

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of TANYA BUTLER-GAINES and U.S. POSTAL SERVICE,  
POST OFFICE, Stratford, NJ

*Docket No. 03-701; Submitted on the Record;  
Issued May 23, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant sustained a recurrence of disability on February 15, 2000, causally related to her July 29, 1998 accepted employment injury.

On August 17, 1998 appellant, then a 41-year-old letter carrier, filed a notice of traumatic injury alleging that on July 29, 1998 she experienced pain in her neck, chest and shoulder while pulling flats from the top shelf of a carrier case. The Office of Workers' Compensation Programs accepted that appellant sustained cervical radiculopathy, rotator cuff impingement of the right shoulder and supraspinatus tendinitis in both shoulders as a result of her federal employment. Appellant stopped work on August 1, 1998 and began receiving compensation benefits. Appellant returned to work on June 1, 1999 as a modified letter carrier for four hours per day; her duties included filing, writing reports and answering the telephone.

On February 16, 2000 appellant filed a claim for recurrence of disability (Form CA-2a), alleging that on February 15, 2000 she was "unable to grasp" and experienced severe pain in her neck, shoulder, arm and hand. By letter dated March 7, 2000, the Office notified appellant that additional information was necessary to establish her claim. Appellant submitted a personal statement stating that when she returned to work in June 1999 to the modified carrier position, she still had pain from the July 1998 injury and sometimes it was severe. Appellant indicated that she called her supervisor on February 15, 2000 and told her that she could not come into work because of the pain, which was in the same area as the original injury. Appellant's supervisor confirmed that appellant notified her on February 15, 2000 that she could not come into work because of the pain and also indicated that appellant had told her on several occasions prior to her absence that she was in a lot of pain and was on medication.

Appellant submitted a duty status report (Form CA-17) from her attending physician, Dr. Alex M. Cueto, who examined her on February 15, 2000. He diagnosed cervical herniation C6-7, outlined appellant's work restrictions and noted "recurrence of injury." In a work capacity evaluation (Form OWCP-5) dated March 29, 2000, Dr. Cueto indicated that appellant could work four hours per day in a limited-duty capacity.

Second opinion physician, Dr. Bruce Wulfsberg, a Board-certified orthopedic surgeon, examined appellant on March 28, 2000 and diagnosed “herniated discs in the cervical spine with radiculopathy and an impingement syndrome and a partial thickness tear of her rotator cuff.” Dr. Wulfsberg stated that appellant should have permanent work restrictions and opined: “I feel that the work-related injury is causally related within a reasonable degree of medical certainty. She was working without major complications until that episode. I believe that the current limitations are causally related to the above work[-]related accident.”

By decision dated May 31, 2000, the Office denied appellant’s claim for recurrence of disability on the grounds that the evidence was insufficient to show a change in the nature or extent of appellant’s job-related condition or in the nature and extent of her light-duty position.

Appellant disagreed with the Office’s decision and requested an oral hearing. In connection with the hearing, appellant submitted an undated treatment note, in which Dr. Cueto diagnosed appellant with cervical hermaturia C6-7 and indicated that she had been treated in his office from February 5 through May 1, 2000 because her condition “worsened.” By decision dated January 29, 2001, the Office hearing representative affirmed the May 31, 2000 decision denying appellant’s claim for recurrence of disability.

On January 4, 2001 appellant filed a second notice of recurrence of disability alleging that her condition worsened on December 30, 2000. The Office accepted appellant’s claim for recurrence of disability on January 4, 2001.

By letter dated November 8, 2001, appellant requested reconsideration of the hearing representative’s January 29, 2001 decision. Appellant submitted medical reports in support of her request and claimed that reports from Drs. David Weisband and Laura Ross, would show that her condition worsened in the beginning of 2000, which caused her to miss time from work.<sup>1</sup> The medical reports submitted were dated from April 4, 2000 through October 11, 2001, however, only one report mentioned the worsening of appellant’s condition and was dated more than one year after the date of appellant’s alleged recurrence of disability.

