

attending Board-certified orthopedic surgeon. On July 22, 1994 appellant filed a Form CA-2, file number 13-1054848, alleging a left shoulder condition caused by her repetitive work duties which included bending, carrying, lifting, reaching and sorting mail. By letter dated October 17, 1994, the Office accepted appellant's claim for left shoulder rotator cuff syndrome, tendinitis and impingement. Appellant was off work beginning March 12, 1994 until she returned to a limited-duty position on December 8, 1995.¹

By decision dated March 9, 1995, the Office found that appellant's actual earnings as a modified mail clerk fairly and reasonably represented her wage-earning capacity. Subsequently, she missed work on intermittent dates from August 8, 1995 through September 26, 1996. The position was subsequently modified consistent with physical restrictions set forth by Dr. Charles on July 19, 1996.

On September 6, 1996 the employing establishment revised the description of the offered position to include additional physical limitations. Appellant accepted the job offer on September 26, 1996 and returned to work on that date. On October 11, 1996 an Office rehabilitation nurse reported that appellant stopped work three days later following a dispute with her supervisor about reading the Bible during a stretch break.

The Office received a December 2, 1996 report of Dr. Fred Blackwell, an attending Board-certified orthopedic surgeon, who opined that appellant could return to her modified position. In a January 10, 1997 report, he stated that she could return to work right away.

The Office received treatment notes of Dr. Esly M. Barreras, Jr., an attending occupational medicine specialist, for intermittent dates from November 15, 1997 through November 19, 1998 describing problems with neuropathy of the right suprascapular that had resolved, impingement of the right shoulder, reflex sympathetic dystrophy of the right arm, a tremor not otherwise specified and a right brachial plexus lesion. Other problems included cervical disc protrusion, impingement of the left shoulder, overuse syndrome of the left arm and depression. A November 26, 1997 motor nerve study and electromyogram (EMG) report found right suprascapula neuropathy (supraspinatus) which had improved over a prior study. A December 3, 1997 sensory nerve study revealed "probable" right brachial plexitis. A January 14, 1998 EMG study was normal and February 25, 1998 motor nerve studies found right suprascapular neuropathy (infraspinatus).

On May 6, 1998 Dr. Barreras performed a motor and sensory nerve study which he stated were "probably" normal. A May 13, 1998 sensory study was abnormal which suggested a lesion on the right nerve. Treatment notes which covered intermittent dates from May 11 through October 28, 1998 reiterated his prior diagnoses.

In a September 2, 1998 treatment note, Dr. Barreras opined that appellant was totally disabled until November 15, 1998.

¹ On July 25, 1994 the Office authorized pain management for the right shoulder and accepted appellant's claim for psychogenic pain disorder.

On September 2, 1998 appellant filed a claim for compensation (Form CA-7) for the period November 1, 1997 through November 15, 1998. She submitted the September 4, 1998 attending physician's report of Dr. Barreras, who provided a history that on July 1, 1993 appellant sustained a work-related injury and underwent right shoulder surgery in 1994. Dr. Barreras diagnosed cervical radiculitis, impingement of the left shoulder, a sprained left shoulder and right Parkinsonism. He indicated with an affirmative mark that the diagnosed conditions were caused by the July 1, 1993 employment injuries. Dr. Barreras stated that appellant was totally disabled from November 1, 1997 through November 15, 1998. He released her to return to work on November 15, 1998. In an October 28, 1998 treatment note, Dr. Barreras reiterated his prior diagnoses. He found that appellant was disabled until January 1, 1999.

By letter dated November 4, 1998, the Office advised appellant that it had received her claim for the period November 1, 1997 through November 15, 1998. It noted that appellant stopped work in a modified position due to a dispute with her supervisor and that Dr. Blackwell and Dr. Charles previously reported that she was able to perform limited-duty work. The Office requested that appellant submit additional medical evidence to establish her claim within 30 days. In a December 2, 1998 letter, appellant stated that she did not stop work due to a dispute with her supervisor but due to an illness resulting from harassment at the employing establishment. On January 20, 1999 the Office combined the case files.

