

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

V.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Carol Stream, IL, Employer**

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**Docket No. 09-1349
Issued: March 22, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 30, 2009 appellant timely appealed a December 17, 2008 merit decision of the Office of Workers' Compensation Programs denying her consequential injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained a hernia condition as a consequence of her January 26, 2004 employment injury.

FACTUAL HISTORY

The Office accepted that on January 26, 2004 appellant, then a 43-year-old mail processing clerk, injured her left shoulder when reaching for a tape dispenser. Appellant stopped work on April 19, 2004 and did not return. The Office accepted the claim for internal derangement of the left shoulder and placed her on the periodic rolls. On August 24, 2005 appellant underwent subacromial decompression surgery. The Office authorized physical therapy treatment and a work conditioning program.

The reports from physical therapy and the work conditioning program, dated January 23 to July 2006, noted appellant's progress and her frequent absenteeism but did not reference any complaints relative to hernia symptoms. On June 19, 2006 appellant missed all her appointments that week except for one. The June 26, 2006 notes stated appellant was scheduled for 24 appointments up to June 23, 2006, but only made 11 of the appointments. On July 3, 2006 appellant missed an appointment that week and had cancelled her other appointments early due to her schedule. A July 11, 2006 letter noted that appellant began a work conditioning program on May 23, 2006 and she attended only two appointments that week. It noted appellant's complaints of being sore and tight through her upper back and anterior shoulders. The work conditioning/hardening progress reports noted her complaint of low back pain and shoulder irritation after each session and that her program was modified to accommodate her. Appellant was discharged from the work hardening/conditioning program on July 14, 2006 with a light-duty physical capacity.

In a July 27, 2006 report, Dr. Steven C. Chudik, a Board-certified orthopedic surgeon, noted that appellant had not been reporting for her work conditioning program. Appellant advised him that she had reagravated an abdominal hernia and that it was too painful and difficult for her to do the work or heavy lifting. Dr. Chudik noted that the physician who treated appellant's hernia did not have a clear recommendation about her continuing with work conditioning. In an August 3, 2006 report, he recommended that appellant continue work conditioning with restrictions on lifting and no core exercises. Dr. Chudik indicated that she remained disabled from work.

In an August 12, 2006 report, Dr. Geoffrey M. Silver, a Board-certified general surgeon, noted appellant had a hernia repaired the previous year. Appellant was undergoing physical therapy for a shoulder injury and noticed pain and bulging in her abdominal wall, which was painful with lifting. Dr. Silver assessed probable abdominal wall hernia and recommended no lifting until the next evaluation. On November 6, 2006 he noted seeing appellant several times for abdominal pain. Dr. Silver diagnosed an abdominal wall hernia and recommended that it be repaired.

On November 20, 2006 appellant filed a claim alleging that she sustained a recurrence of disability on July 20, 2006 due to her January 26, 2004 employment injury. She asserted that her participation in the work conditioning program and physical therapy for five days a week four hours a day resulted in a hernia. Prior to the work injury, appellant had a hernia repaired and experienced abdomen pain in June and July 2006. She stated that her doctors and physical therapist were aware of her pain and her physician advised her to discontinue her work conditioning exercises on August 1, 2006.

In a December 21, 2006 report, Dr. Chudik advised that appellant could not complete her work conditioning due to her hernia. Appellant was scheduled to have surgery on January 10, 2007 and remained totally disabled.

On January 31, 2007 the Office requested appellant to submit additional medical evidence in support of her claim. This included a rationalized report from her physician explaining how her condition worsened and how the newly diagnosed hernia condition was causally related to the accepted work-related condition involving her left upper extremity. The Office developed the matter as a claim for a consequential injury.

In a February 8, 2007 report, Dr. Chudik provided a history of appellant's work-related shoulder injury and medical treatment. He stated that through her work-conditioning program, appellant developed an abdominal hernia which precluded her from completing the program. Dr. Chudik opined that the abdominal hernia could be closely related to her work-conditioning exercises which became necessary treatment following her left shoulder surgery.

On April 4, 2007 the Office denied the claim on the grounds that appellant did not submit sufficient medical evidence to establish that her hernia or disability were a consequence of her January 26, 2004 work injury.

Appellant requested an oral hearing, which was held on August 27, 2007.

In an April 17, 2007 report, Dr. Chudik stated that appellant's preexisting abdominal hernia significantly worsened during her work conditioning, by strenuous activity. On April 27, 2007 he indicated that appellant was performing work-conditioning activities after her shoulder surgery and apparently tore the mesh that was holding her abdominal hernia repair. Dr. Chudik indicated the tearing of the mesh and recurrence of the abdominal hernia was due to performing work-conditioning exercise, which was part of her treatment for her shoulder injury. He recommended no further work conditioning until her hernia was repaired.

In a June 1, 2007 report, Dr. Richard Sidwell, Jr., a Board-certified general surgeon and Office referral physician, noted the history of injury, appellant's treatment and provided findings on examination. He diagnosed left shoulder pain, status post distal clavicle resection left shoulder with probable minimal rotator tendinopathy. With regard to the recurrence of appellant's hernia condition, Dr. Sidwell opined that there was no reason to consider the hernia related in any way to the accepted condition. He advised that, if appellant is cleared by the treating general surgeon, she should be able to do light exercises involving the left upper extremity or at least perform range of motion exercises that would optimize her recovery.

In a February 22, 2007 report, Dr. Jennifer Buhrke, appellant's primary care physician, advised appellant's needed surgery for a ventral abdominal hernia. She opined that the hernia occurred secondary to weight lifting and abdominal exercise that was part of a work conditioning program for which appellant was sent for rehabilitation after shoulder surgery.

