

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

L.M., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Southeastern, PA,
Employer**

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**Docket No. 10-464
Issued: November 18, 2010**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 8, 2009 appellant, through her attorney, filed a timely appeal from June 30 and October 1, 2009 merit decisions of the Office of Workers' Compensation Programs denying her claim for disability compensation. 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 is entitled to compensation for intermittent wage loss from September 1, 2007 through April 22, 2008; and (2) whether she established a recurrence of disability on April 30, 2008 causally related to her September 1, 2007 work injury.

FACTUAL HISTORY

On November 28, 2007 appellant, then a 34-year-old mail processing clerk, filed an occupational disease claim alleging that she sustained right ulnar neuropathy causally related to factors of her federal employment. She did not stop work. The Office accepted the claim for ulnar neuropathy of the right elbow.

On October 29, 2007 Dr. Scott M. Fried, an osteopath, discussed appellant's history of performing repetitive work duties for the employing establishment over the past nine years. He noted that she had ulnar nerve symptoms that she believed were progressively worsening as she tried to work her regular full duty. Dr. Fried diagnosed a subluxing ulnar nerve of the right elbow due to repetitive work activities, right ulnar and radial neuropathy and brachial plexitis. He advised that appellant could perform sedentary work with no use of the right arm, no repetitive work and no lifting over five pounds. On December 14, 2007 Dr. Fried provided work restrictions in accordance with the functional capacity evaluation.

On December 18, 2007 appellant accepted a sedentary position with the employing establishment with restrictions on no use of the right arm, no repetitive activity and casing letters within her restrictions.

On January 23, 2008 Dr. Fried found that appellant could continue working modified duty and requested a chair with a back support. In a report dated March 19, 2008, he discussed her complaints of pain and tension in the neck, right shoulder and particularly the ulnar elbow on the right side. Dr. Fried stated:

“[Appellant] remains symptomatic and disabled and continues to note overuse symptoms on the left. If she is to continue working this current modified position, she really needs an ergonomic chair with back support. [Appellant] must also be provided frequent breaks and self[-]pacing for even the left arm, [b]ut, I would really prefer a more suitably modified position for her, perhaps a trial at nixies. For now, she may continue as tolerated but we will decrease her hours to six a shift.”

In a form report dated April 9, 2008, Dr. Fried indicated that appellant was partially disabled from September 1, 2007 through April 22, 2008 and checked “yes” that the condition was caused or aggravated by employment.

On April 26, 2008 appellant filed a claim for compensation for intermittent time lost from work from September 1, 2007 through April 22, 2008. In an attached leave analysis she claimed 222.09 hours lost from work due to pain and inflammation.

In a report dated May 5, 2008, Dr. Fried discussed appellant's complaint of pain in her right elbow. He stated:

“[Appellant] continues to work part-time, six-hour days at the [employing establishment], casing left handed. Despite our request to by something more appropriate in relation to her injuries, such as nixies, there have been no further changes made at work. [Appellant] has still not been provided an ergonomic chair either despite our last request. Again, her symptoms are aggravated by her activities at work and she actually has been out of work since Friday, May 2 because of elevated symptoms.”

In an accompanying disability certificate, Dr. Fried advised that appellant was out of work beginning May 2, 2008 because of her upper extremity injury and that she would “remain out of work to focus on rest [and] healing.”¹

On June 4, 2008 the Office requested that appellant submit additional evidence supporting her claim for intermittent disability from September 1, 2007 to April 22, 2008.

On June 5, 2008 Dr. Fried found that appellant was totally disabled from May 2 to June 25, 2008 and partially disabled from April 22 to May 31, 2008. He did not provide a diagnosis or opinion on causation.

By decision dated July 7, 2008, the Office denied appellant’s claim for compensation from September 1, 2007 to April 22, 2008.

On July 9, 2008 her attorney requested an oral hearing.

In a disability certificate dated July 30, 2008, Dr. Fried related that appellant “has been out of work to focus on rest [and] healing her upper extremity injury.”² We are looking toward getting approved for surgery. In the meantime, we are happy to review any appropriate light-duty job description.”

On September 3, 2008 appellant filed a notice of recurrence of disability on May 2, 2008 causally related to her September 1, 2007 work injury. She related that her condition worsened due to her light-duty assignment and noted that she sustained a reaction to an ulnar nerve injection on May 5, 2008.

