

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

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**K.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Wausau, WI, Employer**

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**Docket No. 07-2419  
Issued: April 15, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 27, 2007 appellant filed a timely appeal from a September 18, 2007 merit decision of the Office of Workers' Compensation Programs denying her claim for compensation and a September 20, 2007 merit decision retroactively finding that she had no loss of wage-earning capacity. 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 was disabled beginning August 31, 2006 causally related to her employment; and (2) whether the Office properly found retroactively that her actual earnings effective February 23, 2006 fairly and reasonably represented her wage-earning capacity.

**FACTUAL HISTORY**

On March 15, 2002 appellant, then a 31-year-old automation clerk, filed an occupational disease claim alleging that she sustained pain in the neck area from sweeping above her

shoulders and performing repetitive work with the right arm. The Office accepted her claim for cervical strain. Appellant worked limited duty beginning around March 2002.

On August 25, 2003 appellant requested that the Office expand acceptance of her claim to include thoracic outlet syndrome. She submitted an April 30, 2003 report from her attending physician, Dr. Lester Owens, an osteopath and Board-certified physiatrist, who diagnosed bilateral thoracic outlet syndrome, right greater than left, due to employment activities.

On March 4, 2006 appellant accepted a limited-duty position as a modified manual clerk with restrictions against lifting over 10 pounds and overhead work with her right hand. On September 1, 2006 she filed a notice of recurrence of disability beginning August 31, 2006 causally related to her accepted employment injury. Appellant stopped work on August 31, 2006. She attributed her recurrence of disability in part to performing her limited-duty employment. Appellant indicated that she had experienced a previous recurrence of disability on March 31, 2004.

In a report dated October 11, 2006, Dr. Owens discussed appellant's history of recurring neck, back and shoulder girdle pain following a 2002 employment injury. Appellant experienced pain performing her current work duties. Dr. Owens diagnosed cervicobrachial syndrome which he found was a "reaggravation of a preexisting condition following work exposure in the month preceding [appellant's] August 31, 2006 reported work injury...." He also diagnosed thoracic outlet syndrome and hypermobility syndrome. Dr. Owens opined that appellant was disabled until October 10, 2006 and could resume sedentary work for four hours per day starting October 11, 2006.

By decision dated November 16, 2006, the Office found that appellant failed to establish that she sustained an employment-related recurrence of disability beginning August 31, 2006. On November 20, 2006 appellant requested a review of the written record. She submitted reports dated from December 2006 through February 2007 from Dr. Owens, who diagnosed cervicobrachial syndrome and thoracic outlet syndrome and opined that she could work part time with restrictions.

In a decision dated March 20, 2007, an Office hearing representative set aside the November 16, 2006 decision. She found that the Office had not sufficiently developed whether appellant sustained thoracic outlet syndrome due to employment factors. The hearing representative instructed the Office to refer appellant for a second opinion examination regarding whether she had any additional employment-related conditions and whether her disability beginning August 31, 2006 was due to her employment injury.

On May 16, 2007 the Office referred appellant to Dr. Paul A. Cederberg, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated June 25, 2007, Dr. Cederberg reviewed the statement of accepted facts and listed findings on examination. He noted that appellant had "obliteration of the right radial pulse with abduction of the arm, left lateral rotation and Valsalva maneuver." Dr. Cederberg stated:

"My assessment of [appellant's] upper extremity is that she has a right thoracic outlet syndrome, neck strain and probable cervical disc syndrome. She has a

positive Adson test on the right for thoracic outlet syndrome. [Appellant's] neck complaints and injections suggest that she has cervical disc syndrome, but her diagnostic workup has been inadequate. Dr. Owens has diagnosed her with hypomobility syndrome meaning that she has range of motion of her neck well beyond the normal limits and I agree with that."

Dr. Cederberg opined that appellant's subjective complaints were supported by the objective findings. He found that there was a causal relationship between the diagnosed conditions and her employment duties. Dr. Cederberg determined that appellant could work eight hours per day with restrictions against using her right arm above shoulder level or lifting over 10 pounds with the right arm.

