United States Department of Labor
Employees' Compensation Appeals Board

W.P., Appellant	)	
and	)	**Docket No. 10-240**
	)	**Issued: November 18, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Las Vegas, NV, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 2, 2009 appellant, through counsel, filed a timely appeal from the August 26, 2009 decision of the Office of Workers' Compensation Programs denying her recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of disability commencing January 2, 2007 causally related to her March 9, 2005 employment injury.

FACTUAL HISTORY

On March 9, 2005 appellant, then a 46-year-old transportation security screener, sustained injury to her right arm, neck and shoulder while in the performance of duty. The Office accepted her claim for cervical, thoracic and right shoulder strains.

Appellant was treated by Dr. Jaswinder S. Grover, a Board-certified orthopedic surgeon, for persistent neck and right upper extremity pain. He obtained a cervical magnetic resonance imaging (MRI) scan on April 2, 2005 that revealed slight cervical disc degeneration consistent with appellant's age but otherwise reported as normal. X-rays of the cervical spine revealed some narrowing of the C5-6 disc with loss of cervical lordosis. On June 6, 2005 appellant underwent a selective nerve root block at C6, but Dr. Grover noted that she did not appreciate any substantial relief. On June 16, 2005 he released appellant to return to her regular work duty. On July 14, 2005 Dr. Grover noted that he would continue appellant on physical therapy and recommended that she could continue regular duty work. On July 26, 2005 he reiterated that appellant could work without restrictions and was considered released without any permanent impairment.[1]

On June 17, 2005 appellant returned to regular full-duty work. On August 8, 2005 she resigned from the employing establishment. Appellant began work with Union Pacific on April 26, 2006. On October 4, 2007 she filed a claim for a recurrence of disability beginning January 2, 2007.

The record reflects that appellant sought treatment on January 22, 2007 from Dr. Jason M. Tarno, a Board-certified osteopath, for complaints of cervical and right shoulder pain. In a January 24, 2007 treatment record, Dr. Tarno noted appellant's history of injury on March 9, 2005 and noted a positive impingement test on the right with negative labral signs. A January 18, 2007 MRI scan was read as revealing a partial thickness tear involving the articular surface of the supraspinatus tendon with no definite full thickness tear. On February 13, 2007 Dr. Tarno noted that a February 2, 2007 cervical MRI scan showed C5-6 degenerative disc disease with disc narrowing and a mild broad-based annular bulge with minimal stenosis. In an attending physician's report of that date, he checked "yes" to the question of whether appellant's right shoulder partial rotator cuff tear was employment related. Dr. Tarno indicated that appellant's return to work was unknown at that time.

The Office referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a March 27, 2007 report, Dr. Swartz reviewed the history of the March 9, 2005 injury and medical treatment, finding no evidence of treatment from September 2005 to September 2006. He listed appellant's present complaint of cervical and right shoulder pain with numbness extending to the right hand and fingers. Appellant described her duties as a conductor for the railroad and that she last worked on February 12, 2007. On physical examination, Dr. Swartz provided range of motion for the cervical spine and right shoulder and described full motor function. There was no atrophy of either upper extremity and sensation was intact in both. Pain on impingement testing of the right shoulder was noted. Dr. Swartz diagnosed chronic degenerative disc disease at C5-6 and chronic tendinosis/ tendinopathy of the right shoulder with a probable small partial thickness tear of the distal infraspinatus. He based the diagnoses on the imaging studies, noting that appellant's physical

[1] On June 23, 2005 Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, examined appellant. He examined her cervical spine and both upper extremities, noting range of motion of the right shoulder was normal and pain free without any muscle wasting; x-rays showed not arthritis or soft tissue calcifications. Dr. Sherman diagnosed a resolved right shoulder strain without any neurologic deficit or evidence of nerve root compression. He concluded that appellant had no residuals of her accepted conditions.

examination did not reveal any objective findings. Dr. Swartz stated that the March 9, 2005 injury had aggravated appellant's cervical and right shoulder conditions but that the aggravation was temporary and ceased by July 2005 when Dr. Grover found that she had improved and could return to her regular duties. He noted that appellant's complaints were not supported by objective findings and that her cervical and right shoulder conditions were degenerative and nonindustrial. Dr. Swartz advised that she need no further medical treatment for the March 9, 2005 injury as there were no residuals of the accepted strains and she did not require any physical limitations. He found that appellant's March 9, 2005 injury consisted of a relatively mild strain which resolved by July 16, 2005.

