

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY M. CHERRY and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, DISTRICT OFFICE,
Columbus, OH

*Docket No. 02-2370; Submitted on the Record;
Issued January 21, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on January 13, 2000 causally related to her October 23, 1996 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for reconsideration on March 8, 2002.

Appellant, a 55-year-old contact representative, filed a notice of traumatic injury on October 24, 1996 alleging that on October 23, 1996 she injured her back, arms and neck when a coworker pulled a chair from underneath her. The Office accepted appellant's claim for lumbosacral strain. She filed a notice of recurrence of disability on January 27, 2000 alleging that she experienced continuous pain since October 23, 1996 and that she stopped work on January 13, 2000 due to her employment-related condition. Appellant returned to work on February 14, 2000 and retired from the employing establishment on September 30, 2000.

The Office requested additional factual and medical evidence in a letter dated September 11, 2000. By decision dated February 13, 2001, the Office denied appellant's claim finding that she failed to submit the necessary medical opinion evidence. Appellant requested an oral hearing. By decision dated November 26, 2001, the hearing representative affirmed the February 13, 2001 decision of the Office, finding that appellant had not submitted sufficient supportive medical opinion evidence. Appellant requested reconsideration on January 28, 2002 and by decision dated March 8, 2002, the Office denied this request finding that appellant failed to submit new evidence or legal argument in support of her claim.

The Board finds that appellant has failed to meet her burden of proof in establishing that she sustained a recurrence of disability on January 13, 2000 causally related to her October 23, 1996 employment injury.

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

January 13, 2000 and her October 23, 1996 employment injury.¹ 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.²

Appellant submitted a report dated March 8, 2000 from Dr. Thomas A. McMahon, a chiropractor, who diagnosed diffuse post-traumatic disc degeneration as a result of her 1996 employment injury. Section 8101(2) of the Federal Employees' Compensation Act³ provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated by x-ray to exist. The March 8, 2000 report from Dr. McMahon does not establish that he took x-rays nor does it include a diagnosis of spinal subluxation. As this report does not comport with the requirements of the Act, it does not constitute medical evidence and is insufficient to meet appellant's burden of proof.

Appellant's attending physician, Dr. Elliot P. Feldman, an osteopath, completed a note on April 27, 1999 and stated that appellant experienced a recurrence of left hip pain and low back pain beginning April 26, 1999. On March 17, 2000 he stated that appellant experienced an exacerbation of her October 23, 1996 work injury, in January and that she was totally disabled from January 13 to March 5, 2000. While these reports tend to support appellant's claim that she sustained a recurrence of disability due to her October 23, 1996 employment injury, Dr. Feldman did not provide a history of injury nor did he explain why he believed that appellant's current condition was due to her employment injury of more than four years ago. Without medical reasoning explaining how and why appellant's current condition was due to her employment injury, Dr. Feldman's notes are not sufficient to meet appellant's burden of proof.

Dr. Robert C. Turner, a Board-certified orthopedic surgeon, noted on February 14, 2000 that he treated appellant for a back injury among other conditions. He reported that appellant fell in 1996, when a chair was pulled from under her and that she was currently experiencing pain in her back with cramping in the legs. Dr. Turner noted that x-rays did not demonstrate a fracture, but that appellant did have diffuse degenerative disc disease which "most likely was injured and aggravated at the time of the injury."

In a report dated December 21, 2000, Dr. Turner stated that appellant had severe degenerative disease of multiple joints. He noted that he did not have the full details of her 1996 employment injury as he did not treat her for that injury. Dr. Turner found that appellant had diminished range of motion and pain from the back through the buttocks, worse with any activity including sitting. He stated that her symptoms were suggestive of a spinal stenosis-type picture. Dr. Turner stated: "Certainly, the instigating factor could have been a disc rupture at the time of her injury in 1996. Her history, I believe, is very consistent in that this particular injury started her back problems.... Unfortunately, I can[no]t be specific about the anatomic nature of her

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

² *See Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

³ 5 U.S.C. §§ 8101-8193, 8101(2).

problem.” He further noted that the medical connection between appellant’s current condition and the 1996 injury was historical and that he had not tried to prove the connection. Dr. Turner stated that appellant’s condition had worsened and opined that the work-related condition had not resolved. He concluded: “I did mention that [appellant] most likely aggravated her degenerative disc disease and I realize that, that [i]s a very vague description. I do n[o]t really know exactly what she did to aggravate it.”

Dr. Turner’s reports are insufficient to meet appellant’s burden of proof as the reports are not based on a complete history of injury. Furthermore, he couched his conclusions in speculative terms noting that appellant’s accepted 1996 employment injury “most likely” aggravated her degenerative disc disease. Dr. Turner also noted that appellant had degenerative disease of multiple joints, suggesting that her condition was a natural progression of her degenerative disease, rather than being attributable to a specific employment injury. He stated that there was a historical connection between appellant’s current condition and her employment injury, that he had not attempted to provide a more certain causal relationship, that although he believed that appellant’s 1996 employment injury aggravated her degenerative disc disease, he did not know how this aggravation occurred. As Dr. Turner did not provide a complete history of injury, a clear opinion on the causal relationship between appellant’s current condition and her employment injury and as he failed to provide supportive medical reasoning explaining how and why appellant’s employment injury resulted in an aggravation of her degenerative disc disease, especially given her established propensity for degenerative joint disease, his report is not sufficient to meet appellant’s burden of proof. Appellant did not provide the necessary rationalized medical opinion evidence to meet her burden of proof and the Office properly denied her claim.

The Board further finds that the Office did not abuse its discretion by denying appellant’s request for reconsideration.

The Office’s regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument, which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office; or constitutes relevant and pertinent new evidence not previously considered by the Office.⁴

In support of her January 28, 2002 request for reconsideration, appellant asserted that she had been in constant pain since her 1996 employment injury. She did not submit any new evidence or legal argument. As the issue in appellant’s claim is medical, whether she has established a causal relationship between her diagnosed condition and her 1996 employment injury, in order to require the Office to reopen her claim for consideration of the merits, appellant must submit new evidence or legal argument addressing this aspect of her claim. As she failed to submit relevant new evidence or legal argument, the Office properly declined to reopen appellant’s claim for consideration of the merits.

⁴ 5 U.S.C. §§ 10.609(a) and 10.606(b).

The March 8, 2002 and November 26, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
January 21, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member