

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

CYNTHIA A. HENN, Appellant	)	
	)	
and	)	<b>Docket No. 05-1976</b>
	)	<b>Issued: July 6, 2006</b>
U.S. POSTAL SERVICE, PRIORITY HUB,	)	
Oklahoma City, OK, Employer	)	
	)	

*Appearances:*  
Cynthia A. Henn, *pro se*  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On September 27, 2005 appellant filed a timely appeal of a September 29, 2004 merit decision of the Office of Workers' Compensation Programs, finding that she did not sustain an injury while in the performance of duty, a December 15, 2004 nonmerit decision, denying her request for reconsideration and a July 7, 2005 decision denying a recurrence of disability causally related to her accepted June 29, 1999 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has established that she sustained neck and back conditions while in the performance of duty, causally related to factors of her federal employment; (2) whether the Office properly denied appellant's request for further review of the merits pursuant to 5 U.S.C. § 8128(a); and (3) whether appellant has established that she sustained recurrences of disability from March through November 2004 and again January 2005 causally related to her June 29, 1999 employment injury.

## **FACTUAL HISTORY**

On July 1, 1999 appellant, then a 34-year-old mail handler, filed a traumatic injury claim assigned number 160336702 alleging that on June 29, 1999 she experienced a burning sensation and numbness in her right shoulder area as a result of lifting and throwing boxes at work. The Office accepted appellant's claim for right shoulder and cervical strains, adhesive capsulitis of the right shoulder and degeneration of a cervical disc. By decision dated December 13, 1999, the Office denied authorization for an anterior cervical fusion at C4-5. After undergoing surgery on January 10, 2000, appellant returned to limited-duty work eight hours a day effective December 18, 2000.<sup>1</sup>

On January 18, 2002 appellant filed an occupational disease claim assigned number 162031465 alleging that on December 31, 2001 she first became aware of her neck pain and that on January 4, 2002 she realized that this pain was caused by factors of her federal employment. By decision dated March 5, 2002, the Office found that appellant did not sustain an injury while in the performance of duty. In a March 20, 2002 letter, she requested reconsideration. By decision dated June 21, 2002, the Office set aside the March 5, 2002 decision and found that appellant sustained a small disc protrusion at C3-4 while in the performance of duty.

On November 6, 2002 the Office advised appellant that her claims were being combined into a master case file assigned number 160336702.

On August 3, 2004 appellant filed an occupational disease claim assigned number 162080305 alleging that on April 1, 2004 she became aware of her neck and shoulder problems. She noted that she was previously injured in 1999 and that her condition had continuously worsened as evidenced by medical information from her attending physicians.

By letter dated August 23, 2004, the Office requested the employing establishment to respond to appellant's allegations and to provide information regarding the physical requirements of her job and what precautions it took to minimize the effects of her work activities. In addition, the Office requested a copy of appellant's position description and physical requirements. In a letter of the same date, the Office advised appellant that the information submitted was insufficient to establish her claim. The Office further advised her about the factual and medical evidence needed to establish her occupational disease claim.

On August 10, 2004 appellant stated that she was originally injured on June 29, 1999 and that her condition had continuously worsened since that date. She further stated that her attending physicians' letters established that she was permanently and totally disabled. Appellant filed a third occupational disease claim because her supervisor had lost two previous claims. She contended that her supervisor had discriminated against her on many occasions.

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<sup>1</sup> By decision dated August 22, 2002, the Office denied appellant's claim for a schedule award. On March 27, 2003 she requested reconsideration and filed another claim for a schedule award. On June 11, 2003 appellant filed a claim (Form CA-7) for wage-loss compensation for the period May 3 through June 6, 2003. By decision dated January 27, 2004, the Office granted appellant a schedule award for a 20 percent permanent impairment of the right upper extremity. On May 5, 2004 the Office issued a decision, finding that she did not sustain a recurrence of disability from May 3 through June 6, 2003, causally related to the June 29, 1999 employment injury.

Appellant had been on leave without pay since March 2004, which caused severe financial difficulties. She argued that she had witnesses and personal paperwork to support her claim of discrimination which she considered pursuing either with the Equal Employment Opportunity Commission or her congressman. Appellant concluded that the records of the employing establishment and Office erroneously indicated that she was only 30 percent disabled.

