

accepted that appellant sustained a neck sprain, sprain of the right shoulder and upper arm, and a right thoracic back sprain. On October 13, 2009 appellant accepted a limited-duty position with restrictions on lifting over 20 pounds. She received appropriate compensation and disability.

On August 23, 2010 and June 10, 2011 appellant filed a recurrence claim alleging that she sustained a recurrence of disability on August 13, 2010. She indicated that, while on modified duty, she was opening up an all-purpose container (APC) and lifting boxes when her shoulder, neck, and back were aggravated by the lifting. The employing establishment noted that appellant was working with restrictions in a modified position and she indicated that she could not perform the duties of the position. Appellant stopped work on August 23, 2010.

By letter dated July 28, 2011, OWCP requested that appellant submit additional evidence for consideration within 30 days to establish her claim.

Appellant submitted reports from her treating physicians. They included several reports from Dr. Richard Farson, Board-certified in family medicine. In an August 16, 2010 disability certificate, Dr. Farson noted that appellant was under his care from August 16, 2010 and returned to work with restrictions to include no lifting over five pounds. He indicated that appellant was off from August 14 to 16, 2010 because of a “flare up of pain from an old shoulder injury.” In his August 23, 2010 report, Dr. Farson noted that appellant sustained a right shoulder injury on the job which got “a little better but the patient expressed a severe recurrence on the job on August 13, 2010. He placed appellant off work for the next 30 days due to severe right shoulder pain and emotional distress on the job. In an August 30, 2010 attending physician’s report, Dr. Farson noted that appellant injured her right shoulder at work on October 19, 2007. He indicated that appellant had neck, back, and right shoulder pain from lifting heavy boxes at work. Dr. Farson checked a box “yes” to indicate that appellant’s condition was work related and filled in “lifting heavy boxes.” He placed appellant off work. In a November 17, 2010 report, Dr. Farson noted that appellant had experienced much stress from a supervisor who verbally criticized her and caused her to work outside of her restrictions. He explained that on August 13, 2010 appellant had a flare up of right shoulder, right neck, and right upper back pain because of “being forced to do work, which she was not supposed to do.”

OWCP also received several reports dating from January 21 to September 15, 2011 from Dr. George J. Matthews a neurosurgeon, and treating physician. In a January 21, 2011 report, Dr. Matthews noted that on October 31, 2009 she was forced to return to modified employment and worked until August 2010, when her work schedule was increased and she was unable to do the work. He explained that she was off work since August 13, 2010. Dr. Matthews noted that her history included shoulder pain and right shoulder surgery in September 2006 prior to her work injury on October 19, 2007. In May 6 and July 27, 2011 reports, he diagnosed cervical, lumbar disc injury, and recurrent injury of the right shoulder. Dr. Matthews checked the box “yes” in response to whether he advised that the condition found was caused or aggravated by an employment activity. He indicated that appellant was not working and unable to work. Dr. Matthews explained that she reinjured herself doing modified work on August 13, 2010 and opined that this was a recurrence of the old injury. He noted that she continued to have neck and shoulder pain and was totally and temporarily disabled since August 13, 2010. In a September 15, 2011 treatment note and attending physician’s report, Dr. Matthews checked a box “yes” in response to whether he advised that the condition found was caused or aggravated

by an employment activity and he filled in “pain soon after injury.” He indicated that appellant had pain in the neck radiating into the right shoulder and aching in the right arm as well as low back pain radiating into the left hip. Dr. Matthews explained that appellant was unable to work because physical activities including standing, walking, and bending aggravated the pain. He indicated her original injury was on October 19, 2007 and she sustained a “re-injury” on August 13, 2010 and was off work since that time.

On October 6, 2011 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Easton Manderson, a Board-certified orthopedic surgeon.

