

**United States Department of Labor
Employees' Compensation Appeals Board**

DENISE SELSKY, Appellant

and

**U.S. POSTAL SERVICE, TEMPLE HILLS
ANNEX, Tampa, FL, Employer**

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**Docket No. 04-1526
Issued: December 29, 2005**

Appearances:
Denise Selsky, pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument December 14, 2005

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 24, 2004 appellant filed an appeal of a June 5, 2003 decision of the Office of Workers' Compensation Programs, denying her claim for a recurrence of disability and a September 17, 2003 decision, denying her request for a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has established that she sustained a recurrence of disability beginning June 20, 2002 causally related to an accepted emotional condition; and (2) whether the Office properly denied appellant's request for a merit review. On appeal, appellant asserted that the Office did not consider her physical restrictions when determining whether the modified clerk job she performed in June 2002 was suitable work. She also asserted that all physicians of record opined that appellant's accepted emotional conditions had not resolved when she returned to work on June 17, 2002.

FACTUAL HISTORY

On May 16, 2000 appellant, then a 40-year-old letter carrier technician, at the Hilldale Station filed a claim alleging that she sustained an emotional condition on May 11, 2000 after supervisor James Collinsworth and manager Doug Fiedler refused to accommodate her physician's request for light-duty restrictions due to pregnancy.¹ She stopped work on May 11, 2000.²

The Office initially denied appellant's claim by decision dated June 7, 2000. Following an oral hearing held September 9, 2000, an Office hearing representative reversed the June 7, 2000 decision in a decision dated December 19, 2000 and finalized January 29, 2001. The Office found that the May 11, 2000 denial of light duty was compensable and precipitated depressive and anxiety reactions. Appellant received appropriate compensation benefits.

Appellant submitted reports dated May 17, 2000 to April 12, 2001 from Dr. Gary K. Arthur, an attending Board-certified psychiatrist and neurologist. He opined that she sustained "[a]nxiety [s]tate and [a]justment [d]isorder" due, in part, to the denial of light duty on May 11, 2000. Dr. Arthur opined that appellant was totally disabled from any postal employment through June 30, 2001. He noted in an April 12, 2001 report that appellant's fibromyalgia, herniated L5-S1 disc, right shoulder and neck problems³ and allergies needed to be considered in formulating a job offer.

The Office obtained a second opinion from Dr. Bala Rao, a Board-certified psychiatrist. In a June 15, 2001 report, he diagnosed recurrent major depressive disorder and anxiety disorder, both in partial remission and requiring continuing treatment. He opined that appellant could work eight hours a day if she had no contact with her former supervisors.

In a July 18, 2001 report, Dr. Arthur diagnosed stress and anxiety permanently disabling appellant from working at any employing establishment facility. He found her able to work eight

¹ In a May 10, 2000 letter, Dr. Joseph P. Levine, an attending Board-certified obstetrician and gynecologist, stated that "[d]ue to complications from pregnancy," appellant was "advised to discontinue carrying the mail for the remainder of her pregnancy." In a May 18, 2000 report, he stated that she was 22 weeks pregnant and "due to risks secondary to advanced maternal age," he limited lifting to 10 pounds, proscribed prolonged standing and bending at the waist. Appellant gave birth on September 3, 2000.

² To fulfill a naval reserve assignment, appellant worked as an assistant medical technician at a naval air station from July 3 to August 29, 2000. She applied for a medical technician position at McDill Air Force Base in November 2000, but withdrew her application on December 1, 2000.

³ Appellant submitted 1997 and 1998 reports from physicians treating her for anxiety, depression, neck and shoulder problems attributable to a February 1, 1992 injury. The claims relating to the February 1, 1992 injuries are not before the Board on the present appeal.

hours a day in a nonpostal environment. Dr. Arthur affirmed his findings in reports through May 16, 2002.⁴

The Office then found a conflict of opinion between Dr. Arthur, for appellant, and Dr. Rao, for the government, regarding whether she remained disabled for work at the employing establishment. To resolve the conflict, the Office referred her, the medical record and a statement of accepted facts to Dr. Debra Barnett, a Board-certified psychiatrist, for an impartial medical examination. She examined appellant on November 19, 2001 and related her “preoccupation with details of her experiences with ... Mr. Fiedler.” Dr. Barnett diagnosed major depression, recurrent, in partial remission and an anxiety disorder. She opined that appellant could return to full duty at a different postal facility with different supervisors. In a January 7 and 8, 2002 supplemental reports, Dr. Barnett noted that appellant’s “chronic neck and back pain and sprain” should be considered when formulating a position for her.

