

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY E. BUSH and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Buffalo, NY

*Docket No. 03-1261; Submitted on the Record;
Issued April 26, 2004*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant established that she sustained a consequential injury on October 16, 1996 due to employment-related osteoarthritis; and (2) whether she sustained a recurrence of total disability on October 3, 1996 causally related to her accepted work injury of May 30, 1989.

The Office of Workers' Compensation Programs, in case number A2-681373, accepted several conditions including a bilateral knee strain, as a result of a May 15, 1978 employment injury sustained by appellant, who was then 41 years old and working as a telephone operator.¹ In case number A2-602526, the Office accepted the conditions of a right shoulder strain and strains of both knees as a result of a May 30, 1989 fall sustained by her, who was then working as a purchasing agent. In 1993, the Office accepted the condition of carpal tunnel syndrome. The Office paid appropriate compensation for all periods of disability.

On October 3, 1996 appellant was working full time in a limited-duty capacity as a purchasing agent, when she stopped work that day and claimed that she sustained a recurrence of disability related to the May 30, 1989 injury.² On the claim form, she indicated that since 1989 she did not climb ladders and was limited to lifting no more than five pounds with her right arm.

On October 16, 1996 appellant sustained a fall at home and fractured her left wrist, broke her nose and sustained facial injuries. She alleged that her left knee had buckled and caused her fall. Appellant filed both a traumatic injury claim and a recurrence of disability claim for this incident and referenced her prior case files A2-602526 and A2-681373. The Office originally assigned this case, claim number A2-729107.

¹ The record indicates that the case record has been destroyed.

² Although appellant's light-duty status was never written into her job description, it was understood by the employing establishment that she was unable to lift any heavy items.

The Office combined all three cases into the current claim, number A2-602526. The record also reflects that appellant has nonwork-related conditions of osteoarthritis of both knees and obesity. She retired on disability in May 1997.

This case was previously before the Board. In an order remanding case issued December 26, 2000, the Board set aside the Office decisions of September 24, August 27 and June 3, 1998 and November 10, 1997 for appropriate merit decisions on the stated issues.³

In a decision dated March 15, 2001, the Office denied this recurrence of disability claim as not being causally related to appellant's accepted work injury of May 30, 1989. The Office accorded determinative weight to Dr. Bernie P. Davis, a Board-certified orthopedic surgeon and referral physician, who found that appellant, was capable of doing her light-duty job which she had performed prior to the alleged recurrence.

In a separate decision also dated March 15, 2001, the Office denied appellant's claim that she sustained a consequential injury at home on October 16, 1996 as she failed to establish that her osteoarthritis condition was causally related to her work injuries of May 15, 1978 and May 30, 1989.⁴

In an undated letter, received on May 24, 2001 appellant requested reconsideration of the Office's March 15, 2001 decisions. A copy of the June 2, 1998 report from Dr. John D.A. Reinhard, appellant's treating physician and a Board-certified internist and rheumatologist, was submitted, together with a copy of a March 7, 1994 treatment note from Dr. Francisco San Luis, Jr.

In a decision dated August 1, 2001, the Office denied modification of the March 15, 2001 decisions. The Office noted that, as it failed to reissue its August 27, 1998 decision following the Board's Order, it issued a merit decision. In a letter dated October 29, 2001, the Office informed appellant that since osteoarthritis had been denied as not being causally related to her work injuries, it could not pay the bills she submitted for payment.

By letter dated November 24, 2001, appellant requested reconsideration of the Office's August 1, 2001 decision and presented 22 pages of arguments.

In a letter dated November 27, 2001, appellant requested a hearing regarding the Office's decision not to pay her medical bills. She later canceled her request for a hearing, advising that she wished her November 24, 2001 reconsideration request to proceed. By letter dated July 23, 2002, the Office's Branch of Hearings and Review accepted appellant's request for withdrawal of the hearing.

By decision dated October 22, 2002, the Office denied modification of the August 1, 2001 decision.

³ Docket No. 99-442 (issued December 26, 2000).

⁴ The Office advised that it was reissuing its previous decision of June 3, 1998 in accordance with the Board's December 26, 2000 decision.

On January 12, 2003 appellant requested reconsideration and resubmitted a copy of Dr. Reinhard's June 2, 1998 report. By decision dated January 22, 2003, the Office denied her request for reconsideration, but accorded her appeal rights. While the decision advised that it was denying a review on the merits, the Office noted that, due to Office error, it would provide appellant with appeal rights granted to claimant's when modification is denied, to guarantee her due process. Accordingly, the Board finds that the Office issued a merit decision and will proceed to review the case on its merits.

