



## **FACTUAL HISTORY**

The Office accepted that on October 16, 2008 appellant, then a 51-year-old clerk/mail processor, sustained a right ganglion cyst, right flexor carpi radialis tendinitis, neck strain, herniated cervical disc and right shoulder impingement due to moving a tray of mail from a cart to a hand truck. Appellant returned to limited-duty work after the injury and missed time from work to attend various medical appointments. She stopped work on March 30, 2009 and filed a claim alleging that she sustained a recurrence of total disability on that date due to her October 16, 2008 work injury.

In an October 30, 2008 report, Dr. Bruce Montella, an attending Board-certified orthopedic surgeon, diagnosed a cervical disc herniation at C4-5 and C5-6 and right rotator cuff pathology. He stated that appellant's symptoms were ongoing, severe and debilitating, but he cleared her to work with restrictions including lifting no more than 10 pounds, no repetitive pushing/pulling, no simple grasping, no fine manipulation and no reaching above the shoulders.

The results of an October 22, 2008 magnetic resonance imaging (MRI) scan of appellant's cervical spine revealed a right-sided disc bulge/protrusion at the C5-6 level indenting the ventral and right side of the thecal sac with mild right lateral recess narrowing; an annular disc bulge at the C4-5 level indenting the thecal sac without significant spinal stenosis; and an abnormal focus within the cervical spinal cord of indeterminate etiology that could represent an area of gliosis, demyelinating process such as multiple sclerosis or other etiology for which further workup was suggested.

In a December 29, 2008 report, Dr. Eugene Lopez, an attending Board-certified orthopedic surgeon, indicated that he had been treating appellant for a "cervical disc, possibly work related." He also diagnosed right shoulder impingement, partial thickness rotator cuff tear, right lateral epicondylitis and bilateral carpal tunnel syndrome. In a January 29, 2009 report, Dr. Lopez stated that the majority of appellant's symptoms appeared to have been related to carpal tunnel syndrome. The findings of January 6, 2009 electromyogram (EMG) and nerve conduction velocity (NCV) studies revealed evidence of mild right median nerve mononeuropathy (carpal tunnel syndrome) without denervation, borderline/mild right ulnar demyelinating sensory neuropathy and no evidence of radiculopathy, myopathy or plexopathy.

In a March 30, 2009 report, Dr. Montella indicated that appellant had suffered a herniated cervical disc at work and was having worsening, severe and debilitating difficulties with any level of increasing exertion that required use of pain medication, which at times included narcotics. On this basis, he felt that it was unreasonable for her to participate at work in any way. However, Dr. Montella also indicated that appellant's physical examination remained unchanged from previous visits. MRI scan testing of her right shoulder conducted on April 8, 2009 revealed mild rotator cuff tendinitis/bursitis, an unremarkable acromioclavicular (AC) joint and no evidence of a rotator cuff tear.

On April 27, 2009 Dr. Montella noted that appellant reported having ongoing difficulties with activity-related neck pain consistent with herniated disc and radiculitis. He stated that there was no profound progressive neurologic impairment and indicated that her physical examination was unchanged from previous visits. Dr. Montella again asserted that appellant should not

participate at work in any way. On May 27, 2009 he noted that she reported having ongoing difficulties that were severe and debilitating and for which narcotic pain medication was being employed. Dr. Montella stated that it was unreasonable for appellant to participate at work in any way.

In a July 10, 2009 decision, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability beginning March 30, 2009 due to her October 16, 2008 work injury.

In a June 17, 2009 report, Dr. Montella advised that he supported appellant's claim for total disability commencing March 30, 2009. He stated, "My support of her claim is substantiated by objective medical evidence including her history, physical exam[ination] findings, radiographs, clinical course and response to treatment. [Appellant's] diagnostic testing includes [an] MRI scan and EMG supporting this disability claim." Dr. Montella noted that she had been functioning well at work up until October 16, 2008, but had since been having ongoing difficulties with the diagnosed conditions of cervical disc herniation, shoulder impingement, lateral epicondylitis and carpal tunnel syndrome. He asserted that her disability was consistent with her diagnosed conditions and objective findings.

A July 24, 2009 letter from Dr. Lopez stated that appellant's right shoulder impingement syndrome was worsening and that a prior MRI scan had shown a normal rotator cuff and AC joint and only some tendinitis or bursitis. Dr. Lopez noted that impingement syndrome was the narrowing of the acromion and AC joint that impinges down upon the rotator cuff and causes inflammation, thus explaining why she had tendinitis and bursitis. He reported that appellant's inflammatory change was directly related to the impingement syndrome she was experiencing and was the cause of her injury and pain.

