

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

V.D., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Charlotte, NC, Employer

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**Docket No. 06-1994
Issued: February 2, 2007**

Appearances:
Appellant, 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 August 28, 2006 appellant filed a timely appeal from a June 1, 2006 merit decision of an Office of Workers' Compensation Programs' hearing representative, who affirmed the denial of her claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of a medical condition in June 2004 causally related to her accepted June 3, 2001 employment injury.

FACTUAL HISTORY

On June 3, 2001 appellant, a 40-year-old mail processor, filed a traumatic injury claim (Form CA-1), alleging that she injured her right shoulder while reaching above and pulling mail traps from the rack to the belt. By letter dated September 4, 2001, the Office accepted her claim for a right shoulder strain. Appellant worked limited duty from June 4 to 25, 2001 with no lifting

above the shoulder. She resumed regular duty afterwards.¹ In a Form CA-2a dated June 17, 2004, appellant claimed a recurrence of her June 3, 2001 employment injury. She advised that her shoulder pain never resolved. There is no indication that appellant stopped work.

In a June 24, 2004 report, Dr. James Fleischli, a Board-certified orthopedic surgeon, noted appellant's complaints of right shoulder pain, which she had since June 2001. It was worsened with overhead activity which she frequently did during her workday. On examination, Dr. Fleischli found a positive impingement sign, positive Hawkins's sign, mild weakness and pain with supraspinatus testing. He provided an impression of right shoulder impingement syndrome with possible rotator cuff tear. Appellant was restricted from overhead activity and lifting no more than 5 to 10 pounds.

On June 29, 2004 appellant accepted a limited-duty position which involved casing letters and pulling full holdouts.

By letter dated July 6, 2004, the Office requested that appellant submit additional information, including a report from her physician which contained a rationalized opinion as to the causal relationship between her current shoulder condition and the original injury. The Office noted that there was no indication that she received medical treatment since the minor lifting injury sustained three years prior. In response, appellant submitted a magnetic resonance imaging (MRI) scan data sheet/consent for diagnostic testing and duplicate copies of Dr. Fleischli's June 24, 2004 report.

By decision dated August 19, 2004, the Office denied appellant's recurrence of disability claim on the basis that the medical evidence failed to establish that her shoulder condition was causally related to the accepted employment injury.

On September 9, 2004 appellant requested an oral hearing. In a letter dated September 9, 2004 and at the hearing held April 13, 2006, she described her original injury on June 3, 2001 and her medical care. Appellant denied reporting to Dr. Madsen that she was pain free. She stated that, although her pain persisted, she did not seek medical care from August 2001 to June 2004 as management harassed her each time she complained about her shoulder and would not provide the authorization form she needed to see a physician. Appellant worked as a relief supervisor in 2003, for almost a year, which brought some relief to her right shoulder pain, but still performed her regular job on the days she was not supervising. She stepped down from the relief supervisor position and returned to her regular job, alleging that Rodger Parker, a manager, had harassed her. Appellant stated that her right shoulder pain became unbearable on June 16, 2004. She alleged that she was further harassed by Mr. Parker and management after filing the recurrence claim. Appellant described several incidents which she believed constituted harassment. She submitted a June 5, 2005 statement from Fred R. Davis, a coworker, who indicated that he helped appellant put full trays of mail on the top of racks between 2001 and 2003. In a February 19, 2005 report, Marca Storey, a licensed professional counselor, noted

¹ In an August 2, 2001 progress report, Dr. Christian V. Madsen, a Board-certified family practitioner, noted that appellant's examination showed full range of motion of the right shoulder, normal muscle strength and no tenderness or swelling. An impression of resolving impingement syndrome was provided. Appellant was advised to return to full duty and continue with therapeutic exercises.

that appellant had attended counseling sessions during August and September 2004 related to stress about her job-related injury and subsequent surgery.