The relevant medical evidence includes an October 8, 1996 letter, in which Dr. Reinhard indicated that appellant had bursitis, tendinitis and osteoarthritis of her right shoulder and both knees, which were directly related to her work injuries of May 15, 1978 and May 30, 1989. He advised that appellant's initial problems were bursitis and tendinitis and she now had degenerative arthritis, which was post-traumatic in nature and directly related to her work accidents. In an October 10, 1996 letter, Dr. Reinhard stated that appellant was totally disabled and had been unable to work since October 3, 1996 as a result of her work-related injuries.

In a June 10, 1996 letter, Dr. Reinhard stated that appellant had been permanently partially disabled since January 3, 1994 for rheumatologic problems incurred during the accidents of May 15, 1978 and May 30, 1989. He reiterated that her diagnosed conditions and her problems were causally related to her work injuries.

Dr. Reinhard signed off on the following reports from Carolyn Montgomery, a nurse practitioner. In an October 10, 1996 report, Ms. Montgomery noted that appellant was seen for severe post-traumatic bursitis, tendinitis and post-traumatic degenerative joint disease. She advised that appellant was experiencing difficulty going to work and had severe pain and difficulty giving patients medical equipment and supplies because of pain and limited motion in her shoulders. Ms. Montgomery noted that the physical examination was deferred. In an October 17, 1996 report, she advised that appellant fell in her kitchen the previous day and fractured her left arm and left wrist and advised that appellant was scheduled for an evaluation of surgical treatment for her left wrist.

In a postoperative report dated October 22, 1996, Dr. Mark J. Anders, a Board-certified orthopedic surgeon, noted that appellant had fallen approximately a week previously and sustained a comminuted partially displaced intra-articular distal radius fracture. An open reduction and internal fixation was performed on the fracture, together with a carpal tunnel release. In a June 18, 1997 report, Dr. Anders advised that he could not offer an opinion on causal relationship as he did not have direct clinical involvement or access to records to support such an opinion. In an attending physician's report dated September 15, 1997, he advised that appellant was totally disabled from October 16, 1996 through January 27, 1997, because of the fall on her wrist and subsequent fracture.

The Office referred appellant, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Davis for a second opinion evaluation. In a report dated December 15, 1996, he reviewed the history of injury and appellant's complaints. Review of a January 3, 1994 x-ray of the right shoulder showed no evidence to indicate fracture, arthritis or bony pathology. Dr. Davis stated that he did not feel that there were any abnormalities in the shoulder joint or the acromioclavicular joint on the right side. The x-ray of appellant's right

knee showed a slight loss in height of the lateral joint space. In addition, there was evidence to indicate some patellofemoral arthritis on the right side. There were no x-rays for the left side. Examination results were provided. Dr. Davis noted no detectable crepitus on flexion and extension of appellant's knees. There was no specific tenderness and no anterior, posterior, or mediolateral instability of either leg or left knee joint. Examination of appellant's upper extremities revealed limitation of abduction and flexion of both her shoulders. She was able to elevate her arms only to 90 degrees before complaining of pain. Tenderness was noted over the right shoulder cuff tendon. A canvas brace was noted on her left forearm subsequent to treatment of the fracture involving her left wrist. Neurological examination was not performed due to appellant's obesity. Dr. Davis advised that appellant has morbid exogenous obesity and arthritis of both knee joints. He further related the development of the knee arthritis to her obesity and not to the injuries of 1978 and 1989. Dr. Davis, however, opined that appellant's complaints and persistent pain in her right shoulder could be related as an impingement syndrome caused by the work injuries. He advised that, once appellant healed from the recent fracture of her left hand, which was not work related, she would be able to return to her light-duty job, which she described as 60 percent sitting and 40 percent occasionally moving about. Dr. Davis noted that appellant apparently did some type of work handling the durable goods that the patients were provided. He restricted use of her right upper extremity in terms of elevation and lifting to no more than five pounds. In an addendum report dated January 26, 1997, the physician advised that appellant, in addition to being heavy, had limitation of motion of the right shoulder, pain on range of motion of the right shoulder and tenderness over the right shoulder cuff. Dr. Davis reiterated his opinion that, if appellant's condition improved to the point where her pain no longer disabled her, she would be able to return to modified work, wherein she should not have to use the right upper extremity.