By letter dated February 9, 2000, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In a March 1, 2000 report, Dr. Ferretti provided a history of appellant's employment injuries and medical treatment and her occupational and social background. He provided a detailed review of her medical records and reported essentially normal findings on physical examination. Dr. Ferretti diagnosed a history of cervical and right shoulder sprain, chronic neck/right upper extremity pain with no evidence of neurological deficit, left shoulder rotator cuff syndrome tendinitis and impingement. He stated that appellant was status post surgery for right rotator cuff repair. Dr. Ferretti noted that she continued to have residuals of the July 1, 1993 employment injury. Appellant's prognosis was guarded. Although she had physical limitations, Dr. Ferretti opined that appellant could perform the duties of the modified distribution clerk position which was offered to her on August 5, 1996, eight hours a day. In a March 1, 2000 work capacity evaluation (Form OWCP-5c) he reiterated her physical limitations.

In an April 12, 2000 treatment note, Dr. Barreras reiterated the diagnoses set forth in his September 2, 1998 report.

On November 15, 2000 appellant filed a claim for compensation (Form CA-8) for the period March 1 through December 1, 2000.

By letters dated November 28 and December 21, 2001, the Office referred appellant together with the case record, a statement of accepted facts and a list of questions to be addressed, to Dr. Daniel K. Lee, a Board-certified neurologist, for a second opinion medical examination. In a January 8, 2002 report, he reviewed a history of appellant's employment

injuries and medical treatment and her personal and social background. Dr. Lee reported his essentially normal findings on physical and neurological examination. He diagnosed right and left shoulder and cervical sprain/strain, rotator cuff injury, right shoulder pain and found that the diagnosed conditions were related to the accepted employment injuries. Dr. Lee also diagnosed a nonwork-related essential tumor and a work-related movement disorder. He stated that the later diagnosed condition was a manifestation of the underlying symptoms of the work-related shoulder injury. Regarding periods of disability, Dr. Lee noted that appellant was released to return to work by Dr. Charles in 1996, by Dr. Blackwell in January 1997 and by Dr. Ferretti in March 2000. He stated that any one of these dates of release were an appropriate time for the end of her total disability status. Dr. Lee noted appellant's physical limitations but stated that he could not determine whether she could perform the duties of a particular limited-duty job because a description of the position was not made available to him for review. He concluded that she continued to experience residuals of her accepted employment injuries based on subjective complaints. In a January 8, 2002 Form OWCP-5c, Dr. Lee stated that appellant could work eight hours a day within specified physical limitations.

By decision dated May 1, 2002, the Office denied appellant's claims for wage-loss compensation for the period November 1, 1997 to November 15, 1998 and March 1 to December 1, 2000. It found the medical evidence of record insufficient to establish that she sustained a recurrence of total disability during the claimed periods causally related to the July 1 and August 5, 1993 employment injuries.

In a May 28, 2002 letter, appellant, through her attorney, requested an oral hearing before an Office hearing representative. She submitted a July 5, 2002 treatment note from Dr. Barreras which reiterated his September 2, 1998 report.

At the January 16, 2003 hearing, appellant submitted a February 4, 1998 report from Dr. Breanna M. Ruthrauff and Dr. Michael J. Aminoff, both Board-certified neurologists. They provided their findings on physical examination. Dr. Ruthrauff and Dr. Aminoff opined that appellant's history and examination were consistent with reflex sympathetic dystrophy of the right upper extremity. The etiology of her tremor which began several years after the onset of her upper extremity pain was unclear. Dr. Ruthrauff and Dr. Aminoff noted that an adequate neurological examination was not possible due to appellant's pain and recommended referral to a pain clinic for an MRI scan of her head and neck.

Following the hearing, appellant submitted medical records from Kaiser Permanente covering the period January 21, 1990 through October 26, 1994. Treatment notes from her physical therapists indicated that she was treated from October 30, 1990 through March 7, 1999. Appellant also submitted a November 19, 2002 limited-duty job offer made by the employing establishment.

By decision dated April 7, 2003, the hearing representative found that the statement of facts relied upon by Dr. Lee was incomplete as it did not contain the accepted condition of psychogenic pain disorder or appellant's September 22, 1990 nonindustrial motor vehicle accident and other related injuries. The hearing representative set aside the May 1, 2002 decision and remanded the case for a new statement of accepted facts and further medical development.