On March 30, 2002 the employing establishment offered appellant a rehabilitation position as a modified distribution clerk at the Temple Terrace Annex branch.⁵ She submitted an April 11, 2002 form report from Dr. Arthur, finding her “totally and permanently disabled for work at” any employing establishment facility. In an April 26, 2002 letter, the Office advised appellant that the offered position was suitable work. She accepted the offer and returned to work on June 17, 2002. Appellant stopped work on June 20, 2002 and did not return. On June 21, 2002 she filed a claim for wage-loss compensation for the period June 20 to September 15, 2002.

In a June 20, 2002 statement, G. Haumann, appellant’s supervisor, stated that, at 10:50 a.m. that day, she informed him “that she was having a panic attack. Appellant appeared to be quite anxious” and asked to go home. Mr. Haumann instructed her to “go to the break room and calm down.” Appellant subsequently left the premises.

In June 20 and 25, 2002 reports, Dr. Arthur found appellant totally disabled for work due to depression. She also submitted reports from Dr. Walter E. Afield, an attending Board-certified psychiatrist and neurologist. In an April 23, 2002 report, he provided a history of injury and treatment regarding appellant’s lumbar and psychiatric conditions. Dr. Afield commented that the controversy regarding her injuries reawakened feelings from her childhood such that appellant felt “she might hurt somebody if she went back.” He also described appellant’s symptoms of “nightmares about the supervisor” and anxiety attacks. Dr. Afield diagnosed severe major depression, severe anxiety disorder, a history of lumbar disc problems and “[c]hronic pain from fibromyalgia, tendinitis and discs.” He opined that appellant was “not safe to go back to the [employing establishment].” In an April 30, 2002 report, Dr. Afield opined that, if she did return to work, “someone is at risk; either she or the [employing establishment].

⁴ In a July 30, 2001 report, Dr. Edward L. Demmi, an employing establishment physician, diagnosed recurrent major depressive disorder, anxiety, lumbar disc herniations and “[r]ight arm, shoulder and neck tendinitis with fibromyalgia.” He noted physical restrictions and that appellant should not have contact with her previous supervisors.

⁵ The position required clerical work and customer assistance duties, with lifting, bending and squatting limited to four hours intermittently and standing and walking limited to eight hours intermittently.

[Appellant] cannot make it and these problems are work related, every one and they are absolutely disabling.”

In a June 25, 2002 letter, the Office advised appellant of the additional evidence needed to establish her claim, including a detailed statement of the implicated work factors and rationalized medical evidence supporting the claimed causal relationship. The Office also explained that, if “a new incident at work has caused a condition to recur, a new claim should be filed by [F]orm CA-1. If work activities or factors occurring over more than one specific day caused a condition to recur, then a new occupational disease claim should be filed by [F]orm CA-2.”

In response, appellant submitted a July 2, 2002 letter from Dr. Arthur, relating her assertions that hostile managers in June 2002 reminded appellant of the events of May 11, 2000, aggravating her depression and disabling her for work. He explained that this was a recurrence of disability as there was “no particular intervening incident” and the May 11, 2000 incident triggered a depression that had never resolved.” Dr. Arthur commented that appellant returned to work in June 2002 against his advice. He submitted duty status reports dated July 12 and 22, 2002, finding her totally disabled for work.

On July 12, 2002 appellant filed a recurrence of disability commencing June 20, 2002 caused by workplace events on June 17 and 18, 2002.

By decision dated July 29, 2002, the Office denied appellant’s claim for a recurrence of disability commencing June 20, 2002, on the grounds that she attributed her condition to new work factors in June 2002, not to the accepted May 11, 2000 injury.

Appellant disagreed and requested an oral hearing, held March 28, 2003. At the hearing, she alleged that, on June 17 and 18, 2002, a supervisor demanded that she work beyond her restrictions and argued with her, precipitating a panic attack. Appellant also alleged that the employing establishment improperly contacted Dr. Arthur in an attempt to force her to return to work. She also alleged that many of Mr. Fiedler’s subordinates filed emotional condition claims or had taken disability retirement. Appellant submitted additional evidence.

In an October 21, 2001 letter, the employing establishment asked Dr. Arthur for information regarding appellant’s ability to resume work. In an undated note, he responded that she was “totally and permanently disabled from work at the U.S. Postal Service.”

On April 30 and May 15, 2002, Dr. Afield performed assessments indicative of “post-traumatic stress disorder,” that appellant did “not much like people,” had problems with routine and authority and wanted to “avoid responsibilities and obligations.” In a May 15, 2002 note, he found her “terribly impaired,” by anxiety and depression. In a June 1, 2002 report, Dr. Afield found that appellant had attained maximum medical improvement, could not return to work and “pose[d] a major danger.”

In an August 22, 2002 report, Dr. Arthur explained that, on June 17 and 18, 2002, appellant perceived her supervisors as hostile, reminding her of previous episodes of depression. He noted that her depression was only in partial remission and she was totally disabled for work.