In a report dated October 12, 2011, Dr. Manderson described appellant’s history of injury and treatment and examined appellant. He noted that appellant had chief complaints of pain in the neck, upper back, and right shoulder. Dr. Manderson also related that appellant complained of low back pain although that was not in the statement of accepted facts. He related that her pain was 7 out of 10. Dr. Manderson indicated that her history of injury included that on August 13, 2010 she stopped work because she was doing more than light-duty work. He diagnosed chronic cervicodorsal strain, post contusion, right rotator cuff syndrome and lumbosacral strain. Dr. Manderson also added that appellant had cervical disc disease and a disc herniation confirmed by magnetic resonance imaging (MRI) scan. He indicated that she had residuals of her work injury but she was capable of performing light duty. Dr. Manderson advised that appellant should not lift more than 20 pounds. In response to whether appellant had a recurrence of her October 19, 2007, injury and was totally disabled or had residuals, Dr. Manderson opined that “she does suffer residuals of the injury. A neck strain with a cervical disc herniation was, probably from the accident, and right upper extremity weakness and right shoulder pain, which suggests rotator cuff syndrome, probably impingement or a re-tear of her right rotator cuff.” Dr. Manderson advised that appellant could not return to full duty but she could work eight hours per day in a light-duty capacity, as she displayed weakness upon examination in the right upper extremity and pain in the right shoulder. He also indicated that appellant had a neck injury, with a strain superimposed on a herniated cervical disc, and she probably had a rotator cuff syndrome, which could be impingement or a rotator cuff tear. Dr. Manderson recommended x-rays and an MRI scan of the right shoulder in order to ascertain treatment options. He also indicated that she had continued right shoulder pain from the motor vehicle injury, and her restrictions included a 20-pound restriction on lifting and only for a third of her eight-hour workday. Dr. Manderson indicated that a diagnosis of low back pain should be added, which was a lumbar strain. He then indicated that appellant “did not suffer a recurrence. A recurrence is a recurrence of pain after the claimant has completely recovered from the original injury and, for some unknown reason, not a new injury or event, the pain returned spontaneously. This did not happen. Based on the history that I received, appellant’s pain worsened because, according to her, she was doing moderate lifting, which was not part of her light-duty restrictions and this caused her pain in her neck, upper back, and right shoulder to increase and also to affect her lower back.”

By letter dated November 3 and December 7, 2011, OWCP referred appellant for x-rays and an MRI scan of the right shoulder and lumbar spine.

In a December 5, 2011 report, Dr. Gregg A. Ferrero, a Board-certified orthopedic surgeon, noted that appellant had an original injury on October 19, 2007. He related that appellant indicated that she had a “recurrence of the pain on August 13, 2010.” Dr. Ferrero diagnosed right shoulder, cervical and lumbar pain and rotator cuff syndrome.

In a December 18, 2011 addendum report, Dr. Manderson noted that the MRI scan arthrogram of the right shoulder performed on October 10, 2011, revealed a possible frozen shoulder not consistent with clinical correlation; a small partial thickness on the surface tear of the anterior fibers of the supraspinatus which extended beyond 50 percent of the tendon thickness and an associated intramuscular cyst of the supraspinatus with minimal tendinosis of the infraspinatus; degenerative changes of the acromioclavicular joint with undersurface spurring. He indicated that lumbar spine x-rays taken on December 13, 2011, revealed mild-to-moderate degenerative disease at L5-S1 with bilateral facet arthropathy. Dr. Manderson also found that the pedicles at L5 demonstrated an irregular linear artifact. Otherwise there was no other bony joint abnormality of the spine. A lumbar spine MRI scan showed minimal facet hypertrophic changes and a small left foraminal disc protrusion resulting in minimal to moderate left-sided foraminal stenosis at L3-4. At L4-5 level, there was minimal facet hypertrophy with no significant central canal stenosis. A superimposed small right foraminal disc protrusion likely with minimal to moderate right-sided foraminal stenosis was suspected. Dr. Manderson indicated that there was also likely minimal to moderate left-sided foraminal stenosis at the L5-S1 level with no significant central stenosis, minimal facet hypertrophy, minimal to moderate left-sided foraminal stenosis. He diagnosed degenerative disease of the lumbar spine with only small disc protrusions.

OWCP continued to develop the claim. By decision dated March 6, 2012, it denied appellant’s claim finding that she did not establish that she sustained a recurrence of disability.

By letter dated March 23, 2012, appellant’s representative requested a telephonic hearing, which was scheduled for July 9, 2012.

On August 23, 2012 an OWCP hearing representative affirmed the March 6, 2012 decision.² She found that appellant had not submitted probative medical evidence to support a recurrence of disability commencing August 23, 2010 as a result of a spontaneous change in her medical condition and not a new injury.

On February 4, 2013 appellant requested reconsideration and submitted additional medical evidence.

By decision dated May 22, 2013, OWCP denied modification of its prior decision. It found that appellant had not submitted probative medical evidence to support disability beginning August 23, 2010 as a result of a spontaneous change in her medical condition.

² Appellant did not attend the hearing. In a memorandum of telephone call, a representative from attorney Alan Shapiro’s office called and so did Representative Richard Daniels, but neither of the parties was aware that the claimant had contacted the other party. As the parties were unable to reach appellant, they requested that OWCP conduct an examination of the record. By letter dated July 9, 2012, Mr. Daniels withdrew his representation of appellant and by letter dated July 10, 2010, Mr. Shapiro withdrew his representation.