On May 23, 2007 Dr. Tarno reviewed the report of Dr. Swartz and disagreed with his conclusion that appellant no longer had any employment-related residuals or disability. He noted that appellant received treatment from Dr. Grover but he did not have any medical records from her previous treating physicians. Dr. Tarno stated that, prior to the March 9, 2005 employment injury, appellant had no radicular or cervical spine symptoms and she did not report any other injury after March 2005 to the time he saw her on January 24, 2007. He attributed appellant's cervical and radicular symptoms to her March 9, 2005 injury and advised that her present symptoms were the natural progression of that injury. Dr. Tarno stated that there was no specific treatment plan for the right shoulder in 2005 but, in January 2007, there was evidence of a partial rotator cuff tear. He noted that appellant had pain on impingement testing of the rotator cuff, as was found by Dr. Swartz, and demonstrated less than full strength of the right upper extremity. Dr. Tarno concluded that she presently had an aggravation of her prior industrial injury and recommended work restrictions limiting use of her right arm. He recommended that appellant be referred for arthroscopic evaluation of the right rotator cuff and undergo neurological evaluation of her cervical spine.[2]

Appellant submitted medical records and physical therapy reports from 2005 through 2007. In notes dated July 11 and August 9, 2007, Dr. Michael J. Crovetti, a Board-certified osteopath, noted that appellant was seen for right shoulder pain. He related that appellant had been injured at work in March 2005 and a 2007 MRI scan revealed a rotator cuff tear.

On December 4, 2007 the Office referred appellant to Dr. Swartz for clarification of his prior opinion. Dr. Swartz was provided a statement of accepted facts that reviewed her duties as a transportation security screener and subsequent work as of June 4, 2006 as train crew for the Union Pacific Railroad. In a January 29, 2008 report, he noted that he reexamined appellant that day and that she had undergone surgery on her right shoulder since his prior evaluation. Appellant described numbness in the right upper extremity with activities of daily living. On examination, Dr. Swartz noted tenderness in the right cervico-thoracic region with no actual muscle spasm. He listed findings on range of motion of the cervical spine and both upper extremities. Dr. Swartz found that appellant sustained a soft tissue strain of the neck and right shoulder in the March 9, 2005 employment injury with diagnostic testing revealing degenerative disc disease and a mild annular bulge at C5-6. He noted minimum pathology on the February 2,

[2] The Board notes that the Office initially adjudicated appellant's claim as a termination of compensation in a June 7, 2007 decision. This was set aside by an Office hearing representative in an August 28, 2007 decision, remanding for adjudication of the recurrence issue as of January 2007 and whether appellant's cervical or right shoulder conditions were aggravated by the March 9, 2005 injury.

2007 MRI scan and that the cervical strain would have been a self-limiting soft tissue injury, unrelated to the findings on this study.

Dr. Swartz advised that he would amend his prior opinion on aggravation as the reports of Dr. Grover established that appellant's disability related to the cervical strain had resolved by July 26, 2005. As to the right shoulder, he noted there were preexisting degenerative changes but the March 9, 2005 injury again represented a strain which was at maximum improvement by June 23, 2005, based on the reports of Dr. Sherman who found normal range of motion and strength. Dr. Swartz noted that appellant received treatment, including spinal injections, for radiculopathy; however, the electrodiagnostic studies of November 9, 2007 revealed only carpal tunnel syndrome to both wrists, which was not employment related. He advised that appellant required no further medical treatment for the March 9, 2005 injury and that her surgery was based on preexisting pathology to the right shoulder. Dr. Swartz noted that the mechanism of injury was when a coworker grabbed some bins away from appellant, and there was no evidence that this manner of injury caused tearing of the supraspinatus, labrum or pathologic changes to the shoulder or cervical spine. Based on appellant's record, he noted there was also a tendency towards symptom magnification. Dr. Swartz concluded that appellant was capable of full-time employment with physical limitations based on her preexisting degenerative disease.

In a January 9, 2009 progress note, Dr. Jeffrey R. Roberts, a Board-certified anesthesiologist, stated that appellant was treated for right arm and hand pain and listed her employment status as disabled.