In a March 3, 2003 report, Dr. Arthur J. Pedregal, an attending Board-certified psychiatrist and neurologist, diagnosed chronic musculoskeletal pain in the cervical, thoracic and right shoulder areas, secondary to a February 1992 dog attack which occurred while appellant was delivering her route.

Appellant also submitted forms regarding her July 23, 2002 approval for disability retirement benefits through the Office of Personnel Management (OPM), as well as state disability benefits forms.

The employing establishment provided comments to the hearing transcript on April 21, 2003, asserting that its October 21, 2001 letter to Dr. Arthur was an appropriate, routine inquiry to ascertain appellant's work status. In an April 21, 2003 statement, Mr. Fiedler asserted that the Office rejected the sole emotional condition claim a subordinate had made against him.

By decision dated and finalized June 5, 2003, the Office hearing representative affirmed the June 29, 2002 decision, finding that appellant attributed the claimed recurrence of disability to new work exposures in June 2002. The hearing representative noted that, if she attributed the claimed recurrence of disability to intervening causes, that she should "file a new occupational disease claim with substantiating evidence to support that the incidents and events occurred as alleged." The hearing representative also noted that Dr. Barnett continued to represent the weight of the medical evidence.

In an August 25, 2003 letter, appellant requested reconsideration. She explained that work factors in June 2002 were not intervening causes as they "just happened during the so-called normal workdays." Appellant alleged that, in June 2002, her supervisor ignored her work restrictions and supervised her excessively. She asserted that one of her coworkers had a similar claim accepted. Appellant submitted additional evidence.

In a June 6, 2003 chart note, Dr. Arthur stated that appellant's "depression and anxiety with panic attacks" continued and that she remained "permanently and totally disabled for all work at the [employing establishment] for [p]sychiatric reasons."

Appellant also submitted a copy of Dr. Arthur's form report dated July 18, 2001 and May 16, 2002, previously of record and considered by the Office prior to issuance of the July 29, 2002 decision. She also provided May 17, 2003 correspondence regarding her OPM benefits and her August 19 and September 9, 2003 letters to the Office requesting information on prescription drug reimbursements.

By decision dated September 17, 2003, the Office denied appellant's request for a merit review on the grounds that she failed to submit new and pertinent evidence. The Office found that she again attributed the claimed recurrence of disability to new work facts in June 2002. The Office further found that Dr. Arthur's August 6, 2003 report merely repeated his previous opinion that appellant was totally disabled from working at any postal facility. The reports of July 18, 2001 and May 16, 2002 were duplicative of reports already on file. The Office found that the OPM letter and pharmacy billing correspondence were irrelevant to appellant's claim and that the outcome of her coworker's case had no bearing on her claim.

LEGAL PRECEDENT -- ISSUE 1

As used in the Federal Employees' Compensation Act,⁶ the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ A recurrence of disability is defined by Office regulations as an inability to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without an intervening injury or new exposure to the work factors that caused the original injury or illness.⁸ If the disability results from new exposure to work factors, the legal chain of causation from the accepted injury is broken and an appropriate new claim should be filed.⁹

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or 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 job requirements.¹⁰ This 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.¹¹ An award of compensation may not be made on the basis of surmise, conjecture, speculation or on appellant's unsupported belief of causal relation.¹²

While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such an opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and that such a relationship must be supported with affirmative evidence, explained by medical rationale and be based on a complete and accurate medical and factual background of the claimant.¹³ Medical conclusions unsupported by

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Prince E. Wallace*, 52 ECAB 357 (2001).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3 (May 1997); *Donald T. Pippin*, 54 ECAB __ (Docket No. 03-205, issued June 19, 2003).

⁹ Federal (FECA) Procedure Manual, Chapter 2.1500.3 (May 1997); *supra* note 2; *Donald T. Pippin*, *supra* note 8.

¹⁰ *Albert C. Brown*, 52 ECAB 152 (2000); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

¹¹ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *see Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

¹² *Patricia J. Glenn*, 53 ECAB 159 (2001); *Ausberto Guzman*, 25 ECAB 362 (1974).

