

FACTUAL HISTORY

On September 24, 2002 appellant, then a 55-year-old materials expeditor, filed an occupational disease claim (Form CA-2) alleging that around November 2000 she began experiencing pain about the right shoulder related to her job duties requiring repetitive lifting above her shoulder.¹ The Office accepted the claim for exacerbation of right rotator cuff tear.

On August 18, 2008 appellant filed a claim for a June 30, 2008 recurrence claiming both time lost from work and further medical treatment. She stated that her right arm pain had never gone away and that over the past few years her symptoms had worsened such that she was unable to lift her right arm very high.

The record reveals that appellant intermittently used her sick and annual leave for medical treatment and physical therapy during the period June 30 through October 7, 2008.

On June 23, 2008 Dr. Richard Holden, appellant's treating physician and a Board-certified orthopedic surgeon, diagnosed right subacromial tendinosis. He provided work restrictions including no lifting, pushing or pulling over 15 pounds frequently and 20 pounds occasionally and no overhead work.

In a June 30, 2008 medical note, Dr. Holden reported appellant's complaints of right shoulder pain continuing for 8 to 10 years and that she was slowly losing motion and strength. He discussed her history of carpal tunnel syndrome and right rotator cuff tear, as well as right acromioclavicular (AC) arthritis. Dr. Holden noted that appellant did not undergo surgery at that time. Physical examination revealed mild weakness on external rotation and pain with abduction and internal rotation. X-rays showed irregularities of the greater tuberosity, a small cyst in the humeral head and changes of the AC joint. Dr. Holden performed an injection in the right subacromial space, which provided excellent relief of symptoms and returned appellant's strength, elevation and internal and external rotation to normal. He diagnosed rotator cuff tendinitis and tear by history without marked weakness. In a corresponding form, Dr. Holden indicated that appellant could return to full duty and diagnosed right subacromial tendinosis.

On July 23, 2008 Dr. Holden reported appellant's complaints that her pain had returned since the last treatment. He noted that she also experienced paresthesia in her hand, which he opined was due to a cervical condition. Dr. Holden diagnosed impingement lesion of the right shoulder.

In an August 11, 2008 note, Dr. Holden relayed appellant's history of AC joint arthrosis with spurring and impingement of the rotator cuff, a supraspinatus tendon with tendinosis, a tear of the rotator cuff and a degenerative articular surface lesion of the anterior superior glenoid, for which she never had surgery. He also reported appellant's claims of worsening pain. Further, on August 25, 2008 Dr. Holden reviewed an MRI scan revealing a full thickness tear of the supraspinatus without significant retraction and fluid. He noted that appellant also had AC joint arthrosis. Dr. Holden opined that her condition had been going on and off for eight years and

¹ The record reveals that, after her injury, appellant's physician placed her on light duty. It is unclear whether she missed any time for work due to her employment injury or when she returned to regular duty.

that it had worsened within the past few months. He recommended surgery and referred appellant for a consultation. In a separate August 25, 2008 form, Dr. Holden indicated that she should continue to work restricted duty due to right shoulder tendinitis and rotator cuff sprain.

In a September 2, 2008 medical report, Dr. Samuel I. Brown, a Board-certified orthopedic surgeon, stated that appellant had a long and complicated history regarding her right shoulder, dating back to 2000 when she experienced a work-related injury. Appellant reported that she experienced right shoulder pain for several years and that, despite working restricted duty, she was having difficulty carrying out her employment duties. Dr. Brown stated that most of a physical examination could not be carried out because of appellant's claims of severe pain and her unwillingness to participate. He reviewed x-rays of the shoulder, revealing mild degenerative change. An MRI scan showed a focal, full-thickness, small rotator cuff tear at the insertion of the supraspinatus and degenerative changes at the AC joint. Dr. Brown diagnosed right shoulder rotator cuff tear with AC joint arthrosis, which was becoming chronic, and apparent adhesive capsulitis with symptom magnification. In an attached form, he prescribed physical therapy to restore full range of motion prior to surgery and diagnosed right rotator cuff tear.