On July 12, 2007 the Office notified appellant that it had expanded acceptance of her claim to include thoracic outlet syndrome and hypermobility syndrome.<sup>1</sup> The Office noted that Dr. Cederberg diagnosed probable cervical disc syndrome but found that appellant's neck condition had not been sufficiently evaluated. The Office informed appellant that a conflict existed between Dr. Owens and Dr. Cederberg regarding the number of hours that she could work. The Office indicated that it would request that the physician selected to resolve the conflict address whether appellant had cervicobrachial syndrome.

The Office referred appellant on July 26, 2007 to Dr. Stephen F. Weiss, a Board-certified orthopedic surgeon, for an impartial medical examination. The Office requested that Dr. Weiss assess appellant's upper extremities, neck and back and "[s]pecifically state" whether he believed that she had cervicobrachial syndrome. The Office further requested that Dr. Weiss comment on appellant's work restrictions if he believed that there was a causal relationship between the diagnosed conditions and her employment. The Office additionally asked Dr. Weiss to discuss whether she had any disability from employment as of August 31, 2006 and explain the basis for his opinion.

In a report dated September 13, 2007, Dr. Weiss reviewed the medical records and discussed appellant's current complaints. On examination, he found a positive Adson test on the right, a positive Phalen's test over the right middle and ring fingers and a positive Tinel sign over the Guyon's canal. Dr. Weiss found normal cervical range of motion and uncomfortable but "not classically positive" Spurling maneuvers. He diagnosed right thoracic outlet syndrome and possible cervical degenerative disc disease. Dr. Weiss opined that, based on the examination, he "was suspicious that her symptomatology might also be related to a carpal tunnel or Guyon canal syndrome, but diagnostic studies have not been performed." He noted that he should discuss work restrictions if he found the diagnosis due to appellant's employment. Dr. Weiss opined that she could work full time with restrictions. In response to the Office's request for a reasoned opinion whether appellant was incapable of working in her March 4, 2006 limited-duty position for eight hours beginning August 31, 2006, Dr. Weiss stated: "I believe she could have performed the described work activities for [eight] hours a shift, provided she did not have to lift in excess of 10 pounds frequently and 20 pounds occasionally."

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<sup>1</sup> The Office indicated that Dr. Cederberg diagnosed hypomobility instead of hypermobility syndrome but found that this was a typographical error.

By decision dated September 18, 2007, the Office found that appellant had not established that she sustained a recurrence of disability beginning August 31, 2006 such that she could not perform full-time work.

In a decision dated September 20, 2007, the Office found that appellant had no loss of wage-earning capacity based on its retroactive determination that her actual earnings beginning February 23, 2006 fairly and reasonably represented her wage-earning capacity.

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

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his or 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 filed within the applicable time limitation of the Act; that an injury was sustained while 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. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.<sup>3</sup>

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>4</sup> The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>5</sup>

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>6</sup>

In situations where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Calvin E. King*, 51 ECAB 394 (2000); *Caroline Thomas*, 51 ECAB 451 (2000).

<sup>4</sup> 5 U.S.C. § 8123(a).

<sup>5</sup> 20 C.F.R. § 10.321.

<sup>6</sup> *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.<sup>7</sup>

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

The Office accepted that appellant sustained cervical strain due to factors of her federal employment. She worked limited duty beginning February 27, 2002. Appellant accepted a limited-duty position on March 4, 2006 which restricted lifting to 10 pounds and required no overhead work with the right arm. On August 25, 2003 she had previously requested that the Office expand acceptance of her claim to include thoracic outlet syndrome. On September 1, 2006 appellant alleged that she sustained a recurrence of disability beginning August 31, 2006 causally related to her accepted employment injury. She attributed her recurrence, in part, to performing her work duties after February 2002. Appellant stopped work on August 31, 2006 and returned to limited-duty employment for four hours per day on October 11, 2006. As she attributed her recurrence of disability, in part, to new work duties, her claim is for a new injury rather than a recurrence of disability.<sup>8</sup>

On October 11, 2006 Dr. Owens, appellant's attending physician, diagnosed employment-related cervicobrachial syndrome and also thoracic outlet syndrome and hypermobility syndrome. He found that she was disabled until October 10, 2006 and could resume sedentary work for four hours per day on October 11, 2006. On June 25, 2007 Dr. Cederberg, an Office referral physician, diagnosed thoracic outlet syndrome on the right side, neck strain and probable cervical disc syndrome. He indicated that her symptoms "suggest that she has cervical disc syndrome, but her diagnostic workup has been inadequate." Dr. Cederberg found that appellant's subjective complaints were supported by the objective findings and that there was a causal relationship between the diagnosed conditions and her employment duties. He determined that she could work eight hours per day with restrictions of not using her right arm above shoulder level or lifting over 10 pounds with the right arm.

