United States Department of Labor
Employees' Compensation Appeals Board

L.T., Appellant	)	
and	)	**Docket No. 10-2031**
	)	**Issued: August 1, 2011**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Seattle, WA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2010 appellant filed an appeal from an April 30, 2010 merit decision of the Office of Workers Compensation Programs denying her recurrence claim. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c)(2) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that she sustained a recurrence of disability commencing May 7, 2007 causally related to her March 20, 2007 work injury.

FACTUAL HISTORY

On March 20, 2007 appellant, then a 49-year-old customer service representative, injured her right arm when she reached to retrieve a three-inch thick binder and two books on top of the

[1] 5 U.S.C. §§ 8101-8193.

binder began to fall. She felt pain in her wrist elbow and shoulder. The Office accepted the claim for right arm strain and cervical subluxation. Appellant was off work from March 23 through April 4, 2007 and from April 22 through May 4, 2007.[2] When at work, she was in a sedentary position. Appellant stopped work on May 7, 2007 and filed a claim for wage-loss compensation for the period May 7 through June 29, 2007. The record reflects that she underwent chiropractic manipulations and physical therapy.

On March 29, 2007 Dr. B. Daniel Chilczuk, an occupational medicine specialist, noted the work injury and listed appellant's complaints of right side cervical and upper thoracic tenderness with diffuse right arm radiation not in any particular dermatome. Cervical range of motion was full with mild diffuse discomfort on extremes. Neuromuscular examination of the arms was compromised due to pain. Arm ranges of motion were full with diffuse discomfort on extremes for the right wrist and elbow. Tinel's and Phalen's tests were negative. The right hand had mild diffuse swelling. Dr. Chilczuk diagnosed nonspecific subacute right cervical, upper thoracic and right arm strain. He advised that the condition should resolve with conservative treatment and that appellant could return to modified duty on April 5, 2007.

In a May 7, 2007 report, Dr. Chilczuk treated appellant for persistent discomfort in the right cervical and upper thoracic with diffuse right arm radiation associated with mild global weakness. He reported findings of normal gait, full cervical range of motion, no significant discomfort, negative compression and Spurling tests, mild right arm weakness, bilateral full shoulder range of motion, full and nontender elbow and wrist range of motion and negative Tinel's and Phalen's tests at the wrists. Dr. Chilczuk advised appellant's condition as work related and that she would tentatively be off work for four weeks and would undergo diagnostic testing.

On May 17, 2007 appellant underwent a cervical magnetic resonance imaging (MRI) scan. In a May 22, 2007 report, Dr. Chilczuk noted she had moderate improvement in all affected areas. Appellant's most persistent complaint was her right elbow lateral aspect, which was aggravated by increased physical activities. There were no radicular symptoms in the arms or gross muscular weakness, no cervical restriction in spinal range of motion or any right shoulder restriction in joint range of motion despite increased discomfort anterior aspect with full flexion. There were also no symptoms of instability, no restriction in joint range of motion over the right elbow or wrist and no symptoms of peripherovascular insufficiency in the arms. Dr. Chilczuk advised that the recent MRI scan revealed the presence of disc osteophyte preexisting formation at the C5-6 level on the right side and C6-7 level on the left side, with no spinal stenosis or neural foraminal narrowing at both levels. He opined that these were preexisting changes and no other gross abnormalities were detected. Dr. Chilczuk took appellant off work for another three weeks.

In a May 31, 2007 report, Dr. Chilczuk noted that appellant had mild to moderate improvement and that she has proceeded with a chiropractic approach and physical therapy. He noted that there was no reference to new symptoms. Dr. Chilczuk stated that there was no reason to suspect any significant structural abnormality. While appellant had been off work for several

[2] The employing establishment paid appellant continuation of pay through May 4, 2007.

weeks and had some residual discomfort, this should not prevent her from returning to work. Dr. Chilczuk stated, however, she would be held off work for another month while she continued with chiropractic and physical therapy activities. He reported examination findings of: normal posture, normal gait, full cervical range of motion, mild diffuse discomfort on extremes in all directions, negative compression and Spurling test, normal neurological upper extremity examination, full bilateral shoulder range of motion with mild discomfort over the right on extreme flexion extension and abduction, full and nontender right elbow and wrist range of motion and mild discomfort and negative contralateral testing of the right elbow.

