



## **FACTUAL HISTORY**

This case has previously been on appeal before the Board.<sup>3</sup> In the August 2, 2011 decision, the Board found that appellant's case was not in posture for decision with regards to whether she had any additional shoulder or cervical conditions caused or aggravated by her October 2, 2005 work injury.

The record reflects that, after her October 2, 2005 work injury, appellant was returned to full-time modified duty as a rehabilitation/restorative and maintenance staff nurse on June 11, 2007. This was a permanent position based upon the recommendations provided by an impartial medical examiner, Dr. Alfred Dawson, a Board-certified orthopedic surgeon. In an April 18, 2007 report, Dr. Dawson had indicated that appellant had reached maximum medical improvement and could work full time, with restrictions on lifting no more than 15 pounds more than two hours a day, pushing and pulling limited to two hours a day up to 30 pounds, reaching limited to two hours a day, no reaching above the shoulder and no backing up to operate a motor vehicle at work. He released her to work four hours a day for the first month as "a form of work hardening," but opined that she was capable of this restricted duty full time. Appellant did not begin working full time and on July 27, 2007 filed a claim for recurrence of total disability for "June 25, 2007 to the present."

In a March 25, 2009 decision, OWCP denied appellant's claim for a recurrence of total disability finding that the medical evidence was insufficient.

After development of appellant's request to expand her accepted conditions, in a May 7, 2012 decision, OWCP expanded appellant's claim to include permanent aggravation of cervical spondylosis and stenosis and permanent aggravation of right shoulder impingement syndrome and bursitis, but denied the claim for cervical herniated disc. By letter dated September 10, 2012, appellant requested "a formal review" regarding her previous Form CA-7 claims for compensation for disability dating to her original recurrence date of June 28, 2007.

OWCP noted that a reconsideration request filed in 2012 from a March 25, 2009 decision would normally be found untimely. However, as it had accepted additional conditions since that decision had issued, it undertook a merit review of the medical evidence. The medical evidence in the record relevant to appellant's disability status is summarized below.

In a June 14, 2007 report, Dr. Stacy Gajewski, Board-certified in family medicine and appellant's treating physician, had noted that appellant had returned to work for four hours a day. She indicated that appellant did "okay" on the first day, had some problems on the second day and had a severe increase in pain on the third day. Dr. Gajewski indicated that it was probably because appellant had to "push open heavy doors." She noted that appellant was depressed and "any type of work aggravates her pain to the point of being intolerable." Dr. Gajewski diagnosed neck and shoulder pain from her work that "drastically" worsened after returning to work. She advised that appellant "probably should start working on disability since any amount of work made her pain much worse and puts her at risk for chronic pain syndrome." In a July 9, 2007

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<sup>3</sup> Docket No. 10-2330 (issued August 2, 2011). In this prior decision, the Board specifically noted that it did not have jurisdiction over the recurrence claim as that issue was not addressed in the decisions on appeal to the Board.

disability certificate, Dr. Gajewski noted that appellant was under her care from June 28, 2007 to “indefinitely.”

In a June 5, 2009 report, Dr. Gajewski explained that, once appellant returned to light duty in June 2007, the symptoms became worse and she had to quit work on June 28, 2007. She advised that appellant had neck and shoulder pain which she did not have before the injury. Dr. Gajewski explained that doctors initially were more concerned about the neck but the shoulder pain began on the date of the injury and was consistent with her actions. She indicated that, when appellant returned to work, the repetitive action caused the neck and shoulder to worsen. Dr. Gajewski indicated that appellant would not ever return to the type of work she was doing. Furthermore, appellant would have to limit the use of the right shoulder and neck as repetitive movements would cause the condition to worsen.

On June 15, 2009 OWCP referred appellant to Dr. James A. Loging, a Board-certified orthopedic surgeon, for a second opinion on whether additional conditions were causally related to her employment. In an August 12, 2009 report, Dr. Loging opined that appellant’s neck sprain and aggravation of her cervical degenerative disease remained work related and was not due only to a natural progression of her degenerative condition. He advised that she continued to have residuals of chronic pain, limited strength and mobility from her injury and advised that she was not able to perform her regular duties due to her symptoms. Dr. Loging indicated that appellant’s neck symptoms could also be due to a herniated cervical disc. He recommended a magnetic resonance imaging (MRI) scan of the cervical spine and indicated that her shoulder condition was potentially part of her initial injury as her symptoms seemed to start at that time. As to disability, Dr. Loging noted, “I do not feel that [appellant] is able to perform her duties as a position of nurse due to her still residual pain, limited mobility and weakness that she has.”