Appellant also submitted physical therapy notes from June 15 to August 2, 2001 and an August 23, 2004 MRI scan which provided an impression of a full-thickness rotator cuff tear.² In an August 18, 2004 report, Dr. H. Yates Dunaway, a Board-certified orthopedic surgeon, noted that appellant had intermittent trouble with her right shoulder since 2001 when she did overhead work. He stated that an x-ray revealed an osteophyte off of the acromion and appellant managed her pain with Tylenol. Dr. Yates indicated that she was at a lighter job which did not require overhead activity, but appellant still had pain with that activity. In an August 26, 2004 report, Dr. Dunaway noted that the MRI scan revealed a small, full-thickness tear of the supraspinatus tendon. He diagnosed a right rotator cuff tear and recommended surgery, which was performed on August 31, 2004. Postsurgical progress notes were also submitted.

In a May 13, 2005 report, Dr. Henry E. Rice, a chiropractor, indicated that appellant underwent rotator cuff surgery in 2004. Appellant presented to his office with significant right shoulder pain from overhead lifting from her job on March 23, 2005. Dr. Rice stated that appellant's condition had stabilized after approximately six treatments and she returned to work in April 2005 with restrictions on overhead lifting. However, since returning to normal duties in May, appellant's right shoulder pain increased due to overhead lifting. Dr. Rice indicated that due to the repetitive nature of lifting and overhead lifting, she could not be placed in a position to perform any overhead lifting on a repetitive basis.

In a July 5, 2005 report, Dr. Fleischli indicated that appellant resumed work earlier in the year and had a recurrence of her pain with overhead activities. He indicated that the x-rays demonstrated Type 2 acromial morphology with residual or recurrent medial acromial spur. Dr. Fleischli provided an impression of possible right shoulder rotator cuff tear due to ongoing impingement. In an August 11, 2005 report, he indicated that the MRI scan revealed a deep partial thickness cuff tear and that revision rotator cuff repair was indicated. In a December 9, 2005 report, Dr. Fleischli indicated that appellant's left shoulder was bothering her due to compensation and overuse. An impression of left shoulder impingement was provided. He stated that a revision rotator cuff repair was indicated for appellant's recurrent right shoulder rotator cuff tear. In a January 6, 2006 duty status report, Dr. Fleischli advised that appellant's rotator cuff strain had resolved and that she could resume full-time work with restrictions.

By decision dated June 1, 2006, an Office hearing representative affirmed the August 19, 2004 decision. The hearing representative did not address appellant's allegations of harassment, noting that it was not an issue in the recurrence claim.³

² On December 28, 2005 appellant filed an occupational disease claim (Form CA-2), due to repetitive reaching casing mail. There is no indication that the Office issued a decision on that claim.

³ Regarding appellant's assertions at the hearing that her manager harassed her, the hearing representative did not make findings on this, noting that the claim presented was for a recurrence of a right shoulder injury and not for occupational stress.

LEGAL PRECEDENT

Section 10.5(y) of the Office regulation⁴ defines recurrence of medical condition as a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a need for further medical treatment after release from treatment, nor is an examination without treatment.

Appellant has the burden of establishing that the need for further medical treatment is causally related to the employment injury.⁵ The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between her current condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.⁶

ANALYSIS

The Board finds that appellant has failed to submit sufficient rationalized medical opinion which relates her right shoulder condition of June 2004 to her accepted June 3, 2001 right shoulder strain. For this reason, she has not discharged her burden of proof to establish that she sustained a recurrence of disability as a result of her accepted employment condition.

The Office accepted that appellant sustained a right shoulder strain on June 3, 2001. In an August 2, 2001 report, Dr. Madsen released appellant to full duty after examination showed full range of motion of the right shoulder, normal muscle strength and no tenderness or swelling. Appellant alleged that her shoulder symptoms continued; however, she acknowledged that she did not seek additional medical care after her release by Dr. Madsen August 2, 2001 until June 2004. While she also alleged that the employing establishment violated her work restrictions, the record is devoid of any work restrictions from August 2001 to June 2004.

