April 3, 2000 appellant had worsening of symptomatology related to the cervical radiculitis including decreased range of motion in the cervical spine but an intact neurologic status. Dr. Wilkins opined that appellant's current condition was directly related to her work injury.

Dr. Wilkins completed a report on August 29, 2000 and stated that appellant's history included insignificant and transient stiff necks prior to her December 15, 1999 employment injury. Dr. Wilkins stated that appellant's current condition was a direct result of her accepted work injury. He reviewed a magnetic resonance imaging scan which demonstrated degenerative discogenic disease of the cervical spine.

The Office referred appellant for a second opinion evaluation with Dr. Valentino, an osteopath. On February 19, 2001 Dr. Valentino noted that appellant's December 1999 employment injury as well as her alleged recurrence of disability on April 3, 2000. He reviewed the medical history found in Dr. Wilkins' reports and performed a physical examination finding normal spinal curves, normal range of motion of the spine, negative straight leg raising and normal neurologic examination. Dr. Valentino diagnosed resolved cervical strain. He stated that appellant recovered from her December 15, 1999 work injury and stated, "The records indicate a protracted chronic history of neck symptomatology dating back at least ten years." Dr. Valentino concluded, "Subsequent to April 3, 2000 her symptoms at that venture were rather related to preexisting and long-standing neck complaints." He stated that appellant had no evidence to substantiate any ongoing disability or impairment as it related to the work injury.

In a report dated September 26, 2001, Dr. Wilkins reviewed Dr. Valentino's report and opined that appellant suffered an acute cervical radiculitis as a result of her December 15, 1999 employment injury. He noted that appellant had no history of a similar radicular problem nor treatment. Dr. Wilkins opined that appellant's April 3, 2000 work stoppage was due to a

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<sup>1</sup> *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

<sup>2</sup> *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

worsening of her December 15, 1999 employment injury. On May 22, 2002 Dr. Wilkins reviewed appellant's medical treatment notes dating before 1995. He stated that appellant had a bout of neck pain in 1995 which could be conceivably attributed to a cervical radiculitis. Dr. Wilkins opined that this one episode of neck complaint does not constitute long-term preexisting neck complaints. He stated that the presence of degenerative discogenic change seven years ago does not negate that a new injury to the cervical spine occurred in 1999, and that appellant was symptom free from 1995 to 1999. Dr. Wilkins concluded that appellant's cervical radiculitis resulted from her 1999 employment injury and caused her recurrence of disability in April 2000.

There is an unresolved conflict of medical opinion evidence regarding the causal relationship of appellant's condition after April 3, 2000 to her accepted employment injury. Appellant's physician, Dr. Wilkins, initially noted that appellant reported a 10-year history of stiff necks. He concluded that appellant's condition in December 1999 was due to her work duties despite this history. Dr. Wilkins also supported appellant's claim that her April 3, 2000 recurrence of disability was due to her work injury rather than to any preexisting neck condition. In his later reports, Dr. Wilkins opined that appellant's preexisting neck conditions were transient and insignificant. The second opinion physician, Dr. Valentino, reviewed Dr. Wilkins' reports and concluded that appellant had "a protracted chronic history" of neck problems and that her condition after April 3, 2000 was due to this history rather than to her accepted employment injury. Section 8123(a) of the Federal Employees' Compensation Act<sup>3</sup> provides, "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." In this case, there is a clear disagreement between appellant's attending physician, Dr. Wilkins, and the second opinion physician, Dr. Valentino, regarding the causal relationship between appellant's accepted work injury of December 1999 and her alleged recurrent condition in April 2000. Due to this difference of opinion, the Office should prepare an accurate statement of accepted facts addressing the issue of any preexisting neck condition supported by the medical evidence,<sup>4</sup> prepare a list of specific questions and refer appellant to an appropriate Board-certified specialist to resolve the issue of the causal relationship, if any, between appellant's accepted employment injury and her alleged recurrence of disability. After this and such other development as the Office deems necessary, the Office should issue an appropriate decision.

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<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

<sup>4</sup> The record indicates that appellant sought treatment for her neck in 1995 from her family physician and contains an x-ray report dated August 30, 1995. This evidence was not included in the record at the time of Dr. Valentino's examination of appellant.

The decisions of the Office of Workers' Compensation Programs dated August 26, 2002 and October 29, 2001 are hereby set aside and remanded for further development consistent with this opinion of the Board.

Dated, Washington, DC  
February 11, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member