In a February 20, 2008 decision, the Office denied appellant's claim for a recurrence of disability beginning January 2, 2007. It found the weight of the medical evidence was represented by the opinion of Dr. Swartz who found that her cervical, thoracic and right shoulder strains had resolved in 2005 with no disability or residuals due to her accepted injury.

In a letter dated February 23, 2008, appellant's counsel requested an oral hearing that was held before an Office hearing representative on May 15, 2009. Appellant testified that her shoulder became progressively worse while working for the railroad. She noted that she had filed a claim with the railroad due to a worsening of her preexisting shoulder condition.

Appellant submitted treatment notes dated January 16, 2008 through May 6, 2009 from Dr. Crovetti. In a February 17, 2009 report, Dr. Mark O. Reed, a Board-certified physiatrist, noted a July 28, 2006 date of injury and appellant's work as a conductor-brakeman. He advised that appellant's injury occurred while repairing a broken coupling between railroad cars when she experienced right shoulder discomfort while lifting a heavy coupling mechanism. Dr. Mark B. Kabins, an attending Board-certified orthopedic surgeon, related that appellant sustained an injury on July 18, 2006 while working for the railroad as a conductor when she experienced a neck strain. He diagnosed neck pain with upper extremity radiculopathy, C4-5 and C5-6 stenosis and disc osteophyte complex.

On March 16, 2009 Dr. Joseph J. Schifini, a treating Board-certified anesthesiologist, diagnosed C5-6 and/or C4-5 disc pathology and recommended injection therapy. He stated that appellant had a long history of neck pain which began as a result of a March 2005 employment injury while working for the employing establishment. Dr. Schifini noted that her case was

closed and considered resolved in 2007. In July 2006, appellant sustained an injury while working for the railroad which was not considered employment related and appellant stopped work shortly after this injury.

By decision dated August 26, 2009, an Office hearing representative affirmed the February 20, 2008 decision denying appellant's recurrence of disability claim. She found that the weight of medical evidence did not establish that appellant's disability commencing January 2, 2007 was due to the accepted injury; rather, the record established that appellant sustained a new injury on or about July 18, 2006 in private employment.[3]

LEGAL PRECEDENT

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.[4] This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[5]

A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which he or she claims compensation is causally related to the accepted employment injury.[6] Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her employment injury.[7] This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury.[8] Moreover, the physician's conclusion must be supported by sound medical reasoning.[9]

---

[3] The Board notes that following the August 26, 2009 hearing representative's decision the Office received additional evidence; however, the Board may not consider new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *M.B.*, 60 ECAB ___ (Docket No. 09-176, issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[4] 20 C.F.R. § 10.5(x).

[5] *Id. See J.F.*, 58 ECAB 124 (2006).

[6] *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

[7] *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993)

[8] *S.S.*, 59 ECAB 315 (2008); *Ricky S. Storms*, 52 ECAB 349 (2001); *see also* 20 C.F.R. § 10.104(a)-(b).

[9] *Alfredo Rodriguez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[10] In this regard, medical evidence of bridging symptoms between the recurrence and the accepted injury must support the physician's conclusion of a causal relationship.[11] While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.[12]

ANALYSIS

The Office accepted that on March 9, 2005 appellant sustained strains of her cervical, thoracic and right shoulder strains. Appellant received medical treatment and was returned to full-duty work on June 17, 2005 at the recommendation of Dr. Grover, an attending physician. As of July 26, 2005, Dr. Grover released appellant from care, noting that she did not have any residual impairments. Appellant resigned from the employing establishment effective August 8, 2005 and subsequently went to work at Union Pacific on April 26, 2006. Thereafter, she stopped work on February 12, 2007. On October 4, 2007 appellant filed a claim for a recurrence of disability beginning January 2, 2007. The issue is whether the claimed recurrence of disability is causally related to the accepted March 9, 2005 employment injury.