In a July 15, 2003 report, Dr. Lee stated that appellant was working in a modified position and reported bilateral shoulder pain with a limited range of motion on physical examination. He reviewed additional medical records and the new statement of accepted facts. Dr. Lee diagnosed right and left shoulder sprain/strain, cervical sprain, right rotator cuff injury and right shoulder pain due to the accepted employment injuries. He stated that appellant's prognosis for a full recovery was poor and that she required continuing conservative medical treatment. Dr. Lee's opinion regarding the date appellant ceased to be disabled had not changed. It occurred between 1996 and January 1997 when she was released to return to work by Dr. Charles and Dr. Blackwell. Dr. Lee stated that the claimed periods of disability, November 1997 to November 1998 and March to December 2000, were not sufficiently documented as disabling by the medical record. He noted appellant's physical limitations, indicating that she could work eight hours a day within specified physical limitations.

In a September 19, 2003 decision, the Office found that appellant did not sustain recurrences of disability from November 1, 1997 through November 15, 1998 and March 1 through December 1, 2000.

In a May 3, 2004 report, Dr. Jerrald R. Goldman, a Board-certified orthopedic surgeon, found that appellant was status post rotator cuff repair of the right shoulder with multiple secondary problems. A May 3, 2004 report diagnosed shoulder pain.

By letter dated June 10, 2004, the Office referred appellant together with a statement of accepted facts, the case record and a list of questions to be addressed to Dr. John R. Chu, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a July 8, 2004 report, Dr. Chu provided a history of appellant's right and left shoulder conditions and her medical, family and social background and listed findings on physical and neurological examination. He diagnosed status post right shoulder rotator cuff repair with continued discomfort and right upper extremity tremor of an unknown etiology. Dr. Chu agreed with Dr. Lee's recommendation that appellant seek treatment from a pain specialist and noted her physical limitations. Appellant had subjective residuals of the employment-related right shoulder injury. In an accompanying Form OWCP-5c dated July 7, 2004, Dr. Chu listed appellant's physical limitations and found that she could work eight hours a day.

In a July 19, 2004 report, Dr. Aubrey A. Swartz, an attending Board-certified orthopedic surgeon, provided a history of appellant's right and left employment-related shoulder injuries and reported his findings on physical examination. He stated that she experienced chronic recurrent tendinitis in the right shoulder including, chronic recurrent cervicothoracic myofascial strain in the right cervicothoracic region. With both arms and hands outstretched, there appeared to be a fine tremor in her right hand and the etiology of this condition was unknown. Dr. Swartz recommended further evaluation.

Appellant submitted treatment notes from her physical therapist for intermittent dates from August 2 through 19, 2004. In an August 20, 2004 report, Dr. Swartz reviewed the physical therapy notes and indicated that appellant experienced right shoulder pain and had a good range of motion in both shoulders.

On September 20, 2004 appellant, through her attorney, requested reconsideration. Counsel argued that the Office committed error in finding that appellant did not sustain a recurrence of disability during the claimed periods. She stated that the Office's September 19, 2003 decision was not issued in accordance with the hearing representative's instructions. In a September 24, 2004 report, Dr. Michael M. Bronshvag, a Board-certified neurologist, noted pain in appellant's shoulders. He also noted her family medical history and provided findings on physical examination. Dr. Bronshvag found no evidence of Parkinson's disease, brain damage or thyroidal over-activity. He stated that appellant "probably" had a tendency toward "essential" tremor but the liability and variability of the tremor made it clear it was actually generated by her shoulder and related musculoskeletal difficulties. Dr. Bronshvag opined that, absent appellant's musculoskeletal shoulder difficulties, she would probably not have any evident movement tremor difficulties. He did not recommend analysis or treatment of her musculoskeletal difficulties. Dr. Bronshvag concluded that appellant appeared to have minimal and no primary neurological difficulties.

By decision dated December 22, 2004, the Office denied modification of the September 19, 2003 decision. It noted that counsel's arguments were without merit as it applied the proper standard of review to appellant's claim. The Office found that Dr. Lee's July 15, 2003 report constituted the weight of the medical evidence and established that appellant did not sustain recurrences of disability during the period November 1, 1997 to November 15, 1998 and March 1 to December 1, 2000 causally related to the July 1 and August 5, 1993 employment injuries.²

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-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 she cannot perform such limited-duty work. 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 limited-duty job requirements.⁴

² Following the issuance of the Office's December 22, 2004 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

³ 20 C.F.R. § 10.5(x).