Appellant further submitted physical therapy reports dated June 30 through October 3, 2008 and an August 21, 2008 MRI scan report.

By letter dated October 22, 2008, the Office notified appellant of the deficiencies in her recurrence claim and requested that she provide additional factual and medical information.

In an October 29, 2008 statement, appellant claimed that, during the early part of the year, she was placed on a special project requiring extensive lifting and pulling of materials ranging from light weight to over 40 pounds, as well as constant standing and carrying of materials. The project lasted until about April or May, at which time she noticed sharp pains in the right arm and shoulder.

By decision dated February 26, 2009, the Office denied appellant's claim for a recurrence of disability on the grounds that the factual and medical evidence did not establish that she sustained a disabling condition causally related to her accepted work injury.

By letter postmarked April 15, 2009, appellant submitted a request for an oral hearing before an Office hearing representative.²

In a May 5, 2009 decision, the Branch of Hearings and Review denied appellant's request for an oral hearing before an Office hearing representative on the grounds that her request for an oral hearing, postmarked on April 15, 2009, was not submitted within 30 days of the February 26, 2009 Office decision. It further found that the issue on appeal could be equally well addressed by requesting reconsideration from the Office with the submission of new evidence.

² On March 20, 2009 appellant requested that the Office provide a copy of her file so that she could request a hearing for the denial of the recurrence of her employment-related injury.

LEGAL PRECEDENT -- ISSUE 1

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.”³ A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish 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 the employment injury and supports that conclusion with sound medical reasoning.⁴ Where no such rationale is present, medical evidence is of diminished probative value.

A recurrence of a medical condition is defined in the Office’s procedure manual as “the documented need for further treatment of the accepted condition when there has been no work stoppage.”⁵ When a claim for a recurrence of medical condition is made more than 90 days after release from medical care, an employee is responsible for submitting a medical report that contains a description of objective findings and supports causal relationship between the employee’s current condition and the previous work injury.⁶

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an exacerbation of a right rotator cuff tear in November 2000. The issue is whether she sustained a recurrence of disability or medical condition on or after June 30, 2008.

Appellant filed a recurrence claim for both time lost from work and further medical treatment. It does not appear from the record that appellant was disabled after June 30, 2008 due to the claimed injury. Although Dr. Holden provided work restrictions, it appears as though the employing establishment accommodated the work restrictions and appellant continued to receive the wages she was receiving prior to the claimed recurrence.⁷ It appears as the only time she lost from work was for intermittent medical appointments and physical therapy. Office procedures

³ *R.S.*, 58 ECAB 362 (2007); 20 C.F.R. § 10.5(x).

⁴ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

⁵ *J.F.*, 58 ECAB 124 (2006); *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(a) (January 1998).

⁶ *J.F.*, *supra* note 5; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5(b) (September 2003).

⁷ The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury. This meaning for brevity is expressed as “disability for work.” *See e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999); *John W. Normand*, 39 ECAB 1378, 1381 (1988); 20 C.F.R. § 10.5(f).

provide that wages lost for compensable medical examinations or treatment may be reimbursed.⁸ Thus, in order for appellant to receive compensation for these periods of lost time, she must establish that she sustained a recurrence of medical condition.

Appellant submitted a series of reports from her treating physician, Dr. Holden, dated June 23 through August 11, 2008. Dr. Holden reported appellant's complaints of right shoulder pain continuing for the past eight years and worsening in the past few months. He also noted her history of right rotator cuff tear and right AC arthritis, which had been going on and off for eight years. Dr. Holden diagnosed right subacromial tendinosis, right rotator cuff tendinitis and strain and impingement lesion of the right shoulder, but he did not provide an opinion as to the cause of appellant's current condition or explain the worsening of her pain symptoms. He did not fully discuss the history of her prior work injury, beyond noting that she previously sustained a right rotator cuff tear that had been going on and off for eight years, and did not describe how this prior injury was related to appellant's current condition. As Dr. Holden did not provide a rationalized medical opinion bridging the symptoms of appellant's current right arm condition to the November 8, 2000 work injury, his report does not support appellant's recurrence claim.⁹