In an August 26, 2004 letter, the employing establishment stated that appellant did not sustain a new injury rather she sustained a recurrence of disability. The employing establishment noted that she had not provided any additional statements on which it could provide comments.

The Office received an April 12, 2004 medical report from Dr. Terrell Phillips, an anesthesiologist, which diagnosed cervical radiculitis and found that appellant was temporarily totally disabled as of that date.

An August 2, 2004 decision from the Department of Veterans Affairs (VA) found that appellant had a 50 percent impairment for a hysterectomy and bilateral salpingo-oophorectomy with pelvic adhesions due to endometriosis and ovarian cysts, a 30 percent impairment for left nephroureterectomy and a 50 percent impairment for post-traumatic stress disorder due to a sexual assault.

By decision dated September 29, 2004, the Office found the evidence of record sufficient to establish that the claimed event occurred, but insufficient to establish that appellant sustained a medical condition causally related to the accepted employment incident. The Office noted that she did not submit any evidence in response to its August 23, 2004 developmental letter.

In an October 4, 2004 letter, appellant requested reconsideration. She contended that her date of injury was June 29, 1999 and not April 1, 2004. Appellant claimed that she did not sustain a new injury rather her accepted employment-related condition had worsened. She submitted a September 25, 2004 letter, reiterating that her June 29, 1999 employment injury had worsened. She stated that she had been off work since March 2004, due to her employment-related injury and that, despite her claim being accepted twice, she had not received any compensation.

In an October 25, 2004 letter, appellant stated that she saw Dr. Phillips on that date. Appellant indicated that Dr. Jansen<sup>2</sup> found that she could return to her previous job while Dr. Phillips believed that she needed surgery to correct her neck and shoulder problems prior to returning to work. She stated that if the Office approved the surgery then she could possibly return to work depending on the outcome of the surgery. Appellant concluded that her condition prevented her from returning to work. Dr. Phillips signed the letter stating that he agreed with appellant's comments and that either the surgery should be approved or she should be deemed disabled.

In a December 20, 2004 report, Dr. Phillips diagnosed cervical radiculitis and noted appellant's treatment plan. He released her to return to light-duty work from November 20

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<sup>2</sup> The Board notes that Dr. Jansen's professional qualifications cannot be determined from the record.

through December 20, 2004, with limitations on lifting and repetitive movement of the upper extremities and a break every two hours.

By decision dated December 15, 2004, the Office denied appellant's request for reconsideration on the grounds that it neither raised substantive legal questions nor included pertinent new and relevant evidence and, thus, was insufficient to warrant a merit review of its prior decision.

In a letter dated February 5, 2005, appellant advised that the Office erred in its May 5 and December 15, 2004 decisions. She contended that her June 29, 1999 employment injury was worsening.

On March 28, 2005 appellant filed a Form CA-7 claim for compensation for the periods March through November 2004 and beginning in January 2005. In a May 26, 2005 letter, the Office advised her about the factual and medical evidence needed to establish her claim. Appellant failed to submit a medical report addressing the causal relationship between her current condition and her accepted employment injury.

With respect to appellant's February 5, 2005 request for reconsideration, in a May 26, 2005 letter, the Office advised that it was not clear which decisions or issues she was asking it to reconsider. Appellant was instructed to provide specific details about her request. On the same date, the Office advised appellant that her claims had been combined into the master claim. The Office also advised her about the factual and medical evidence needed to establish that she sustained a recurrence of disability from March through November 2004 and beginning in January 2005. Appellant did not respond to this letter.

By decision dated July 7, 2005, the Office noted that appellant failed to provide the additional evidence requested in its May 26, 2005 letter and, therefore, failed to establish that her claimed recurrence resulted from her accepted work injury.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>3</sup> has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>4</sup> These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>5</sup>

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>5</sup> *See Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has failed to establish a causal relationship between her neck and shoulder problems and her federal employment. In an April 12, 2004 report, Dr. Phillips diagnosed cervical radiculitis and found that appellant was temporarily totally disabled as of that date. The Board finds that Dr. Phillips' report is of diminished probative value as he failed to address the issue of causal relationship. He provided no opinion on whether the diagnosed condition was caused by factors of appellant's employment in her position as a mail handler.

