

her neck and left arm. The Office accepted this claim for cervical strain, left shoulder strain and permanent aggravation of degenerative joint disease at C5 and appellant was off work from May 19 to 25, 1997, when she returned to a full-time modified position.¹ On July 3, 1997 the employing establishment offered appellant a limited-duty staff nurse position, which complied with the medical restrictions set forth by appellant's physician. Appellant accepted this position.

On March 13, 1998 appellant filed a Form CA-2a, notice of recurrence of disability, stating that she experienced left shoulder, arm and thumb numbness, tingling and weakness of her left hand grip and soreness of her neck causally related to her May 1997 injury. Appellant indicated that after her May 1997 injury she was transferred to a light-duty position in the ambulatory care unit and had worked there since July 1997 and stopped work completely in March 1998.

Appellant submitted medical reports from Dr. Ferdinand A. Alfonso, a Board-certified psychiatrist and neurologist, dated January 30, 1998, which diagnosed increasing pain and tenderness on the posterior neck area and the left upper extremity and a history of left cervical radiculopathy, work related in nature. His report of February 20, 1998, noted appellant's symptoms of shooting pains from the left neck to the left arm and paresthesia on the left thumb, which caused her difficulty in performing her usual activities. Dr. Alfonso reported that a cervical spine series revealed hypertrophic degenerative joint disease of the cervical spine with severe narrowing of C4-5 and C5-6 disc spaces and advised that appellant could work four hours per day for the next two weeks. Dr. Alfonso's report of March 6, 1998 diagnosed recurrent cervical radiculitis on the left with increasing pain and tenderness of the left upper extremity, work related in nature. He noted diminished range of motion on the neck joint, especially on lateral rotation to both sides and continued appellant's modified work schedule of four hours per day for the next two weeks. In his reports of April 3, May 8 and July 14, 1998, the physician related that appellant continued to experience recurrent radicular pain from the left neck down the left upper extremity with cervical myofasciitis on the left side and noted diminished range of motion of the neck joint on lateral rotation bilaterally. Dr. Alfonso indicated that appellant had difficulty performing her regular job and household activities and continued the restrictions previously imposed. In his report of August 21, 1998, he noted a new onset of right upper extremity paresthesia of uncertain etiology and advised that the presence of right cervical radiculopathy could not be ruled out. The physician's October 19, 1998 report advised that appellant's symptoms persisted such that, in February 1998, he reduced her work hours to four per day and in March 1998, appellant stopped working completely. Dr. Alfonso advised that appellant continued to complain of pain and discomfort of the left upper extremity with associated numbness and more recently complaints of right upper extremity pain.

¹ The record reflects that appellant filed two other claims for injuries occurring on June 7 and August 22, 1995, File Nos. 13-1086070 and 13-1155846, which were accepted for cervical strain and left shoulder strain. Appellant was off work from June 20 to August 1995 and from August 22 to October 30, 1995 and returned to modified duty. In a decision dated April 1, 1996, the Office determined that the modified position fairly and reasonably represented appellant's wage-earning capacity. The instant claim was adjudicated under File No. 13-1136650. The Office consolidated all three claims.

By letter dated October 1, 1998, the Office requested detailed factual and medical evidence from appellant, stating that the information submitted was insufficient to establish that she sustained a recurrence on March 13, 1998.

In a decision dated October 22, 1998, the Office denied appellant's claim on the grounds that the evidence of record did not establish a change in the nature and extent of her injury-related disability or a change in the nature of her light-duty job. On the same date, the Office proposed to terminate appellant's compensation on the grounds that she abandoned suitable light-duty work. The Office advised that appellant had 30 days to accept and return to her position or provide an explanation for the refusal.

In a decision dated December 1, 1998, the Office terminated monetary compensation under section 8106(c), based on appellant's refusal of suitable employment. The Office noted that appellant did not respond to the notice of proposed termination issued October 22, 1998.

Appellant requested a hearing before an Office hearing representative. In a decision dated June 3, 1999, the Office hearing representative vacated that decision of the Office dated December 1, 1998 and remanded the case for further development by a second opinion physician with regard to the extent and duration of the residuals of appellant's accepted employment injuries. He specifically noted that the Office's decision on December 1, 1998 was premature in that the Office did not advise appellant of the sanction provision under the Federal Employees' Compensation Act prior to termination of benefits.