In a September 2, 2008 medical report, Dr. Brown diagnosed right shoulder rotator cuff tear with AC joint arthrosis and apparent adhesive capsulitis with symptom magnification. He stated that appellant had a long and complicated history regarding her right shoulder, dating back to 2000 when she experienced a work-related injury. Dr. Brown also noted her complaints of right shoulder pain for years. Although he opined that appellant had a history of right shoulder injury and referenced the 2000 work injury, he did not address the cause of appellant's current right shoulder condition or provide an opinion as to whether it was related to her previous work injury. Therefore, Dr. Brown's report is insufficient to establish appellant's claim.¹⁰

Appellant also submitted physical therapy reports dated June 30 through October 3, 2008. As physical therapist is not included in the definition of a physician under the Act, these reports are of diminished probative value.¹¹ Further, the August 21, 2008 MRI scan report is only a diagnostic report and does not address causation. Therefore, this report is also of diminished probative value.¹²

Moreover, in an October 29, 2008 statement, appellant stated that she noticed sharp pains in the right arm and shoulder around April or May after participating in a special project at work requiring extensive lifting and pulling of materials, as well as constant standing and carrying.

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.16 (December 1995). See also *Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁹ See *Ricky S. Storm*, 52 ECAB 349 (2001).

¹⁰ A physician's opinion which does not provide an opinion on causation is of diminished probative value. See *Robert Broome*, 55 ECAB 339 (2004). See also *Mary A. Ceglia*, *supra* note 5.

¹¹ Under section 8101(2), the definition of a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). See *Jerre R. Rinehart*, 45 ECAB 518 (1994).

¹² See *Conard Hightower*, 54 ECAB 796 (2003).

Here, she appears to attribute her right shoulder injury to exposure to new work factors instead of a spontaneous change of the November 8, 2000 employment injury. Thus, appellant's claim does not meet the definition of a recurrence but is better characterized as a claim for a new occupational disease.¹³

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Federal Employees' Compensation Act¹⁴ provides that a claimant not satisfied with a decision of the Office is entitled to a hearing before an Office hearing representative when the request is made within 30 days after issuance of the Office's decision.¹⁵ Under the implementing regulations, a claimant who has received a final adverse decision by the Office is entitled to a hearing by writing to the address specified in the decision within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.¹⁶ If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.¹⁷

ANALYSIS -- ISSUE 2

The Office denied appellant's claim for a recurrence of disability in a decision dated February 26, 2009. Appellant requested an oral hearing before an Office hearing representative by letter postmarked April 15, 2009. As her request was not filed within 30 days of the February 26, 2009 decision, she is not entitled to an oral hearing as a matter of right.¹⁸

The Office exercised its discretion and determined that appellant's request for an oral hearing could be equally well addressed by requesting reconsideration and submitting additional evidence. This is a proper exercise of the Office's discretionary authority.¹⁹

CONCLUSION

The Board finds that appellant did not establish that she sustained a recurrence of disability on or after June 30, 2008 causally related to her accepted employment injury. The Board also finds that the Office did not abuse its discretion when it denied appellant's request for an oral hearing on the grounds that it was untimely filed.

¹³ See *Bryant A. Blackmon*, 56 ECAB 752 (2005).

¹⁴ 5 U.S.C. §§ 8101-8193.

¹⁵ *Id.* at § 8124(b)(1).

¹⁶ 20 C.F.R. § 10.616(a); 5 U.S.C. § 8124(b)(1).

¹⁷ *Teresa Valle*, 57 ECAB 542 (2006).

¹⁸ See *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

¹⁹ See *R.T.*, 60 ECAB ____ (Docket No. 08-408, issued December 16, 2008). See also *André Thyratron*, 54 ECAB 257 (2002).

ORDER

IT IS HEREBY ORDERED THAT the May 5 and February 26, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 7, 2010
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