

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

T.N., Appellant)	
)	
and)	Docket No. 10-1810
)	Issued: May 25, 2011
DEPARTMENT OF JUSTICE, IMMIGRATION)	
& NATURALIZATION SERVICE,)	
Calipatria, CA, Employer)	

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

Case Submitted on the Record

ORDER REMANDING CASE

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On June 29, 2010 appellant filed an appeal for review of a May 28, 2010 decision of the Office of Workers' Compensation Programs. The appeal was docketed as No. 10-1810.

This is the fourth appeal in this case to the Board. By order dated September 1, 2005, the Board found that appellant had been denied her right to an oral hearing and remanded the case to the Office, in order to provide appellant the opportunity to exercise her right to an oral hearing.¹ In an order dated July 12, 2007, the Board dismissed appellant's appeal of a May 19, 2006 decision of an Office hearing representative. As the hearing representative had directed the Office to obtain a second opinion examination to determine whether appellant had a cervical condition causally related to her accepted 1998 injury, the Board found that the case was in an interlocutory posture.² By order dated February 4, 2010, the Board remanded the case to the Office for reconstruction of the record and an appropriate order to preserve appellant's rights of

¹ Docket No. 05-844 (issued September 1, 2005).

² Docket No. 06-1552 (issued July 12, 2007).

appeal.³ The Board has duly considered this matter and concludes that this case is not is posture for a decision.

Following the Board's July 12, 2007 dismissal of her appeal, the Office referred appellant to Dr. Irwin Shapiro, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether there was a causal relationship between her claimed cervical condition and factors of employment, and whether she was disabled from August 19, 1998 through January 1999. The examination was scheduled for June 2, 2009. On May 28, 2009 appellant notified the Office that she was unable to attend the scheduled examination due to a previously-scheduled surgery and requested that the examination be postponed until the first week in August 2009 following her recovery from surgery.⁴

In a report dated June 2, 2009, Dr. Shapiro stated that he had not examined appellant but that he had been asked to respond to the Office's questions based upon his review of the medical record. He opined that he saw no evidence that appellant had ever had cervical radiculopathy, as claimed. Dr. Shapiro saw no evidence of a specific traumatic injury to account for neck strain. Although there was documentation of a disc bulge, there was no evidence of a herniation. Dr. Shapiro stated that objective findings did not support a diagnosis of a cervical condition. He did not provide current examination findings, a statement of all records reviewed or a history of injury.

In an August 24, 2009 decision, the Office denied appellant's request to expand her claim to include a cervical condition and denied compensation for disability from August 19, 1998 through January 1999, finding that the weight of the medical evidence was contained in Dr. Shapiro's second opinion report. Following the Board's February 4, 2010 order remanding the case, the Office issued a May 28, 2010 decision denying appellant's claim, again relying on Dr. Shapiro's opinion.

It is well established that proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.⁵ While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁶ The Office undertook development of the medical evidence, first by requiring a second opinion examination, and then by referring appellant to Dr. Shapiro. It therefore had an obligation to secure a report adequately addressing the issue at hand, namely, whether appellant had a cervical condition causally related to her accepted injury.⁷ On its face, Dr. Shapiro's report

³ Docket No. 09-2350 (issued February 4, 2010).

⁴ The record contains a report from a Dr. Williams indicating that appellant would be out of work for six weeks for recover from uterine surgery.

⁵ *Vanessa Young*, 55 ECAB 575 (2004).

⁶ *Richard E. Simpson*, 55 ECAB 490 (2004).

⁷ See *Peter C. Belkind*, 56 ECAB 580 (2005) (where the opinion of the Office's second opinion physician was unclear on whether the claimant had any permanent impairment due to his accepted employment injury, the Board found that the Office should secure a report adequately addressing the relevant issue). In this case, appellant's request to reschedule the examination to early August 2009 was reasonable, given her previously scheduled surgery.

is insufficient to satisfy the requirement of the May 19, 2006 decision to obtain a second opinion examination to determine whether appellant had a cervical condition causally related to her accepted 1998 injury. As he did not perform an examination of appellant, his report was not based on his own current objective findings. Although Dr. Shapiro made references to various records reviewed, he did not identify all records reviewed or provide a complete history of injury. Therefore, his report is of limited probative value.

The Board finds that this case is not in posture for a decision. The case will be remanded for appropriate development of the medical evidence, to be followed by an appropriate decision, in order to protect appellant's appeal rights.

IT IS HEREBY ORDERED THAT the May 28, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to the Office for further proceedings consistent with this order.

Issued: May 25, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board