The Office then referred appellant to Dr. Thomas R. Dorsey, a Board-certified orthopedist, for a second opinion evaluation. Dr. Dorsey advised that there were no ongoing work-related factors of disability and no legitimate subjective or objective complaints, which were appropriately related to the events of May 1997, or other work factors. He diagnosed appellant with degenerative disc disease of the cervical spine, which progressed naturally and noted that there was no evidence that the degenerative disease of the cervical spine was materially worsened by work factors. Dr. Dorsey indicated that there was no evidence of ongoing shoulder strain, aggravation of shoulder strain, cervical strain or aggravation of the cervical strain.

In a decision dated November 9, 1999, the Office denied appellant's claim on the grounds that Dr. Dorsey's report established that appellant had no disability or medical residuals causally related to the work injury of May 1997.

In a letter dated March 7, 2000, appellant requested an oral hearing before an Office hearing representative and the hearing was held on March 22, 2000. Appellant submitted a report from Dr. Jacob E. Tauber, a Board-certified orthopedist, dated January 7, 2000, who noted objective and subjective findings of cervical radiculitis, which he attributed to permanent aggravation of appellant's underlying degenerative disc disease by her industrial injury. Also submitted was a magnetic resonance imaging (MRI) scan dated December 20, 1999, which revealed degenerative disc disease, with disc protrusions at C2-3, C3-4 and C4-5. An electromyogram (EMG) of February 18, 2000, revealed right moderate carpal tunnel syndrome.

In a decision dated August 22, 2000, the hearing representative vacated the November 9, 1999 decision of the Office and remanded the case for referral to an impartial medical examiner, determining that there was a conflict in medical opinion between Dr. Tauber, appellant's physician, who indicated that she was totally disabled and experiencing residuals of her work-related injury and Dr. Dorsey, an Office referral physician, who determined that appellant's work-related injury had resolved and that she could return to work.

To resolve the conflict, appellant was referred to a referee physician, Dr. James S. Shafer, a Board-certified orthopedic surgeon. In a report dated October 27, 2000, Dr. Shafer indicated that he reviewed the records provided to him and performed a physical examination of appellant. He diagnosed cervical degenerative disc disease with myelopathy and noted that this condition was preexisting, naturally occurring and ongoing. Dr. Shafer advised that the three work-related injuries did cause left radiculopathy, which was a permanent condition. He further related that there were no objective or subjective findings of right carpal tunnel syndrome and he did not attribute her right-sided symptoms to any of the industrial injuries she sustained.

In letters dated May 3, September 19 and October 23, 2001, the Office requested clarification from Dr. Shafer with respect to the period of disability due to appellant's work-related condition and any physical limitations resulting from the work-related condition.

In a letter dated May 3, 2001, the Office notified appellant that her condition was accepted for permanent aggravation of the degenerative disc disease at C5; however, the condition of right carpal tunnel syndrome was not accepted. The Office advised appellant that this was not an appealable Office decision and that she must request an appealable decision from the Office. In May 2001, appellant, through her attorney, requested an appealable decision; however, appellant did not receive a response from the Office.

In a letter dated December 31, 2001, the Office noted that, in letters dated May 3, September 19 and October 23, 2001, it attempted to obtain a supplemental report from the referee physician, Dr. Shafer, but was unable to do so. The Office reported that it had sent the correspondence to Dr. Shafer's correct address.²

The Office then referred appellant to a second referee physician, Dr. Daniel S. Gobaud, a Board-certified orthopedic surgeon. In a report dated January 25, 2002, Dr. Gobaud indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury and diagnosed degenerative disc disease of the cervical spine. Dr. Gobaud advised that appellant's condition was degenerative, chronic, developmental in nature and caused her symptomology and was not caused by her work-related injuries. He advised that the incidents, which occurred at work were minute in nature and ordinary occurrences in the performance of a nursing job and concluded that the minute incidents at work did not cause aggravation of her preexisting problems, opining that the cause of her

² When the impartial medical specialist's statement of clarification or elaboration is not forthcoming to the Office, or if the physician is unable to clarify or elaborate on the original report, or if the physician's report is vague, speculative or lacks rationale, the Office must refer the employee to another impartial medical specialist for a rationalized medical opinion on the issue in question. See *Margaret M. Gilmore*, 47 ECAB 718 (1996); *Terrence R. Stath*, 45 ECAB 412 (1994); *Nathan L. Harrell*, 41 ECAB 402 (1990); *John I Lattany*, 37 ECAB 129 (1985).

symptomology was the progressive and chronic degenerative condition. Dr. Gobaud reported that appellant did not have any sign of radiculopathy and that any disability was the result of the natural progression of her underlying pathology and was not caused by a work-related injury. He determined that appellant's total disability ceased in March 1998, when she stopped working and that the three-minute incidents at work did not cause her any form of disability to prevent her from working and to perform the duties of a nurse. Dr. Gobaud concluded that appellant could work full duty as a nurse without any restrictions.