¹³ *Conard Hightower*, 54 ECAB __ (Docket No. 02-1568, issued September 9, 2003).

medical rationale are of diminished probative value and are insufficient to establish causal relation.¹⁴

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained depressive and anxiety reactions due to a May 11, 2000 incident. She claimed to have sustained a recurrence of disability commencing June 20, 2002, while working light duty, causally related to the May 11, 2000 injury. In order to prevail, appellant must demonstrate either a spontaneous change in the nature and extent of her accepted emotional condition or a change in her light-duty job requirements such that she could no longer perform the position.¹⁵

Appellant attributed the claimed recurrence of disability not to the events of May 11, 2000, but to new work factors from June 17 to 20, 2002. In essence, she asserted a new injury, not a recurrence of disability. On her claim form appellant attributed her emotional state on and after June 20, 2002 to workplace events on June 17 and 18, 2002, not the accepted May 11, 2002 injury. At the March 28, 2003 hearing, she attributed a June 20, 2002 panic attack to an argument with her supervisor about work restrictions on June 17 and 18, 2002. Appellant submitted a June 20, 2002 supervisory statement corroborating her account of a panic attack that day. Her statements and the factual record demonstrate that she was exposed to new work factors from June 17 to 20, 2002 which allegedly caused a worsening of her depression and anxiety beginning June 20, 2002. The Board notes that, although the events of June 17 to 20, 2002 may be similar to the accepted May 11, 2000 incident, they constitute new employment factors. Appellant also alleged that she experienced stress when the employing establishment allegedly made improper contact with Dr. Arthur, an attending Board-certified psychiatrist, on October 21, 2001. Again, this is a new event occurring well after May 11, 2000.

Dr. Arthur, an attending Board-certified psychiatrist, asserted in an August 2, 2002 report, that perceived hostility from supervisors on June 17 and 18, 2002 precipitated an episode of depression, disabling her for work.

The Board notes that appellant was advised by June 25, 2002 letter and in the June 5, 2003 decision that, if she attributed her condition to new work factors, she could file a new claim for traumatic injury or occupational disease as appropriate. However, there is no evidence of record that she filed a new claim either for a traumatic injury or for occupational disease.

Appellant has not established that she sustained a recurrence of disability commencing June 20, 2002 as the record demonstrates that her condition was due to exposure to new factors and not the accepted May 11, 2000 employment incident.

¹⁴ *Albert C. Brown, supra* note 10.

¹⁵ *Albert C. Brown, supra* note 10; *Terry R. Hedman, supra* note 10.

LEGAL PRECEDENT -- ISSUE 2

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.¹⁶ Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁷

In support of her request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge her burden of proof.¹⁸ She need only submit relevant, pertinent evidence not previously considered by the Office.¹⁹ When reviewing an Office decision denying a merit review, the function of the Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.²⁰

ANALYSIS -- ISSUE 2

The Office denied appellant's claim for a recurrence of disability commencing June 20, 2002 on the grounds that she attributed the recurrence to new work factors occurring in June 2002, after the accepted May 11, 2000 incident. She requested reconsideration on August 25, 2003 alleging that excessive supervision and an argument regarding work restrictions in June 2002 were not intervening causes.

Appellant submitted May 17, 2003 correspondence regarding her OPM benefits and her August 19 and September 9, 2003 letters to the Office regarding prescription reimbursements. She also submitted a copy of Dr. Arthur's report dated July 18, 2001 and May 16, 2002 previously of record, as well as a new June 6, 2003 chart note from Dr. Arthur opining that she remained totally disabled for any postal employment due to psychiatric diagnoses.

Dr. Arthur's report dated July 18, 2001 and May 16, 2002 was previously of record and considered by the Office prior to the issuance of the July 29, 2002 decision. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening the case.²¹ Dr. Arthur's June 6, 2003 note, while new,

¹⁶ 20 C.F.R. § 10.606(b)(2) (2003).

¹⁷ 20 C.F.R. § 10.608(b) (2003).

¹⁸ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁹ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

²⁰ *Annette Louise*, 54 ECAB ____ (Docket No. 03-335, issued August 26, 2003).

²¹ *Denis M. Dupor*, 51 ECAB 482 (2000); *Howard A. Williams*, 45 ECAB 853 (1994); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

is repetitive of his July 2 and August 22, 2002 reports previously of record. Similarly, appellant's August 25, 2003 letter describing the workplace events of June 17 to 20, 2002 is repetitive of her testimony at the March 28, 2003 oral hearing. While her assertion that the Office accepted a similar claim is new, it is irrelevant.²² Therefore, these documents are insufficient to warrant reopening the case for a merit review.²³

Regarding the correspondence discussing appellant's OPM benefits and prescription reimbursement, these letters are irrelevant to the underlying issue in the claim. Therefore, they do not constitute a basis for reopening her claim on the merits.²⁴

The Board finds that the Office properly denied appellant's August 25, 2003 request for reconsideration as she did not submit new, relevant evidence or argument sufficient to warrant a merit review.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability beginning June 20, 2002 as alleged. The Board further finds that the Office properly denied appellant's August 25, 2003 request for reconsideration.

²² *Mark H. Dever, supra* note 19.

²³ *Denis M. Dupor, supra* note 21.

²⁴ *Mark H. Dever, supra* note 19.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 17 and June 5, 2003 are affirmed.

Issued: December 29, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board