Appellant submitted a May 5, 2010 report from Dr. James Bethea, a Board-certified orthopedic surgeon, to whom she was initially referred for a second opinion examination and later sought treatment. Dr. Bethea opined that pushing and shoving a large bulky medication cart aggravated her tendinosis, arthritis and bursitis in her shoulders. He advised that appellant was not able to work since her October 2005 injury and needed further medical care for her shoulders.

To comply with the Board’s order to further develop the medical evidence as to whether appellant’s accepted conditions should be expanded,<sup>4</sup> OWCP had referred appellant to Dr. Joseph Estwanik, a Board-certified orthopedic surgeon, for a second opinion. Dr. Estwanik was asked to determine whether appellant’s herniated cervical disc and right shoulder condition were related to her work injury. Although not specifically requested to determine appellant’s ability to work, he stated, “Soft tissue injuries would allow her recommended return to work in June 2007. [Appellant’s] claimed symptoms and self-limiting behavior is far in excess of the pathology objectively confirmed.”

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<sup>4</sup> *Supra* note 2. The Board had remanded the case to OWCP to obtain a supplemental report from the previous second opinion physician but as he demanded prepayment, contrary to OWCP procedures, OWCP sought another second opinion physician.

On October 24, 2011 OWCP requested clarification from Dr. Estwanik regarding the extent of appellant's disability and whether her right shoulder condition was aggravated on October 2, 2005. In a November 16, 2011 supplemental report, Dr. Estwanik opined that the aggravation was temporary and would have allowed appellant to return to work in June 2007. He also explained that the assessment of bilateral shoulder pain and intermittent arm pain confirmed that no significant diagnostic category was confirmed or proposed.

On February 24, 2012 OWCP referred appellant to Dr. William Lehman, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between the second opinion physician, Dr. Estwanik and the treating physicians, Drs. Gajewski and Bethea, regarding whether appellant's shoulder and cervical conditions remained due to the original injury. Although he was not selected to resolve a conflict regarding appellant's work capacity, he was asked to respond to the question: "Does Ms. Foister have any work limitations as a result of the October 2, 2005 work injury?"

In his report dated March 27, 2012, Dr. Lehman noted appellant's history of injury and treatment and examined appellant. He provided findings and determined that the left-sided herniated disc was unrelated to her claim. However, the right shoulder impingement syndrome was related to the 2005 work injury and represented an aggravation of an underlying condition of acromioclavicular (AC) hypertrophy and subacromial stenosis. Dr. Lehman advised that the neck and right shoulder conditions had not changed since the 2005 injury and continued to require ongoing likely permanent restrictions in functional activities. Regarding appellant's work status, he advised that he did not find a specific conflict regarding whether she was completely disabled. Dr. Lehman noted that Dr. Gajewski did not believe that appellant could return to work as a nurse but she did not indicate that appellant was completely disabled. He indicated that appellant should be able to work in some capacity once suitable treatment was completed.

In a letter dated April 18, 2012, OWCP requested clarification from Dr. Lehman regarding rationale to support his opinion that appellant's cervical herniated disc was unrelated to the October 2, 2005 injury. In an April 21, 2012 response, Dr. Lehman explained that an MRI scan from August 16, 2006, which was after the October 2, 1995 work injury, revealed a left-sided cervical disc herniation. He opined that there were never any significant left-sided radicular symptoms or evidence of nerve impingement, which led him to question the significance of the herniation. There was no reference to appellant's ability to work.

By decision dated November 16, 2012, OWCP denied modification of its March 25, 2009 decision, which denied her claim for compensation for a recurrence of total disability commencing June 28, 2007. It found that Dr. Lehman's reports were sufficient to serve as the weight of the evidence on the recurrence issue and determined that appellant had failed to establish a recurrence of total disability as of June 28, 2007.

#### **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. 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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>5</sup> When 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 of record establish that he or 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 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 requirements.<sup>6</sup>

In situations where there exists a conflict in medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>7</sup>

### ANALYSIS

The Board finds that Dr. Lehman was not obtained to resolve a conflict on whether appellant was totally disabled as of June 28, 2007. Dr. Lehman was asked to resolve the conflict of whether appellant's shoulder and cervical conditions were due to the original injury. Therefore, he is not an independent medical specialist for the recurrence issue and his report does not carry special weight.<sup>8</sup>

The Board has carefully reviewed the medical evidence in the record on the issue of disability and finds that appellant has failed to meet her burden of proof to establish total disability commencing June 28, 2007.