Dr. Reinhard continued to opine that appellant was permanently disabled from her post-traumatic bursitis, tendinitis and post-traumatic degenerative joint disease, which were causally related to her work injuries.

In a January 28, 1997 report, Dr. Reinhard advised that he had cared for appellant since January 3, 1994 for problems related to her work-injuries sustained on May 15, 1978 and May 30, 1989. He stated that initially she had post-traumatic tendinitis and bursitis of her right shoulder and both knees, which had been persistent with progressive problems. Dr. Reinhard advised that, more recently, appellant developed post-traumatic degenerative arthritis of both knees and shoulder with significant pain with any ambulation and great difficulty getting in and out of a chair and her car to go to work. He opined that she was permanently and totally disabled due to her work-related injuries. Dr. Reinhard encouraged appellant to stop working several years ago and that her employer had been accommodating, but no further gains could be made by job modification. In a May 22, 1997 report, he reiterated his opinion that she was totally disabled due to the medical problems relating to her injuries of May 15, 1978 and May 30, 1989.

In a May 23, 1997 report, Dr. Angel Gutierrez, an internist, advised that appellant had osteoarthritis, which was mainly localized to both knees and went back to 1978. He related the history of the accepted work injuries and noted that appellant's condition continued to worsen and caused her to be severely handicapped in her ambulation. Dr. Gutierrez stated that he believed that this problem was partially responsible for the fall she sustained while walking at home. Appellant told him that her knee gave out and, in attempting to break her fall, she

fractured her left wrist. He stated that x-rays revealed the presence of degenerative joint disease of both knees and features consistent with the same diagnosis of the right shoulder. Dr. Gutierrez advised that he read appellant's job description and given her osteoarthritic condition, he did not believe that she would be able to sit for prolonged periods of working at a computer terminal and that she was severely limited in her ability to retrieve equipment from a storage room. He further stated that she would not be able to climb, as required for the stocking of equipment in the storage areas, as her knee disability made it risky for her. Dr. Gutierrez further stated that appellant's ability to carry items weighing up to 15 pounds was also impaired as a result of her problems.

In an August 15, 1997 report, Dr. Gutierrez advised that appellant experienced problems with her knee as a result of a compensable work injury she had sustained many years previously. He advised that her knee had been weak and caused difficulties with ambulation. Dr. Gutierrez stated that, during the course of her daily activities at home, appellant's knee buckled and, in attempting to break her fall, she sustained a fracture of the left wrist. He opined that the broken wrist was the result of the left knee buckling and that this constituted a consequential injury. In a December 9, 1997 report, Dr. Gutierrez reiterated his opinion. He indicated that Ms. Montgomery and Dr Reinhard had observed buckling of the knee in the past. Dr. Gutierrez stated that obese people do not fall simply because they are obese unless they have some other handicapping condition. He concluded that appellant had suffered a consequential injury as the fall was caused by her osteoarthritis which caused the knee to buckle and it was not related to her obesity. Appellant's physicians, Drs. Reinhard and Gutierrez, submitted additional reports advising that she was completely and totally disabled.

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

In the case of *John R. Knox*,⁵ regarding consequential injury, the Board stated:

“It is an accepted principal of workers’ compensation law and the Board has so recognized 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 which is attributable to the employee’s own intentional conduct. As is noted by Professor Larson in his treatise: ‘[O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause.... [S]o long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself, would not be unreasonable [under] the circumstances. A different question is presented, of course, when the triggering activity is itself rash in the light of claimant’s knowledge of his condition.’”⁶

⁵ 42 ECAB 193 (1990).

⁶ *Id.* at 196.

In this case, appellant claimed that she sustained a consequential injury at home on October 16, 1996 when her injured left knee buckled and caused her to fall. The record reflects that she has degenerative arthritis or osteoarthritis in her knees. Appellant's burden of proof requires that a claimant 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 medical reasoning.⁷

Section 8123(a) of the Act,⁸ 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, appellant's attending physician, Dr. Reinhard, a Board-certified internist and rheumatologist, was familiar with the history of injury and constantly maintained that her arthritic knee condition was causally related to the accepted work injuries. The Office referral physician, Dr. Davis, a Board-certified orthopedic surgeon, likewise reviewed the medical evidence of record and examined appellant and concluded that her knee arthritis developed as a result of her obesity and not to the work injuries of 1978 and 1989. Due to the difference of opinion between appellant's attending physician and the Office referral physician, the Board finds that there is a conflict of medical opinion regarding the cause of appellant's arthritic knee condition. Therefore, on remand the Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician for an impartial medical examination and a report as to whether the accepted work injuries of 1978 and 1989 either caused or contributed to the development of her arthritic knee condition. After such further development as the Office deems necessary, it should issue an appropriate decision.