On September 11, 2008 a claims examiner authorized right ulnar nerve surgery but denied other procedures to be performed as part of the same surgery. By letter dated September 11, 2008, the Office requested additional information regarding appellant’s recurrence of disability, including a comprehensive report from her attending physician describing the objective evidence that showed that she was unable to perform her modified duty.

On October 9, 2008 appellant related that she sat for six hours a day on a stool in her limited-duty assignment. The employing establishment did not provide her with an ergonomic chair or a more suitable assignment as requested by her physician. Appellant’s right arm worsened and she began having problems with her left arm because she was overcompensating for the injured right arm.

By decision dated November 14, 2008, the Office found that appellant did not establish an employment-related recurrence of disability beginning April 30, 2008.

¹ On May 12, 2008 Dr. Fried noted that appellant was off work due to her injuries and gave her an injection. On May 21, 2008 he noted that she had sustained a reaction to the injection without infection.

² On June 25, 2008 Dr. Fried evaluated appellant for continuing complaints of right ulnar nerve pain and noted that she was not working due to her injuries. He discussed possible right ulnar nerve surgery. On July 23, 2008 Dr. Fried again noted that appellant was out of work due to her injuries and that her symptoms had improved since stopping work. He listed findings on examination, diagnosed a subluxing ulnar nerve of the right elbow due to repetitive work activities. Dr. Fried recommended surgery.

In a progress report dated November 3, 2008, received by the Office on November 17, 2008, Dr. Fried discussed appellant's complaints of pain in the right ulnar nerve.³ He advised that she was not working due to her injuries. Dr. Fried noted that he had requested additional modifications or a different light-duty position as the last one aggravated her condition. He related that appellant tried to work six hours per day in her modified position but did not have an ergonomic workstation or provided with breaks. Appellant stopped work on May 2, 2008 due to "elevated symptoms since no further accommodations/modifications were made for her. She has not returned to work yet as we have never received any other light-duty job descriptions despite our multiple requests."

On November 18, 2008 appellant, through her attorney, requested an oral hearing. On November 20, 2008 a hearing was held regarding the Office's July 7, 2008 decision denying her request for compensation for intermittent disability from September 1, 2007 through April 22, 2008. Appellant described her elbow condition and her work restrictions. She contended that her employer did not provide her with an ergonomic chair or frequent breaks. Appellant did all the work with her left hand and began to have symptoms of carpal tunnel syndrome on the left. She attended physical therapy but did not miss time from work because she was working nights and scheduled her appointments on her days off. Appellant began working six hours per day around March 19, 2008 but her arm continued to worsen.

By decision dated February 4, 2009, the Office hearing representative affirmed the July 7, 2008 decision denying appellant's claim for intermittent periods of disability from September 1, 2007 through April 22, 2008.⁴

A hearing was held on March 18, 2009 regarding the Office's finding that appellant did not sustain a recurrence of disability. She reiterated the employing establishment's failure to provide her with an ergonomic chair or a chair with armrests. Appellant experienced increase pain and Dr. Fried took her off of work. For a month she had increased symptoms after a reaction to an ulnar nerve injection.

On April 2, 2009 appellant, through her attorney, requested reconsideration of the February 4, 2009 decision.⁵

By decision dated May 7, 2009, the hearing representative affirmed the November 18, 2008 decision. He noted that appellant attributed her condition to her limited-duty work which showed a possible new occupational disease rather than a spontaneous recurrence of disability.

On June 8, 2009 appellant, through her attorney, requested reconsideration of the February 4, 2009 decision. In a report dated May 29, 2009, Dr. Fried related that appellant did not sustain a new injury to her ulnar nerve but instead "progressively worsened with respect to this injury as is common once there is permanent scarring about the nerve. In fact, the report

³ In a progress report dated December 1, 2008, Dr. Fried discussed appellant's increased symptoms.

⁴ In a progress report dated February 4, 2009, Dr. Fried noted that appellant's symptoms had somewhat subsided. On March 30, 2009 Dr. Fried noted that she wanted to return to work but had not received limited-duty job offers.