Appellant submitted treatment notes of her physical therapists and a report from Dr. Rice, a chiropractor. The treatment notes of her physical therapists do not constitute probative medical evidence as a physical therapist is not considered a physician under the Federal Employees' Compensation Act.⁷ Additionally, the treatment notes of the physical therapist predate the claimed recurrence commencing June 2004. The chiropractor's report also does not constitute probative medical evidence. Section 8101(2) of the Act provides that chiropractors are considered physicians only to the extent that their reimbursable services are limited to treatment

⁴ 20 C.F.R. § 10.5(y).

⁵ *Joan R. Donovan*, 54 ECAB 615 (2003).

⁶ *Id.*

⁷ 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).

consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.⁸ In this case, Dr. Rice did not diagnose a spinal subluxation based on x-ray and he was providing chiropractor services for appellant's shoulder condition. Thus, he is not considered a physician under the Act and his report cannot be considered as competent medical evidence.⁹

In a June 24, 2004 report, Dr. Fleischli noted appellant's history of right shoulder pain since June 2001 which worsened with overhead activity. He provided an impression of right shoulder impingement syndrome with possible cuff tear and restricted her from overhead lifting. However, Dr. Fleischli did not provide an explanation as to how the June 3, 2001 work injury caused or contributed to appellant's medical condition beginning June 2004. In a July 5, 2005 report, he noted that appellant had a recurrence of pain with overhead activities and a revision rotator cuff repair was indicated based on an MRI scan showing a deep partial thickness cuff tear. However, Dr. Fleischli provided no opinion on whether the rotator cuff tear and the necessity for surgery repair were causally related to the June 3, 2001 employment injury. Although he also opined that appellant had a left shoulder impingement as a result of compensation and overuse, the Office has not accepted that she developed a left shoulder condition as a result of her June 3, 2001 employment injury and there is no medical rationalized evidence to support such a conclusion.¹⁰ Thus, Dr. Fleischli's reports are insufficient to establish appellant's claim.

In an August 26, 2004 report, Dr. Dunaway diagnosed a right rotator cuff tear as demonstrated by an August 23, 2004 MRI scan and performed a right rotator cuff repair August 31, 2004. However, Dr. Dunaway did not provide any opinion on how the rotator cuff tear caused or contributed to the June 3, 2001 employment injury. Thus, his report is insufficient to establish appellant's claim.

An award of compensation may not be based on surmise, conjecture or speculation.¹¹ The mere fact that subsequent symptoms mirrored those following the employment injury without more, is insufficient to establish a causal relationship as the work activities may produce symptoms which are revelatory of an underlying condition.¹² To be of probative value, a physician's opinion must be based on a complete factual and medical background and be supported by medical rationale explaining the nature of the relationship between the claimed condition and the employment injury or factors of her federal employment.¹³ Therefore, the medical reports on record are insufficient to satisfy appellant's burden of proof, because the

⁸ 5 U.S.C. § 8101(2); see 20 C.F.R. § 10.311; see also *George E. Williams*, 44 ECAB 530 (1993) (chiropractic opinions are of no probative value on treatment of conditions beyond the spine).

⁹ See *Susan M. Herman*, 35 ECAB 669 (1984).

¹⁰ For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship. *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹¹ *Shirloyn J. Holmes*, 39 ECAB 938 (1988).

¹² See *Gary R. Fullbright*, 40 ECAB 737 (1989); *Dominic M. DeSala*, 37 ECAB 369 (1986).

¹³ *Lucretia M. Nielson*, 42 ECAB 583 (1991).

physicians base their opinion on new symptoms which mirror the employment injury, but fail to present medical rationale explaining the occurrence of the new symptoms to the employment injury.

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of a medical condition beginning June 2004 causally related to her accepted right shoulder strain.

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 2, 2007
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