The Board further finds that appellant failed to meet her burden of proof in establishing that she sustained a recurrence of disability on or about October 3, 1996.

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. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.⁹ Furthermore, 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 October 3, 1996 and her accepted employment injuries.¹⁰ 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

⁷ *Carmen Gould*, 50 ECAB 504 (1999).

⁸ 5 U.S.C. § 8123.

⁹ *Mary A. Howard*, 45 ECAB 646 (1994); *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁰ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.¹¹

The record reflects that appellant suffered a nonwork-related fractured left wrist on October 16, 1996 which disabled her. The Office attributed the weight of the medical evidence to Dr. Davis, who found that she was capable of working eight hours a day in her limited-duty position, once her left wrist condition improved. He found that appellant would be capable of performing her light-duty job, noting that it was 40 percent occasionally moving about and required handling the durable goods that the patients were provided. Dr. Davis further advised limited use of the right arm, with lifting limited to five pounds.

The evidence in the record does not establish that appellant sustained a recurrence of disability on or about October 3, 1996, due to the change in the nature and extent of her light-duty position.

In testimony of August 27, 1997, appellant contended that she experienced a change in the nature and extent of her light-duty requirements. The evidence does not support this contention. Appellant advised that there was a lot of paperwork involved in her job and that it also required lifting up to 15 pounds, which was more than the 5 pounds she indicated she was allowed to lift. She, however, provided vague or contradictory testimony regarding lifting requirements, stating that she was occasionally required to lift in excess of five pounds and, at another time, indicating that she refrained from lifting heavier weights and was given assistance with such tasks. The employing establishment noted that, although appellant's light-duty status was never written into her job description, it was understood by the employees in Prosthetics that she was unable to lift any heavy items and the other employees would get items from the stock room for her. The evidence establishes that appellant was provided with assistance with lifting and that the light-duty assignment did not require lifting in excess of five pounds. Therefore, her light-duty employment was consistent with Dr. Davis' physical limitations. Although appellant alleged in a vague manner that she was provided with less assistance the record is devoid of an objective indication of a change in the nature of her light-duty job when she stopped working in October 1996. The Board finds that, at the time of the alleged recurrence, appellant did not show a change in the nature and extent of her light-duty requirements.

The medical evidence in the record also fails to establish that appellant sustained a recurrence of disability due to the change in the nature and extent of her employment-related conditions.

Dr. Reinhard's reports are insufficient to establish a change in the nature and extent of appellant's accepted employment injuries. Although he opined that appellant was totally disabled, he failed to provide any findings or rationale to support that her employment-related conditions had worsened by October 3, 1996, to the point that she was no longer capable of working due to the accepted conditions. The physician listed objective findings concerning the motion of appellant's elbows and shoulders, a mild crepitus of the knees and an x-ray showing degenerative changes in both of her knees. However, Dr. Reinhard failed to attribute those

¹¹ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989).

changes to appellant's accepted work injuries or provide sufficient rationale which would render her totally disabled from performing her limited-duty position on or about October 3, 1996.

The evidence fails to establish a worsening of the injury-related conditions when appellant stopped working on October 3, 1996. The medical evidence of record indicates that she had a concurrent, nonwork-related disability due to a fractured left wrist from October 16, 1996. Accordingly, there is no evidence to support that appellant's claimed recurrence of October 3, 1996 was disabling, rather, that her left wrist fracture was the disabling condition.

Dr. Davis, the second opinion physician, had a statement of accepted facts and copies of all the medical evidence of record. He performed a thorough physical examination in support for his conclusion that appellant could return to her limited-duty position once her left hand healed from the recent fracture and her pain complaints subsided. Accordingly, his report is indicative that there was no change in the nature and extent of appellant's employment-related condition. Thus, the Board finds that the report of Dr. Davis represents the weight of the medical evidence with respect to the alleged recurrence of disability of October 3, 1996.

Accordingly, appellant has failed to meet her burden of proof in establishing that she sustained a recurrence of disability on October 3, 1996 causally related to her accepted work injuries.

The January 22, 2003 and October 22, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed, in part and set aside, in part, and the case remanded for proceedings consistent with this decision.

Dated, Washington, DC
April 26, 2004

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member