By decision dated March 2, 2002, the Office denied appellant's claim for recurrence of disability on or after March 1998 on the grounds that the weight of the medical evidence was represented by the report of the referee physician Dr. Gobaud, who determined that appellant had no disability after March 1998, due to her industrial injuries.

In a letter dated March 13, 2002, appellant requested an oral hearing before an Office hearing representative. She later withdrew this request and asked that the Office review the written record and issue a decision. Appellant, through her attorney, argued that a second impartial medical examiner should not have been appointed in this case and that the Office should have more diligently requested a supplemental report from the initial referee physician, Dr. Shafer.

In a decision dated February 10, 2003, the hearing representative affirmed the decision of the Office noting that Dr. Gobaud's report represented the weight of the medical evidence that appellant's work-related disability ceased in March 1998.

LEGAL PRECEDENT

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.³

ANALYSIS

The Board finds that this case is not in posture for decision. In the statement of accepted facts dated December 4, 2001, which was forwarded to the impartial medical adviser, the Office noted that it accepted appellant's claim for cervical strain, left shoulder strain and permanent

³ *Terry R. Hedman*, 38 ECAB 222 (1986).

aggravation of degenerative joint disease at C5.⁴ However, the Board notes that the questions to the referee physician dated December 4, 2001, intermingled the issue of causal relationship with the issue of appellant's disability for work as they requested that the impartial medical adviser opine as to whether appellant sustained a permanent aggravation of degenerative joint disease at C5, a previously accepted condition. In this case, the underlying issue was whether appellant had a recurrence of disability commencing on March 13, 1998, not whether the permanent aggravation of degenerative joint disease at C5 was accepted.

The Office procedure manual provides:

a. The CE [claims examiner] should prepare a Statement of Accepted Facts (SOAF) as a frame of reference (preparation of the SOAF is discussed in detail in FECA PM 2-809). The CE should also identify on a separate sheet of paper the specific questions for which medical opinion is desired. In requesting medical opinions the CE should formulate questions as precisely as possible. The questions should be tailored to the particular circumstances of the case, and they should reflect a definite purpose in adjudicating the claim at hand. Try to avoid asking general questions or questions which are susceptible to more than one interpretation, and avoid asking questions which suggest a certain answer...."⁵

The Office specifically asked whether "the diagnosed condition medically connected to the work injury by direct cause, aggravation, precipitation or acceleration"... and "if aggravation is indicated, it should be explained if it is temporary or permanent. If temporary, when did such aggravation cease or when may it be expected to cease? If permanent, what material change has occurred to alter the course of the underlying disease?" As noted above, the Office previously accepted the condition of permanent aggravation of degenerative joint disease at C5 and there is no evidence that the Office rescinded this acceptance prior to the referral to Dr. Gobaud. As such, any inquiries asking the doctor to opine as to causal relationship on an accepted condition, instead of the extent and duration of any disability due to an accepted condition, would not be proper in these circumstances.⁶

As Dr. Gobaud, proceeded to opine that appellant did not have a permanent aggravation of degenerative disc disease at C5 causally related to her work injury, he did not squarely address the point at issue, whether appellant had disability beginning March 13, 1998, causally related to his accepted conditions of cervical strain, left shoulder strain and permanent aggravation of

⁴ Federal (FECA) Procedural Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2(b) (June 1995) provides: "Permanent aggravation occurs when a condition will persist indefinitely due to the effects of the employment-related injury or when a condition is materially worsened such that it will not revert to its previous level of severity. For instance, an allergy which would have persisted in any event may be permanently aggravated by exposure to dust and fumes in the workplace such that subsequent episodes are more severe than they otherwise would have been. A case should be accepted for permanent aggravation only after careful evaluation of all medical evidence of record. Such a finding provides no additional benefit to the claimant and should not be routinely considered due to the difficulty involved in rescinding it if the claimant's condition improves."

⁵ Federal (FECA) Procedural Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.5(a) (June 1995).

⁶ *Donald G. Aitken*, 42 ECAB 237 (1990).

degenerative joint disease at C5. Thus, his report is of diminished probative value and insufficient to resolve the medical conflict.⁷

As there remains an unresolved conflict of the medical opinion, the case must be remanded for the Office to prepare an updated statement of accepted facts and submit it with the case record and a list of appropriate questions to another impartial medical specialist for an appropriate evaluation.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 10, 2003 is set aside and remanded for further action consistent with this decision.

Issued: May 7, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁷ See *George Tseko*, 40 ECAB 948, 952-53 (1989) (where the Board found that a physician's function is only to provide opinions on medical questions, not to determine facts).