⁵ In a disability certificate dated April 13, 2009, Dr. Fried noted that appellant was out of work to heal her upper extremity injuries and asked for surgical approval. He indicated that he would review a limited-duty job offer. On April 29, 2009 Dr. Fried again noted that he was awaiting approval for surgery.

referenced in your letter indicates that there is progressive atrophy. This is consistent with the progression of the [September 2007] work injury to the ulnar nerve.” Dr. Fried advised that appellant could have permanent loss of function given the delay in surgical approval. He concluded, “Her present problem is a progression of the initial work injury and though her work activities are contraindicated and do worsen the problem, this is not new injury *per se*, rather progression of the already well-documented ulnar nerve pathology.”

By decision dated June 30, 2009, the Office denied modification of its February 4, 2009 decision denying compensation for intermittent wage loss.

On September 4, 2009 appellant, through her attorney, requested reconsideration of the May 7 and June 30, 2009 decisions.⁶ He asserted that Dr. Fried’s May 20, 2009 report established that appellant sustained a recurrence of disability beginning May 2, 2008.

By decision dated October 1, 2009, the Office denied modification of its prior decisions of February 4, May 7 and June 30, 2009. It determined that the medical evidence remained insufficient to show either that appellant sustained intermittent disability from September 1, 2007 to April 22, 2008 or a recurrence of disability beginning April 30, 2008 due to her accepted work injury.

On appeal, counsel contends that the medical reports are sufficient to show that appellant experienced disability due to her employment injury and sustained a recurrence of disability beginning May 2008.

LEGAL PRECEDENT -- ISSUE 1

The term disability as used in the Federal Employee’s Compensation Act⁷ means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.⁸ Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁹ When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.¹⁰ The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employee’s to self-certify their disability and entitlement to compensation.¹¹

⁶ The record contains progress reports from Dr. Fried dated June through September 2009.

⁷ 5 U.S.C. §§ 8101-8193; 20 C.F.R. § 10.5(f).

⁸ *Sandra D. Pruitt*, 57 ECAB 126 (2005); *Paul E. Thams*, 56 ECAB 503 (2005).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Amelia S. Jefferson*, 57 ECAB 183 (2005); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained right ulnar neuropathy due to factors of her federal employment. She began working limited duty within the restrictions outlined by Dr. Fried in his report of October 29, 2007 of no work with the right hand, no repetitive work and not lifting over five pounds. On April 26, 2008 appellant filed a claim requesting compensation for intermittent time lost from work from September 1, 2007 through April 22, 2008 due to pain and inflammation.

On October 29 and December 18, 2007 Dr. Fried listed work restrictions. He did not, however, find any periods of disability. As discussed, the Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹²

On January 23, 2008 Dr. Fried requested that the employing establishment provide appellant with a chair with back support. On March 19, 2008 he found that she had increased symptoms in her neck, right shoulder and ulnar elbow. Dr. Fried requested that the employing establishment provide appellant with an ergonomic chair and breaks and, if possible, another position. He found that she could continue in her modified position but only for six hours per day. Dr. Fried, however, did not explain why appellant required an ergonomic chair and breaks or provide rationale for his finding that she was unable to perform the duties of her modified position for more than six hours per day. A medical report is of limited probative value on a given medical question if unsupported by medical rationale.¹³

In an April 9, 2008 form report, Dr. Fried found that appellant was partially disabled for September 1, 2007 through April 22, 2008. He checked “yes” that the condition was caused or aggravated by employment. The Board has held, however, that when a physician’s opinion on causal relationship consists only of checking “yes” to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.¹⁴

On appeal counsel contends that Dr. Fried’s reports are sufficient to show that she sustained disability from employment. As noted, however, Dr. Fried did not provide adequate rationalized medical opinion explaining why she was disabled from work for any period from September 1, 2007 through April 22, 2008. Consequently, appellant has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Where an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total

¹² *Id.*

¹³ *T.F.*, 58 ECAB 128 (2006); *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

¹⁴ *D.D.*, 57 ECAB 734 (2006); *Deborah L. Beatty*, 54 ECAB 3234 (2003).

disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.¹⁵

Office regulations provide that 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.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained ulnar neuropathy of the right elbow due to factors of her federal employment. Appellant began working limited-duty employment. She stopped work on April 30, 2008 and filed a notice of recurrence of disability due to her employment injury.