In a July 27, 2009 report, Dr. Montella indicated the physical examination of appellant's cervical spine found no motor deficits, normal range of motion, no tenderness, intact sensation in all dermatomal distributions of both extremities and a negative impingement test. In a separate July 27, 2009 letter to the Office, he stated that she was injured at work on October 16, 2008 while lifting a tray overhead and setting it on a rack at a lower level. Dr. Montella reported that from that time forward, appellant had difficulties with neck and radiating right shoulder and arm pain consistent with cervical disc herniation, shoulder impingement and carpal tunnel syndrome. Appellant tried to work through these difficulties but because of repetitive exertion, her symptoms became progressively severe and debilitating. This circumstance necessitate her being taken off work on March 30, 2009. Dr. Montella found appellant totally disabled from that date.

Appellant requested an oral hearing before an Office hearing representative. At the hearing held on November 20, 2009, she testified that Dr. Montella found that she was totally disabled for work beginning March 30, 2009 due to her cervical condition. Appellant asserted that she had an increase in pain while performing limited-duty work prior to the claimed recurrence of total disability. She described her limited-duty work as involving manual letter casing, which required her to throw mail into different compartments based on zip code. Appellant also testified that she had to lift trays of mail in order to bring the mail to her workstation to sort or case. She asserted that she had no previous injuries to her neck or right shoulder prior to the work injury of October 16, 2008.

In a February 17, 2010 decision, the Office hearing representative affirmed the Office's July 10, 2009 decision.

### **LEGAL PRECEDENT**

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she 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 disability and show that 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.<sup>2</sup>

### **ANALYSIS**

The Office accepted that on October 16, 2008 appellant sustained a right ganglion cyst, right flexor carpi radialis tendinitis, neck strain, herniated cervical disc and right shoulder impingement due to moving a tray of mail from a cart to a hand truck. Appellant returned to limited-duty work after the injury. She stopped work on March 30, 2009 and claimed a recurrence of total disability as of that date due to her October 16, 2008 work injury.

The Board finds that appellant did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability beginning March 30, 2009 due to her October 16, 2008 work injuries.

Dr. Montella, an attending Board-certified orthopedic surgeon, opined that appellant was totally disabled or incapacitated for work beginning March 30, 2009 and could no longer continue performing limited-duty work. The Board notes, however, that he did not adequately describe any objective worsening of her cervical disc condition. Dr. Montella has stated that appellant reported worsening difficulties with her cervical spine in March 2009 but he did not explain the change in the nature or extent of her work-related cervical disc condition. His medical records did not explain or identify any change in the physical examination findings other than citing an increase in reported pain. Rather, Dr. Montella appeared to premise his finding of disability on appellant's complaint of debilitating difficulties. He did not address any of the recent diagnostic testing of finding on physical examination to support his opinion.

Dr. Montella's July 27, 2009 report advised that there were no motor deficits, no range of motion deficits, no tenderness, intact sensation in all dermatomal distributions of both extremities and a negative impingement test on physical examination. Moreover, EMG and NCV studies obtained on January 6, 2009 found no evidence of any cervical radiculopathy. Although an October 22, 2008 MRI scan of the cervical spine did demonstrate disc bulges at C4-5 and C5-6, along with an abnormality within the cervical spinal cord at C4-5 of indeterminate etiology, the medical evidence does not demonstrate that the disc conditions change. There is no reasoned medical explanation as to why appellant could not continue performing limited-duty work after March 30, 2009. Auguring Dr. Montella's opinion on

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<sup>2</sup> *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

disability appears to be based on her reported subjective symptoms, rather than on objective findings. Therefore, his reports do not establish a change in the accepted injury-related conditions, which caused a recurrence of total disability beginning March 30, 2009.

In a July 24, 2009 letter, Dr. Lopez, an attending Board-certified orthopedic surgeon, indicated that appellant's right shoulder impingement syndrome was worsening, but he did not explain the medical process through which her injury-related right shoulder condition had worsened. He stated that impingement syndrome was the narrowing of the acromion and AC joint that impinged down upon the rotator cuff and caused inflammation. Dr. Lopez diagnosed tendinitis and bursitis; however, he did not explain how her condition had changed with respect to her right shoulder or the objective findings that supported a worsening condition. His opinion did not demonstrate a change in the nature or extent of appellant's work-related right shoulder condition resulting in her inability to perform limited-duty work.

For these reasons, appellant did not show a change in the nature or extent of her injury-related condition such that she sustained total disability beginning March 30, 2009. The evidence also does not establish any change in her limited-duty job requirements prior to the claimed recurrence of total disability.<sup>3</sup> Therefore, appellant did not meet her burden of proof to establish a recurrence of total disability beginning March 30, 2009 due to her accepted work injuries.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability beginning March 30, 2009 due to her October 16, 2008 work injuries.

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<sup>3</sup> On appeal, appellant asserted that she submitted sufficient medical evidence to establish a work-related recurrence of total disability beginning March 30, 2009. For the reasons noted, the evidence she submitted did not show a change in her work-related medical condition, which would have caused such a recurrence of total disability. Appellant submitted additional evidence after the Office's February 17, 2010 decision, but the Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 21, 2011  
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