Dr. Tarno, an attending osteopath, noted that appellant sought treatment on January 22, 2007 for cervical and right shoulder pain. He listed appellant's history of injury on March 9, 2005 and advised that there was a positive impingement test on the right with negative labral signs. Dr. Tarno reviewed a January 18, 2007 MRI scan study which showed a partial thickness tear of the right shoulder supraspinatus and C5-6 degenerative disc disease. He checkmarked "yes" that appellant's right shoulder condition was related to the employment injury. The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, it is of diminished probative value.[13] Dr. Tarno's reports are also of diminished probative value because he did not review appellant's history of employment while with the railroad in the private sector, her history of treatment in July 2006 for right shoulder discomfort after lifting a heavy coupling mechanism or address how

[10] *See Ricky S. Storms*, *supra* note 8; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

[11] For the importance of bridging information in establishing a claim for a recurrence of disability, see *Richard McBride*, 37 ECAB 748 at 753 (1986)

[12] *See Ricky S. Storms*, *supra* note 8; *Morris Scanlon*, 11 ECAB 384, 385 (1960).

[13] *D.D.*, 57 ECAB 734 (2006).

the diagnosed partial tear to the right shoulder related back to the 2005 injury accepted for a soft tissue strain.[14] He did not provide an accurate history or adequate rationale in support of his stated opinion that appellant's right shoulder condition was related to her 2005 injury.[15]

The record indicates that appellant had an intervening injury in July 2006 while working for Union Pacific. Drs. Kabins, Reed and Schifini all reported that she sustained an employment injury on or about July 18, 2006 while moving a heavy coupling mechanism. At the hearing, appellant stated that her shoulder became progressively worse while working for the railroad due to her work and that she filed a claim with the railroad company for an aggravation of her preexisting shoulder condition. Neither Dr. Tarno nor Dr. Crovetti adequately explained how her rotator cuff tear and shoulder pain in January 2007 was the direct or natural result of her March 2005 employment injury. Their opinions are diminished as they were based on an inaccurate medical history. The reports from the physicians did not reflect an accurate history of appellant's July 2008 injury while working in the private sector. Medical conclusions based on inaccurate or incomplete histories are of little probative value and are insufficient to satisfy a claimant's burden of proof.[16] The opinions of Dr. Tarno and Dr. Crovetti are not sufficient to meet appellant's burden of proof.

The Board finds that the weight of medical opinion is represented by the reports of Dr. Swartz, a Board-certified orthopedic surgeon who provided a second opinion examination. On March 27, 2007 Dr. Swartz reviewed an accurate history of the accepted injury, advising that the medical record established that appellant had recovered from the accepted strains by July 2005, when she was released from treatment by Dr. Grover. He recorded a history of her work with the railroad, noting that she last worked on February 12, 2007. Dr. Swartz listed findings on physical examination and diagnosed chronic degenerative disc disease at C5-6 and chronic tendinosis of the right shoulder with a probable tear of the supraspinatus tendon. On January 29, 2008 he clarified that appellant had sustained soft tissue strains of her neck and right shoulder on March 9, 2005 and diagnostic testing at that time revealed degenerative disc disease with a mild annular bulge at C5-6. Dr. Swartz compared this with the February 2, 2007 MRI scan, advising that the findings were not related to the 2005 injury. He again referred to the treatment records of Dr. Grover and reiterated that appellant's accepted strains had resolved by July 26, 2005. Dr. Swartz addressed the mechanism of injury on March 9, 2005, finding that this was not competent to cause a tear of the supraspinatus tendon. He advised that appellant required physical limitations in full-time employment, but these restrictions were due to her degenerative disease without contribution by the 2005 injury.

[14] The Board notes that the January 18, 2007 MRI scan was obtained some 20 months following the accepted injury. The Board has held that, when diagnostic testing is delayed, uncertainty mounts regarding the cause of the diagnosed condition and a question arises as to whether that testing in fact documents the injury claimed by the employee. The greater the delay in testing, the greater the likelihood that an event not related to employment has caused or worsened the condition for which the employee seeks compensation. When the delay becomes so significant that it calls into question the validity of an affirmative opinion based at least in part on the testing, such delay diminishes the probative value of the opinion offered. *See Linda L. Mendenhall*, 41 ECAB 532 (1990).

[15] *T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

[16] *M.W.*, 57 ECAB 710 (2006); *John W. Montoya*, 54 ECAB 306 (2003).

The Board finds that the opinion of Dr. Swartz is based on an accurate history of injury and medical treatment. Dr. Swartz reported thorough findings on examination of appellant and compared the diagnostic studies of record. His opinion constitutes the weight of medical opinion in this case.

CONCLUSION

The Board finds that appellant failed to establish that she sustained a recurrence of disability commencing January 2, 2007 causally related to her accepted March 9, 2005 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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