Appellant's attending physician, Dr. Gajewski, opined that appellant could not perform the duties of her modified duty nurse position for eight hours a day, beginning on June 28, 2007 and indefinitely. She attributed appellant's disability to a severe increase in pain from having to push heavy doors. Dr. Gajewski noted that appellant was depressed and "any type of work aggravates her pain to the point of being intolerable." She further indicated that appellant would not ever return to the type of work she was doing. Furthermore, appellant would have to limit the use of the right shoulder and neck as repetitive movements would cause the condition to worsen. While Dr. Gajewski's reports were generally supportive of appellant's inability to work, they were speculative as to whether she was totally disabled for work. She provided no medical reasoning to explain how particular work activities caused or aggravated her condition to render

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<sup>5</sup> 20 C.F.R. § 10.5(x).

<sup>6</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>7</sup> *Guiseppe Aversa*, 55 ECAB 164, 167 (2003).

<sup>8</sup> See *Leonard Lothlen*, 37 ECAB 314, 321 (1986); *Pierre W. Peterson*, 39 ECAB 955, 960 (1988); *L.T.*, Docket No. 09-38 (issued July 7, 2009).

her totally disabled and suggested that some work would be feasible with the appropriate restrictions. The Board has held that where a physician's opinion is speculative it lacks probative value.<sup>9</sup>

Further, Dr. Gajewski suggested that appellant "probably should start working on disability since any amount of work made her pain much worse and puts her at risk for chronic pain syndrome." The Board has consistently held that fear of future injury is not compensable.<sup>10</sup>

Appellant began treating with Dr. Bethea, who opined that pushing and shoving a heavy cart aggravated her tendinitis, AC arthritis and bursitis in her shoulders. Dr. Bethea indicated that she was not able to work since her injury and was in need of medical care. He did not support this conclusory opinion with any rationalized description of the employment duties or why they would have prevented appellant's from returning to work. Medical reports consisting solely of conclusory statements without supporting rationale are of little probative value. To be of probative value, Dr. Bethea must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.<sup>11</sup>

Dr. Estwanik, the second opinion physician, opined that appellant's right shoulder condition, her cervical degenerative disc disease and the cervical disc disease at C5-6 were aggravated by her work injury. However, he explained the aggravation was temporary and that she could have returned to work in June 2007 as recommended.

Dr. Loging discussed disability in his August 12, 2009 report noting, "I do not feel that she is able to perform her duties as a position of nurse due to her still residual pain, limited mobility and weakness that she has." His opinion was not prohibiting appellant from working at any position, but noted only that she could not perform the duties of the nurse position. At the time of appellant's claim of recurrence, she was working in a limited-duty position that met her physician's restrictions at that time.

Dr. Lehman examined appellant on March 27, 2012 to resolve the conflict of medical evidence regarding the nature and extent of appellant's injury-related conditions. He found that the right shoulder impingement syndrome was related to the work injury in 2005 and represented an aggravation of her underlying condition of AC hypertrophy and subacromial stenosis. Regarding disability, Dr. Lehman noted that he did not find a specific conflict regarding whether appellant was completely disabled. He stated that Dr. Gajewski did not believe that appellant could return to work as a nurse, but she did not indicate appellant was completely disabled. In his follow-up report of April 21, 2012, Dr. Lehman reiterated his findings to his March 27, 2013 report.

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<sup>9</sup> *Rickey S. Storms*, 52 ECAB 349, 352 (2001) (the opinion of a physician supporting causal relationship need not be one of absolute medical certainty but must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty); *see also D.D.*, 57 ECAB 734, 739 (2006).

<sup>10</sup> *See Calvin E. King*, 51 ECAB 394, 401 (2000).

<sup>11</sup> *T.M.*, Docket No. 08-975 (issued February 6, 2009); *William C. Thomas*, 45 ECAB 591, 594 (1994) (a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale).

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify their disability and entitlement to compensation.<sup>12</sup>

The Board finds that appellant has failed to provide a well-rationalized medical opinion on the issue of whether she had established a recurrence of total disability for work commencing June 28, 2007. OWCP therefore properly denied the recurrence claim.

On appeal, appellant argued that the reports from Dr. Gajewski supported her disability. However, Dr. Gajewski's reports were insufficiently rationalized to meet her burden of proof.

Appellant may submit evidence or argument to OWCP with a written request for reconsideration within one year of this merit decision pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish a recurrence of disability for work commencing June 28, 2007.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 16, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>12</sup> See *Amelia S. Jefferson*, 57 ECAB 183, 188 (2005); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).