Based on Dr. Cederberg's opinion, the Office expanded acceptance of appellant's claim to include thoracic outlet syndrome and hypermobility syndrome. The Office found that there was a conflict in medical opinion between Dr. Owens and Dr. Cederberg on the extent of her disability. The Office referred appellant to Dr. Weiss for resolution of the conflict and to address the issue of whether she had cervicobrachial syndrome.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>9</sup> In a report dated September 13, 2007, Dr. Weiss

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<sup>7</sup> See *Guiseppe Aversa*, 55 ECAB 164 (2003).

<sup>8</sup> 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." 20 C.F.R. § 10.5(x). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift." 20 C.F.R. § 10.5(q).

<sup>9</sup> See *David W. Pickett*, *supra* note 6.

reviewed the medical records and listed findings on examination of a positive Adson test on the right, a positive Phalen's test over the right middle and ring fingers, a positive Tinel sign over the Guyon's canal and uncomfortable but not positive Spurling's maneuvers. He diagnosed right thoracic outlet syndrome and possible cervical degenerative disc disease. Dr. Weiss found that appellant required further diagnostic studies to determine whether she had carpal tunnel or Guyon canal syndrome. He opined that appellant could work full time in a limited-duty capacity. Regarding the question of whether she was disabled from full-time employment beginning August 31, 2006, Dr. Weiss related: "I believe [that] she could have performed the described work activities for [eight] hours a shift, provided she did not have to lift in excess of 10 pounds frequently and 20 pounds occasionally." He did not, however, provide any rationale for his finding that appellant could work full time from August 31, 2006 onward. The Office requested that he explain the basis for any disability finding. Instead, while Dr. Weiss made statements regarding disability that were clear and unequivocal, he failed to offer medical reasoning in support of his conclusions.<sup>10</sup> The certainty with which he expressed his opinion cannot overcome the lack of medical rationale.<sup>11</sup> The Board has held that medical conclusions unsupported by rationale are of little probative value.<sup>12</sup> As Dr. Weiss failed to provide rationale for his disability finding, the Office should have requested clarification from the physician. Additionally, the Office asked that Dr. Weiss "specifically state" whether appellant sustained cervicobrachial syndrome. He diagnosed possible cervical degenerative disc disease and determined that her cervical symptoms may be due to carpal tunnel syndrome or Guyon canal syndrome. Dr. Weiss opined that further testing would be required to determine the nature of her condition. He thus did not sufficiently address the issue of whether appellant sustained cervicobrachial syndrome.

In situations where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.<sup>13</sup> As the Office referred appellant to Dr. Weiss, it has the duty to obtain a report sufficient to resolve the issues raised and the questions posed to the specialist. The case, consequently, is remanded for the Office to obtain a

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<sup>10</sup> See *Elaine Sneed*, 56 ECAB 373 (2005).

<sup>11</sup> See *Willa M. Frazier*, 55 ECAB 379 (2004).

<sup>12</sup> *Jimmy H. Duckett*, 52 ECAB 332 (2001).

<sup>13</sup> See *Guiseppe Aversa*, 55 ECAB 164 (2003).

supplemental report from Dr. Weiss. Following this and such further development deemed necessary, the Office should issue an appropriate decision.<sup>14</sup>

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated September 20 and 18, 2007 are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 15, 2008  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> In view of the Board's disposition of the issue of whether appellant sustained disability beginning August 31, 2006 due to her employment, it is premature to address the retroactive loss of wage-earning capacity determination. The Board has held that it is inappropriate to issue a retroactive wage-earning capacity determination when there is a pending claim for compensation from the time of the work stoppage. *Juan A. DeJesus*, 54 ECAB 721 (2003). The Office's procedure manual provides that a retroactive loss of wage-earning capacity determination may be made where the claimant worked in the position for at least 60 days, the employment fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).