In a June 8, 2007 report, Dr. Garry W. Baldwin, a chiropractor, noted appellant's history of injury and her treatment plan. He advised that her condition had improved, but her progress was slow. For this reason, Dr. Baldwin agreed with appellant's treating physician that she should be off work for another month. On June 29, 2007 Dr. Baldwin advised that she could return to full duty on July 2, 2007 with five-minute breaks every hour for stretching. In a July 18, 2007 letter, the employing establishment noted it could accommodate her restrictions.

On June 29, 2007 Dr. Chilczuk reported appellant had mild residual discomfort primarily over her right elbow, diffuse in distribution. He stated that she had an essential normal examination and could return to work full time at her regular duties on July 2, 2007. In a July 27, 2007 report, Dr. Chilczuk noted that appellant returned to full-duty work on July 2, 2007 and indicated an aggravation. He noted that she had been working full time or part time depending on her discomfort and that ergonomic changes to her workstation had not yet been implemented. Appellant had normal gait, full cervical range of motion, negative compression and Spurling test, full shoulder, elbow and wrist range of motion, moderate tenderness over the right lateral epicondyle and negative Phelan and Tinel's tests at the wrists. Dr. Chilczuk indicated that she could work regular duties on a part-time basis for four hours a day with a 10-minute stretching break every hour.

Appellant was referred to Dr. Patrick Bays, an osteopath and orthopedic surgeon, for a second opinion evaluation. In an August 2, 2007 report, Dr. Bays noted the history of injury, reviewed the medical record and statement of facts and set forth findings. Based on a May 17, 2007 MRI scan, he diagnosed noncompressive C3-4, C4-5 central disc bulging/protrusions, C5-6 central right posterolateral disc osteophyte complex with resultant mild central canal and right lateral recess stenosis and no evidence of nerve root impingement, with C6-7 paracentral disc osteophyte complex and mild central canal stenosis, which he opined were preexisting and unrelated to the March 20, 2007 injury. Dr. Bays also diagnosed cervical subluxation and right arm strain, by history, due to the March 20, 2007 incident; with significant and profound symptom magnification with subjective complaints far out of proportion to the objective findings and nonphysiologic pain behavior. He reported that appellant had a normal objective cervical spine examination with no diagnosable cervical spine condition. As to her right arm, her complaints were nonanatomic, out of proportion to objective findings and the constellation of symptoms objectively fit no specific diagnosis. Dr. Bays found the accepted right arm strain and cervical subluxation had resolved and that appellant could resume full-duty regular work. He advised her disability since May 7, 2007 was not supported by his examination and the history of the claim.

On August 16, 2007 the Office proposed to terminate appellant's medical benefits and wage-loss compensation.

Appellant submitted additional reports. On August 17, 2007 Dr. Chilczuk noted that she had been working four hours daily but her symptomatology persisted despite extensive conservative treatment. He recommended an electromyogram (EMG) of the right arm even though appellant's presentation was atypical. Dr. Chilczuk also suggested a psychiatry consultation since structurally no significant abnormalities had been found for her symptoms. He released appellant to full duty September 4, 2007. Appellant returned to work full duty September 6, 2007.

In a September 6, 2007 report, Dr. Baldwin questioned how Dr. Bays was able to determine proper physical restrictions three months before he evaluated appellant. He opined that she had to stop work as her work duties significantly aggravated her cervical/upper extremity condition. Dr. Baldwin explained that, while appellant's position was "sedentary," she had to continually sit, use the telephone, keyboard and computer at work. He stated that this position was biomechanically poor, caused extreme pressure on the cervical and thoracic spine and aggravated her condition. Dr. Baldwin stated that he agreed with Dr. Chilczuk that appellant's progress would have been slower if she had continued with her work duties as it was possible that she would have incurred further soft tissue injuries due to the inability to rest her right arm. He indicated that appellant was approaching maximum chiropractic improvement.

In a September 18, 2007 decision, the Office finalized the termination of appellant's wage-loss compensation and medical benefits.

On October 17, 2007 appellant requested an oral hearing, which was held on March 28, 2008. She submitted an October 8, 2007 statement and medical reports. In a July 30, 2007 report, Dr. Baldwin noted the history of injury and noted reviewing x-rays. He opined, based on his examination findings, that appellant had a cervicothoracic sprain/strain injury secondary to a cervical and thoracic subluxation as a result of the March 20, 2007 injury. This was associated with cervicalgia, mid back pain, headaches, cervical radiculitis and muscle spasm in the cervical spine and was complicated by spinal misalignment. Dr. Baldwin also indicated that appellant had a sprain/strain injury to her right arm. He recommended chiropractic adjustment, massage and physical therapy.