The August 2, 2004 VA decision found that appellant had a 50 percent impairment for a hysterectomy and bilateral salpingo-oophorectomy with pelvic adhesions due to endometriosis and ovarian cysts, a 30 percent impairment for left nephroureterectomy and a 50 percent impairment for post-traumatic stress disorder due to a sexual assault. The Board finds that this decision is of no probative value in establishing her claim under the Act. It is well established that findings of other administrative bodies are not determinative with regard to proceedings under the Act, which is administered by the Office and the Board.<sup>7</sup>

The Board finds that appellant has failed to submit sufficiently rationalized medical evidence of record establishing that she sustained a neck and back condition causally related to factors of her federal employment. The Board finds that she has failed to meet her burden of proof.

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<sup>6</sup> *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

<sup>7</sup> *Raj B. Thackurdeen*, 54 ECAB 396 (2003).

## LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,<sup>8</sup> the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>9</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>10</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

## ANALYSIS -- ISSUE 2

In an October 4, 2004 letter, appellant requested reconsideration of the Office's September 29, 2004 decision, which found that she did not sustain an injury while in the performance of duty causally related to factors of her federal employment. The relevant underlying issue is whether appellant sustained an injury causally related to factors of her federal employment.

Appellant submitted a September 25, 2004 letter describing how her June 29, 1999 employment-related right shoulder and cervical strains, adhesive capsulitis of the right shoulder and degeneration of a cervical disc had worsened. As the relevant issue is medical nature, appellant's opinion on causal relationship is irrelevant and insufficient to warrant reopening her claim for further merit review.

Dr. Phillips' indication that he agreed with appellant's October 25, 2004 statement and that the surgery should be approved or she should be deemed disabled. He did not provide a medical report addressing the issue of causal relationship correct her neck and shoulder problems prior to her return to work and that her conditions prevented her from returning to work at that time. He stated that either the surgery should be approved or she should be deemed disabled. Dr. Phillips did not explain how appellant sustained an injury causally related to her employment. Therefore, his statement agreeing with the comments in letter is irrelevant and insufficient to warrant a merit review of appellant's claim.

Dr. Phillips provided a December 20, 2004 report, which diagnosed cervical radiculitis and found that appellant could perform light-duty work from November 20 through December 20, 2004 with certain physical limitations. However, he failed to address whether the diagnosed condition was caused by factors of appellant's employment. This report is insufficient

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<sup>8</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>10</sup> *Id.* at § 10.607(a).

to warrant a merit review of appellant's claim as it does not provide opinion on the relevant issue.

Appellant did not submit any relevant and pertinent new evidence not previously considered by the Office in support of her request for reconsideration. Further, she did not show that the Office erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by the Office. As appellant did not meet any of the necessary regulatory requirements, the Board finds that the Office properly denied merit review.<sup>11</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup>

### **ANALYSIS -- ISSUE 3**

Following the June 29, 1999 employment-related right shoulder and cervical strains, adhesive capsulitis of the right shoulder and degeneration of a cervical disc, appellant returned to work in a full-time limited-duty capacity on December 18, 2000. She claimed compensation for total disability for the period March through November 2004 and beginning in January 2005 due to the June 29, 1999 employment injury. Appellant did not submit any medical evidence which established that she sustained a recurrence of disability during the claimed periods. Nor did she submit any evidence to support that the nature and extent of her limited-duty assignment changed.

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<sup>11</sup> See *James E. Norris*, 52 ECAB 93 (2000).

<sup>12</sup> 20 C.F.R. § 10.5(x).

<sup>13</sup> *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>14</sup> *James H. Botts*, 50 ECAB 265 (1999).

By letter dated May 26, 2005, the Office advised appellant of the medical and factual evidence necessary to establish her claim. As appellant has failed to submit any evidence establishing that she sustained a recurrence of disability during the claimed periods causally related to her accepted employment injury, she has not met her burden of proof.

**CONCLUSION**

The Board finds that appellant has failed to establish that she sustained an injury while in the performance of duty. The Board further finds that the Office properly denied appellant's request for further review of the merits pursuant to 5 U.S.C. § 8128(a). Lastly, the Board finds that appellant has failed to establish that she sustained a recurrence of disability from March through November 2004 and beginning in January 2005 causally related to her June 29, 1999 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 7, 2005 and December 15 and September 29, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 6, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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