⁴ *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.⁵

ANALYSIS

The July 1, 1993 employment injury was accepted for right shoulder and cervical strains. The August 5, 1993 employment injury was accepted for left shoulder rotator cuff syndrome, tendinitis and impingement. The Office later accepted a psychogenic pain disorder. Appellant returned to work in a full-time limited-duty capacity on September 26, 1996. She claimed compensation for total disability for the periods November 1, 1997 through November 15, 1998 and March 1 through December 1, 2000 due to the July 1 and August 5, 1993 employment injuries.

Appellant submitted treatment notes from Dr. Barreras covering the period November 15, 1997 through July 5, 2002. He stated that her problems included neuropathy of the right suprascapular that had resolved, impingement of the right shoulder, reflex sympathetic dystrophy of the right arm, a tremor not otherwise specified and a right brachial plexus lesion. Appellant's other conditions included cervical disc protrusion, impingement of the left shoulder, overuse syndrome of the left arm and depression. Dr. Ruthrauff's and Dr. Aminoff's February 4, 1998 report found that she sustained reflex sympathetic dystrophy of the right upper extremity and a tremor whose etiology was unknown. Dr. Goldman's May 3, 2004 report diagnosed status post rotator cuff repair of the right shoulder with multiple secondary problems. His May 3, 2004 report diagnosed shoulder pain. In a July 19, 2004 report, Dr. Swartz found that appellant had chronic recurrent tendinitis in the right shoulder and cerviothoracic myofascial strain in the right cervicothoracic region, and a tremor in her right hand, the etiology of which was unknown. His August 20, 2004 report found that appellant had right shoulder pain but a good range of motion of both shoulders. Dr. Bronshvag noted right shoulder pain. There was no evidence of Parkinson's disease, brain damage or thyroidal over-activity. Dr. Bronshvag stated that appellant "probably" had an essential tremor. Dr. Barreras, Dr. Ruthrauff, Dr. Aminoff, Dr. Goldman, Dr. Swartz and Dr. Bronshvag did not find that appellant was totally disabled for work during the claimed periods. Therefore, their treatment notes and reports do not support her claim. Further, Dr. Bronshvag's diagnosis that appellant "probably" had an essential tremor is speculative and equivocal in nature and thus, of diminished probative value.⁶

The November 26, 1997 and February 25, 1998 motor and sensory nerve and EMG studies found right suprascapula neuropathy (supraspinatus and infraspinatus) and a normal January 14, 1998 EMG study are insufficient to establish appellant's claim. The tests do not establish that appellant was totally disabled for work during the claimed periods. A December 3, 1997 sensory nerve study that diagnosed "probable" right brachial plexitis is speculative in

⁵ *James H. Botts*, 50 ECAB 265 (1999).

⁶ *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

nature and of little probative value.⁷ Therefore, the Board finds that Dr. Barreras' study is insufficient to establish appellant's claim.

In treatment notes dated September 2 and October 28, 1998, Dr. Barreras reiterated his prior diagnoses. In the September 2, 1998 treatment note, he also diagnosed a reaction to medication, cardura palpitations and panic disorder. Dr. Barreras opined that appellant was temporarily totally disabled until November 15, 1998. He did not provide any medical rationale explaining how or why appellant's disability was caused by the accepted employment injuries. The Board finds that Dr. Barreras' opinion regarding appellant's disability for work is insufficient to establish that she was totally disabled from November 1, 1997 through November 15, 1998 and March 1 through December 1, 2000 due to the July 1 and August 5, 1993 employment injuries.

Dr. Barreras' September 4, 1998 form report indicated that appellant's cervical radiulitis, impingement of the left shoulder, left shoulder sprain and right Parkinsonism were caused by the July 1, 1993 employment injuries with an affirmative mark. He found that she was totally disabled from November 1, 1997 through November 15, 1998. This report does not provide any medical rationale explaining how or why appellant's conditions were caused by the accepted employment injuries and is insufficient to establish her claim. This type of report, without more by way of medical rationale explaining how the incident caused the injury, is insufficient to establish causal relationship and is of diminished probative value.⁸

In a January 12, 2000 treatment note, Dr. Barreras found that appellant was disabled through April 12, 2000 unless modified work was available. He did not explain how or why appellant was disabled due to the accepted employment injuries. The Board finds that Dr. Barreras' treatment note is insufficient to establish appellant's claim.