In an August 30, 2007 report, Dr. Chilczuk disagreed with Dr. Bays' opinion. He opined that, instead of symptom magnification, there was a psychological component. Dr. Chilczuk recommended a psychiatric evaluation to rule out work-related stressors and a right arm EMG to rule out peripheral neuropathy. He also objected to Dr. Bays making a retroactive determination as to recurrent disability as Dr. Bays examined appellant after she had already stopped work on

May 7, 2007. Progress reports dated June 29, August 2 and 17 and September 6 and 27, 2007, were submitted.[3]

By decision dated July 14, 2008, an Office hearing representative reversed the Office's September 18, 2007 decision with regard to the termination of compensation benefits. The hearing representative found a conflict in medical opinion between Dr. Bays, for the Office and Drs. Baldwin and Chilczuk for appellant, as to her residual and whether her cervical spine subluxation continued. The Office was directed to consider the issue of a recurrence of disability as of May 7, 2007. On remand, it reinstated medical benefits.

The Office received additional progress reports from Dr. Chilczuk.

In a November 6, 2009 decision, the Office denied the claim for a recurrence of disability commencing May 7, 2007 on the grounds the medical evidence was insufficient to establish causal relation.

Appellant requested a hearing which was changed to a review of the written record.[4] In an April 6, 2010 report, Dr. M.E. Goodrich, a Board-certified radiologist, noted that an EMG and nerve conduction study showed evidence of bilateral carpal tunnel syndrome and left Guyon's canal syndrome. He stated that, when compared to the September 2007 study, the median nerve distal latencies were much more prolonged on the present study which was consistent with a worsening of bilateral carpal tunnel syndrome.

By decision dated April 30, 2010, an Office hearing representative affirmed the November 6, 2009 recurrence decision.[5]

LEGAL PRECEDENT

The Board notes that the term disability, as used in the Act, means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[6] Whether a particular injury caused an employee disability for employment is a medical issue

[3] On December 27, 2007 appellant was injured when she walked into a glass door. Under file number xxxxxx221, the Office accepted facial contusion, closed head injury and concussion. Appellant stopped work December 27, 2007 and worked intermittently through August 28, 2008, when she stopped all work. The Office terminated compensation benefits on June 2, 2009. It combined file number xxxxx221 with the file for the present claim.

[4] A hearing was scheduled for February 26, 2010 but, when appellant requested postponement on February 11, 2010, the Office found that the reason provided did not comport with 20 C.F.R. § 10.622(c) and it changed her request to that of a review of the written record.

[5] The hearing representative noted that the Office had been unable to locate an impartial medical specialist to address the conflict in medical evidence as to whether a cervical subluxation still existed. He directed the Office resolve this matter and issue an appropriate decision. The issue of whether appellant has any continuing work-related condition and disability, beyond the claimed recurrence of disability, is not presently before the Board as no final decision had been rendered at the time of appellant's appeal. 20 C.F.R. § 501.2(c).

[6] *Patricia A. Keller*, 45 ECAB 278 (1993).

which must be resolved by competent medical evidence.[7] 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.[8] 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.[9]

An individual 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 compensation is claimed is causally related to the accepted injury.[10] This burden includes the necessity of furnishing 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 rationale.[11] Where no such rationale is present, medical evidence is of diminished probative value.[12]

For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship.[13]

ANAYSIS

The Office accepted that appellant sustained a right arm strain and cervical subluxation on March 20, 2007 in the performance of duty. She stopped work May 7, 2007 and claimed a recurrence of disability. The record reflects appellant's position as a customer service representative was a sedentary position. The issue before the Board is whether she established that she sustained a recurrence of disability as of May 7, 2007 causally related to her accepted work injuries.

Dr. Chilczuk, appellant's treating physician, held her off work starting May 7, 2007, released her to full-time duties eight hours a day on July 2, 2007 and then subsequently opined on July 27, 2007 that she was only able to work part time four hours a day. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled from

[7] *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

[8] *Clement Jay After Buffalo*, 45 ECAB 707 (1994).

[9] 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008).