By decision dated November 13, 2007, an Office hearing representative vacated the April 4, 2007 decision, finding a conflict of medical opinion between Dr. Chudik and Dr. Buhrke, the treating physicians, and Dr. Sidell, the second opinion physician, regarding the claimed abdominal hernia condition.

To resolve the conflict, the Office referred appellant, together with a statement of accepted facts, a list of questions and the medical record, to Dr. Scott Kale, a Board-certified internist. In a February 18, 2008 report, Dr. Kale reviewed the medical records, appellant's treatment following her work injury and her claimed hernia injury. He noted that appellant related a history of an aggravation of a preexisting otherwise asymptomatic abdominal hernia during physical therapy for her injured shoulder. It appeared from her history that the aggravation occurred at some point in June or July 2006; however, thorough review of appellant's therapy record revealed no complaints of any abdominal pain or any incident in which her abdomen was injured, aggravated or otherwise affected by her physical therapy.

Moreover, appellant's description that she engaged in 200 sit-ups at each session was not verified or supported in the medical record, which noted that she may have done no more than several sets of eight sit-ups. There was no evidence that appellant engaged in core exercises that would reasonably have injured her abdomen in the course of physical therapy or evidence of appellant injuring her abdomen. Dr. Kale noted that there was considerable evidence of appellant having missed multiple physical therapy appointments because of an upper respiratory infection, low back pain, and for reasons that were not specified. He noted that, while her physicians dutifully recorded that she injured her abdomen during physical therapy, there was no independent support for this history other than appellant's narrative. Dr. Kale found that there was no relationship between appellant's physical therapy for her left shoulder condition and her abdominal hernia. He stated that there was no medical record of appellant injuring her abdomen at her place of therapy. Dr. Kale advised the preexisting nature of a ventral hernia increased the likelihood of future herniations, which could occur with any activity, including activities of daily living. He found that appellant's hernia prevented her from working but was not work related. Dr. Kale stated that appellant was medically capable of returning to full-time limited-duty work with regard to her shoulder injury.

By decision dated March 12, 2008, the Office denied appellant's claim for a consequential hernia injury based on the report of Dr. Kale, the impartial medical specialist.

Appellant disagreed with the Office's decision and requested an oral hearing, which was held September 30, 2008. No new medical evidence was submitted.

By decision dated December 17, 2008, an Office hearing representative affirmed the March 12, 2008 decision.

LEGAL PRECEDENT

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct. The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.¹

A claimant bears the burden of proof to establish a claim for a consequential injury.² As part of this burden, he must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must

¹ S.S., 59 ECAB ___ (Docket No. 07-579, issued January 14, 2008).

² J.J., 60 ECAB ___ (Docket No. 09-27, issued February 10, 2009); *Charles W. Downey*, 54 ECAB 421 (2003).

be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.³

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: 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.⁴ In situations where 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.⁵

ANALYSIS

The Office accepted that appellant sustained internal derangement of the left shoulder on January 26, 2004. Following surgical repair of her left shoulder, appellant underwent physical therapy and a work conditioning/hardening program. She subsequently claimed that her hernia condition and disability on July 20, 2006 was due to her participation in the physical therapy and work conditioning/hardening program.

The Office found a conflict in medical opinion between Dr. Chudik and Dr. Buhrke, appellant's treating physicians, and Dr. Sidell, the second opinion physician, regarding whether she sustained a consequential abdominal hernia condition. Pursuant to section 8123(a) of the Act, it properly referred appellant to Dr. Kale, a Board-certified internist, for an impartial medical examination and an opinion on the matter.

Dr. Kale provided an accurate factual and medical history. He indicated that the history that appellant provided to her treating physicians -- that she had sustained an abdominal injury while participating in physical therapy exercises -- was not supported by the objective evidence of record. Dr. Kale noted the physical therapy records did not indicate any complaints of abdominal pain or any incidents in which her abdomen was injured, aggravated or otherwise affected by her workouts at physical therapy. He further noted there was no evidence that appellant engaged in the frequency of exercise claimed or had engaged in core exercises which reasonably would have injured her abdomen, which was susceptible to future herniations because of the preexistence of a ventral hernia.⁶ Dr. Kale opined there was no relationship between appellant's physical therapy arising out of her left shoulder injury and her abdominal hernia. He explained that herniations could occur with any activities of daily living and not just from sit-ups and that the amount and frequency appellant claimed was not supported by the record. Dr. Kale

³ *Charles W. Downey, supra* note 2.

⁴ 5 U.S.C. § 8123(a).

⁵ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁶ The Board notes that the record reflects that appellant's progress in the work-conditioning program was hindered by multiple absenteeism and the physical therapy reports do not reference any complaints by appellant relative to hernia symptoms. Additionally, the record does not contain any evidence that appellant attended physical therapy on or about July 20, 2006, when her claimed total disability began.

found no basis on which to attribute appellant's hernia condition to her conditioning program to treat her accepted left shoulder condition.

The Board finds that the opinion of Dr. Kale is sufficiently well rationalized and based upon an accurate history such that it is entitled to special weight and establishes that appellant did not sustain an abdominal hernia as a consequence of her January 26, 2004 employment injury.

Dr. Kale found that appellant's hernia condition was not a consequence of her January 26, 2004 employment injury.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a hernia condition or disability as a consequence of her July 20, 2004 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2008 Office of Workers' Compensation Programs' decision is affirmed.

Issued: March 22, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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