In a letter dated May 20, 2014, appellant's representative requested reconsideration and submitted additional medical evidence.³ He argued that OWCP did not follow its own procedures. Appellant's representative explained that OWCP specifically found that, while appellant did not suffer a recurrence, she "reinjured herself lifting packages." Furthermore, he argued that OWCP had the responsibility, under FECA Procedure Manual section 2.800.3(c)(2) to process the claim as a traumatic injury in light of the new evidence. Appellant's representative argued that OWCP in effect, decided that appellant had not suffered a recurrence, but had suffered a traumatic injury. He further argued that, while the submission of an incorrect form was a technical error, it was improper to deny a case on the basis that appellant failed to submit the correct form. Appellant's representative requested that OWCP should convert the claim to the correct type and develop the claim as a traumatic injury.

By decision dated August 14, 2014, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

Section 10.5(x) of OWCP's 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.⁴

Appellant has the burden of establishing that she sustained a recurrence of a medical condition⁵ that is causally related to his accepted employment injury. To meet her burden, appellant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale.⁶ Where no such rationale is present, the medical evidence is of diminished probative value.⁷

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 establishes 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

³ In a letter dated May 19, 2014, appellant designated Kevin L. Card as her representative.

⁴ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

⁵ "Recurrence of medical condition" means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a need for further medical treatment after release from treatment, nor is an examination without treatment. 20 C.F.R. § 10.5(y) (2002).

⁶ *Ronald A. Eldridge*, 53 ECAB 218 (2001).

⁷ *Albert C. Brown*, 52 ECAB 152 (2000).

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.⁸

OWCP procedures provide that a case which is created may nonetheless lack appropriate forms. Submission of an incorrect form is a technical error and it is improper to deny a case on the basis that the claimant failed to submit the correct form.⁹

ANALYSIS

The Board finds that the case is not in posture for decision.

OWCP accepted appellant's claim for a neck sprain, sprain of the right shoulder and upper arm, and a right thoracic back sprain. Appellant returned to a modified-duty position on October 13, 2009.

Appellant subsequently asserted that she sustained an onset on August 13, 2010 and then a total disability on August 23, 2010 while on modified duty. Appellant reported that her shoulder, neck, and back were aggravated when she was opening up an APC and lifting boxes. Although she initially filed the wrong claim form (recurrence of disability claim form), this cannot serve as the basis for OWCP to deny her claim.

OWCP proceeded to develop the claim and referred appellant for a second opinion examination with Dr. Manderson on October 12, 2011. Dr. Manderson explained that appellant, "does suffer residuals of the injury. A neck strain with a cervical disc herniation was, probably from the accident, and right upper extremity weakness and right shoulder pain, which suggests rotator cuff syndrome, probably impingement or a re-tear of her right rotator cuff." Dr. Manderson added that appellant did not suffer a recurrence. He defined a recurrence as the development of pain after a patient has completely recovered from an original injury. For some unknown reason, not a new injury or event, the pain then returns spontaneously. Dr. Manderson explained that did not happen in appellant's case.

Dr. Manderson stated that appellant's pain worsened because, as she reported, according to her, she was doing moderate lifting, beyond her light-duty restrictions and this caused the pain in her neck, upper back, and right shoulder to increase and also to affect her lower back. The Board finds that this is a description of a new traumatic injury. The fact that it was reported on a recurrence form does not prevent the claim from being addressed as a new injury.¹⁰

The Board further finds that OWCP undertook development of the claim with regard to whether the injury was a recurrence or a new injury, as identified by Dr. Manderson, the second opinion physician. OWCP continued to deny her claim on the basis that it was not a recurrence. It is the duty of the claims examiner to develop a claim based on the facts at hand and not solely

⁸ *Conard Hightower*, 54 ECAB 796 (2003).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, 2.800.3(c)(2) (June 2011). See also *R.O.*, Docket No. 07-2070 (issued January 12, 2009).

¹⁰ *Id.*

on the basis of the type of claim form filed.¹¹ The records submitted from appellant along with the second opinion physician, Dr. Manderson, clearly describe a new or traumatic injury. There is also a recommendation to expand the claim to include lumbar strain. On remand, OWCP should develop this claim as a new traumatic injury. It should provide appellant with the opportunity to supplement her claim in accordance with her factual statements, the medical evidence and OWCP's procedures.¹²

Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2014 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: July 10, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

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

¹¹ *Silverio J. Trujillo*, Docket No. 99-593 (issued December 5, 2000); *Jimmy L. Gardner*, Docket No. 95-2360 (issued January 12, 1998).

¹² See *John H. Taylor*, 40 ECAB 1228, at note 8 (1989) (when in the development of a claim the evidence indicates another aspect of the case, the evidence should be further developed and a determination made as to that aspect).