[10] *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

[11] *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[12] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[13] *Alice J. Tysinger*, 51 ECAB 638 (2000).

work.[14] In reports dated May 7, 22 and 31 and July 27, 2007, Dr. Chilczuk reported essentially normal findings on examination, apart from mild right upper extremity weakness and tenderness at the right lateral epicondyle. He did not explain how such findings were sufficient to disable appellant from her sedentary job as of May 7, 2007. In a July 27, 2007 report, Dr. Chilczuk suggested the lack of ergonomic changes to her workstation was the reason for her erratic work schedule depending on her comfort level; but he offered no rationale or explanation supporting work on a part-time basis or any period of disability due to her accepted employment injuries. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[15] On May 31, 2007 Dr. Chilczuk noted that appellant's residual discomfort should not prevent her return to work as there was no significant structural abnormality and there were no new symptoms. He subsequently recommended a psychiatric evaluation and a diagnostic study to rule out a possible psychological component or peripheral neuropathy. Dr. Chilczuk failed to explain how residuals of the accepted right arm strain or cervical subluxation disabled appellant commencing May 7, 2007. He did not provide any findings supporting causal relation of her disability to the March 20, 2007 injury.[16] Dr. Chilczuk's reports are insufficient to establish a recurrence of disability.

In a June 8, 2007 report, Dr. Baldwin advised that appellant was held off work because her progress in improving was slow. In his September 6, 2007 report, he stated it was possible she would have incurred further soft tissue injuries had she continued with her work duties. However, Dr. Baldwin's general caution against appellant's return to work is prophylactic in nature. The Board has held that fear of future injury is not compensable under the Act.[17] Dr. Baldwin further indicated in his September 6, 2007 report that appellant's work duties had significantly aggravated her cervical/upper extremity condition. He explained that her sedentary position was biomechanically poor and caused extreme pressure on the cervical and thoracic spine and the activities sitting and using the telephone, keyboard and computer had aggravated her condition. However, Dr. Baldwin's report is conclusory and insufficient to establish appellant's claim as he did not provide a rationalized opinion explaining the reasons why her recurrent condition and disability was due to the accepted cervical subluxation.[18] Moreover, he provided no time frame for appellant's disability.[19] On July 30, 2007 Dr. Baldwin opined that appellant sustained a cervicothoracic sprain/strain secondary to a cervical and thoracic

[14] *Laurie S. Swanson*, 53 ECAB 517 (2002).

[15] *Willie M. Miller*, 53 ECAB 697 (2002).

[16] *See Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[17] *See Mary Geary*, 43 ECAB 300, 309 (1991); *Pat Lazzara*, 31 ECAB 1169, 1174 (1980) (finding that appellant's fear of a recurrence of disability upon return to work is not a basis for compensation).

[18] *See Franklin D. Haislah*, *supra* note 16. Dr. Baldwin, a chiropractor, also is not competent to diagnose disorders of the extremities. *George E. Williams*, 44 ECAB 530, 534 (1993). *See* 5 U.S.C. § 8101(2).

[19] *Fereidoon Kharabi*, 52 ECAB 291 (2001); *see also David H. Goss*, 32 ECAB 24 (1980). The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.

subluxation as a result of the March 20, 2007 work injury. However, the Office only accepted a cervical subluxation. Dr. Baldwin did not adequately explain how the cervicothoracic sprain/strain was causally related to the accepted work injury. Additionally, he did not address any specific date of a recurrence of disability or change in appellant's accepted conditions, arising from the employment injury, which prevented her from performing her sedentary position. Therefore, Dr. Baldwin's reports are insufficient to establish appellant's claim.

Dr. Goodrich's diagnostic test report of April 6, 2010 noted diagnoses but failed to provide an opinion on causal relationship between the claimed period of disability and the accepted condition. The Board has held that a physician's opinion, which does not address causal relationship, is of diminished probative value.[20] Additionally, the Office did not accept the condition of bilateral carpal tunnel syndrome. Thus, Dr. Goodrich's report is insufficient to establish appellant's claim.

It is appellant's burden of proof to provide evidence from a qualified physician to support the recurrence of total disability for any period of time. She failed to submit rationalized medical evidence establishing that her claimed recurrence of disability commencing May 7, 2007 was causally related to the accepted employment injury and therefore the Office properly denied her claim for compensation. Other medical evidence of record, either does not address causal relationship or negates it as is the case with Dr. Bays' opinion.

On appeal, appellant contends that not all the medical evidence was considered in her claim. The Board notes all relevant evidence for the claimed period of the recurrence was considered. This does not include evidence resulting from her December 27, 2007 work injury, which occurred subsequent to the claimed recurrence. For the reasons stated above, the medical evidence of record was insufficient to establish appellant's claimed recurrence of disability.

CONCLUSION

The Board finds that appellant has not established that she is entitled to wage-loss benefits for total disability beginning May 7, 2007 causally related to her accepted employment injuries.

[20] *See A.D.,* 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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