Appellant has not alleged a change in the nature and extent of her light-duty job requirements. Instead, she attributed her recurrence of disability to a change in the nature and extent of her employment-related conditions. Appellant must thus provide medical evidence establishing that she was disabled due to a worsening of her accepted work-related conditions.¹⁸

On May 5, 2008 Dr. Fried discussed his request that the employing establishment provide appellant with a more appropriate position and an ergonomic chair. He asserted that her work duties aggravated her symptoms and indicated that "she actually has been out of work since Friday, May 2, [2008] because of elevated symptoms." Dr. Fried, however, did not explain what specific work duties caused appellant's increased symptoms or why she was unable to perform the duties of her position. Additionally, he attributed her condition to her modified duties rather than her work injury. A recurrence of disability, however, is a work stoppage 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."¹⁹ To the extent that Dr. Fried found that appellant's condition was aggravated by employment duties, any disability resulting from the alleged aggravation would be considered a new injury and not a recurrence as defined by the regulations.²⁰

¹⁵ *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹⁶ 20 C.F.R. § 10.5(x).

¹⁷ *Id.*

¹⁸ See *Jackie D. West*, *supra* note 15.

¹⁹ 20 C.F.R. § 10.5(x).

²⁰ See *Cecelia M. Corley*, 56 ECAB 662 (2005).

In a form report dated June 5, 2008, Dr. Fried found that appellant was totally disabled from May 2 to June 25, 2008. He did not provide a causation finding or diagnosis, however, and thus his opinion is of little probative value.

On July 30, 2008 Dr. Fried indicated that appellant was not working in order to rest and facilitate healing. He noted that he would review an appropriate modified-duty position. Dr. Fried did not explain why she was disabled from her previous limited-duty assignment other than to note that she was resting and healing. The issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.²¹

In a report dated November 3, 2008, Dr. Fried noted that appellant experienced right ulnar nerve pain. She "came out of work" on May 2, 2008 because of increased symptoms after her job was not further modified. Dr. Fried opined that appellant could not return to her previous position because it was aggravating her condition. He did not explain how the work aggravated the accepted injury and thus his opinion is of diminished probative value.²² Dr. Fried also attributed her increased symptoms to the work duties in her limited-duty position. As discussed, a recurrence of disability does not include disability resulting from exposure to new work factors, even if it involves the same part of the body previously injured.²³

On May 29, 2009 Dr. Fried related that appellant's ulnar nerve injury progressively worsened due to scarring and that she did not sustain a new injury. He attributed the progression of her ulnar nerve condition to her September 2007 employment injury. Dr. Fried, however, did not address the relevant issue of whether appellant was disabled from her modified position beginning April 30, 2008. Consequently, his report is insufficient to meet her burden of proof.

On appeal appellant's attorney argues that Dr. Fried's reports are sufficient to show that she sustained a recurrence of disability. An award of compensation, however, may not be based on surmise, conjecture, speculation, or upon appellant's own belief that there is a causal relationship between her claimed condition and his employment.²⁴ Appellant must submit a physician's report in which the physician reviews those factors of employment identified by her as causing his condition and, taking these factors into consideration as well as findings upon examination and the medical history, explain how employment factors caused or aggravated any diagnosed condition and present medical rationale in support of his or her opinion.²⁵ She failed to submit such evidence and therefore failed to discharge her burden of proof.

²¹ See *Sandra D. Pruitt*, *supra* note 8.

²² *Richard A. Neidert*, 57 ECAB 474 (2006).

²³ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(2) (May 1997).

²⁴ *George H. Clark*, 56 ECAB 162 (2004); *Patricia J. Glenn*, 53 ECAB 159 (2001).

²⁵ *D.D.*, 57 ECAB 734 (2006); *Robert Broome*, 55 ECAB 339 (2004).

CONCLUSION

The Board finds that appellant is not entitled to compensation for intermittent wage loss from September 1, 2007 through April 22, 2008. The Board further finds that she has not established a recurrence of disability on April 30, 2008 causally related to her September 1, 2007 work injury.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 1 and June 30, 2009 are affirmed.

Issued: November 18, 2010
Washington, DC

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

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

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