The Kaiser Permanente records covering the period January 21, 1990 through October 26, 1994 are insufficient to establish appellant's claim because they predate the claimed recurrences of disability from November 1, 1997 through November 15, 1998 and March 1 through December 1, 2000.

The treatment notes from appellant's physical therapists do not constitute probative medical evidence as a physical therapist is not a physician as defined under the Act.⁹

In a July 8, 2004 report, Dr. Chu, an Office referral physician, diagnosed status post right shoulder rotator cuff repair with continued discomfort and right upper extremity tremor of an unknown etiology. He agreed with Dr. Lee's recommendation that appellant seek treatment from a pain specialist and noted her physical limitations. Dr. Chu opined that she had subjective residuals of the employment-related right shoulder injury. In an accompanying Form OWCP-5c dated July 7, 2004, he reiterated appellant's physical limitations and stated that she could work

⁷ *Id.*

⁸ See *Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

⁹ 5 U.S.C. §§ 8101-8193; 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).

eight hours a day. Dr. Chu did not address whether appellant was disabled from November 1, 1997 to November 15, 1998 and March 1 to December 1, 2000 due to the July 1 and August 5, 1993 employment injuries. Thus, the Board finds that his report does not establish appellant's claim.

In a March 1, 2000 report, Dr. Ferretti, an Office referral physician, provided an accurate factual and medical background. He conducted a thorough medical examination, which provided essentially normal findings on physical examination. Dr. Ferretti diagnosed a history of cervical and right shoulder sprain, chronic neck/right upper extremity pain with no evidence of neurological deficit, left shoulder rotator cuff syndrome tendinitis and impingement. He stated that appellant was status post surgery for right rotator cuff repair. Dr. Ferretti opined that she continued to experience residuals of the accepted employment injuries and her prognosis was guarded. Although she had physical limitations, Dr. Ferretti opined that appellant could perform the duties of the modified distribution clerk position which was offered to her on August 5, 1996, eight hours a day. In a March 1, 2000 work capacity evaluation (Form OWCP-5c) he reiterated appellant's physical limitations.

Dr. Lee, an Office referral physician, also provided an accurate factual and medical background in a July 15, 2003 report. Further, he conducted a thorough medical examination, which found pain and limited range of motion of the shoulder. Dr. Lee diagnosed right and left shoulder sprain/strain, cervical sprain, right rotator cuff injury and right shoulder pain due to the accepted employment injuries. He stated that appellant's prognosis for a full recovery was poor and that she required continuing conservative medical treatment. Dr. Lee stated that his opinion regarding the date she ceased to be disabled had not changed from his prior opinion that it occurred between 1996 and January 1997 when she was released to return to work by Dr. Charles and Dr. Blackwell. He stated that the claimed periods of total disability, November 1997 to November 1998 and March 2000 to December 2000 were not periods of disability as they were not sufficiently documented by the medical record. Dr. Lee concluded by noting appellant's physical limitations. In an accompanying undated Form OWCP-5c, he stated that appellant could work eight hours a day with certain physical limitations.

The Board finds that the opinions of Dr. Ferretti and Dr. Lee are entitled to weight and establish that appellant was not totally disabled from November 1, 1997 to November 15, 1998 and March 1 to December 1, 2000 due to her July 1 and August 5, 1993 employment injuries. The reports are sufficiently rationalized and based on a proper factual and medical background.

On appeal appellant contends that the Office erred in finding that she did not sustain a recurrence of disability during the claimed periods. Although appellant's September 20, 2004 request for reconsideration was not timely filed as it was not filed within one year of the Office's September 19, 2003 decision, the Office conducted a merit review.¹⁰ The Office is not prohibited from reviewing an untimely application for reconsideration under the less stringent standards set forth at 20 C.F.R. § 10.607, but such a review is on the Office's own motion pursuant to 20 C.F.R. § 10.610. No error is established in the adjudication of appellant's claim.

¹⁰ 20 C.F.R. § 10.607; *see also Alan G. Williams*, 52 ECAB 180 (2000).

CONCLUSION

The Board finds that appellant has failed to establish that she sustained a recurrence of disability from November 1, 1997 through November 15, 1998 and March 1 through December 1, 2000 causally related to her July 1 and August 5, 1993 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 25, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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