By decision dated February 12, 2002, the Office denied appellant’s request for modification of the January 29, 2001 decision on the grounds that the evidence submitted was not contemporaneous medical evidence and did not establish that she sustained a recurrence of disability as alleged.

By letter dated September 20, 2002, appellant requested reconsideration and submitted a September 11, 2002 report from Dr. Cueto. He stated:

“This letter is in regards of [appellant’s] disability claims that was denied from February 15 to May 31, 2000. As you well know, the patient had a work[-]related injury occurred on July 29, 1998.

“Her orthopedists Dr. Shelsky recommended surgery on her cervical spine and Dr. Fenlin recommended surgery on her right shoulder. She has been on physical

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<sup>1</sup> The Board notes that appellant did not submit any reports from Dr. Weisband.

therapy with different modalities but because of the failed conservative treatment she was requested to proceed with the surgery, which the patient declined. Since then the patient only relies on pain medication which obtained small relief.

“The patient work continuously with pain until on February 15, 2000 when she called her supervisor that she is really on pain and can[no]t come to work instead she together with her husband went to our office for consultation. The patient was examined with presenting complaints of severe neck pain with limitation of movement and headaches. The patient was given Percocet 5 mg to be taken 1 tab every 6 hours and Robaxin 500 mg 1 tab BID and was also recommended to put her neck brace to eliminate unnecessary movement of her neck, which might aggravate the condition. The patient was also advised to rest for a while until she fully recovered.”

By decision dated December 18, 2002, the Office denied appellant’s request for modification of the January 29, 2001 decision on the grounds that the evidence submitted was insufficient to establish a recurrence of disability as alleged.

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

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> However, it is well established that proceedings under the Federal Employees’ Compensation Act<sup>3</sup> are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>4</sup>

In this case, appellant did not allege that her light-duty job requirements changed after she returned to work on June 1, 1999. She alleged that her pain continued after the July 29, 1998 accepted employment injury and that her condition became worse in February 2000.

The Board has reviewed the evidence and notes that, while the report and treatment notes from appellant’s attending physician are not completely rationalized, they are consistent in indicating that appellant sustained a recurrence of disability on and after February 15, 2000 due to her accepted employment injury and are not contradicted by any substantial medical or factual evidence of record. Dr. Cueto’s duty status report dated February 16, 2000, is consistent with appellant’s statement that he treated her on the day of the alleged recurrence of disability, as appellant indicated on her CA-2a form. Dr. Cueto stated that he examined her on

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

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Dorothy Sidwell*, 36 ECAB 699 (1985); *William J. Cantrell*, 34 ECAB 1233 (1983).

February 15, 2000 and indicated “recurrence of injury” when asked to describe how the injury occurred. He also indicated in a treatment note that he treated appellant from February 5 through May 1, 2000, because her condition had worsened.

In his report dated September 11, 2002, Dr. Cueto noted the denial of appellant’s disability claim from February 15 through May 31, 2000 and discussed the work-related injury on July 29, 1998. He indicated that appellant had chosen to undergo conservative treatment for her condition, which included taking medication and undergoing physical therapy, instead of undergoing surgery. He stated that appellant had relied on pain medication since the injury, which had brought her little relief. Dr. Cueto also indicated that appellant had worked continuously with the pain from her injury until February 15, 2000, when her pain became very severe and she called her supervisor to tell her that she could not come into work. He noted that appellant and her husband came to see him on that day. Dr. Cueto explained that appellant had complained of severe pain and that she had limited movement in her neck. He prescribed pain medication and recommended that she wear a neck brace to eliminate unnecessary movement and suggested that she rest. Appellant did not return to work. Dr. Cueto noted that he saw appellant at a follow-up appointment on March 13, 2000 and that she still had neck pain, shoulder pain and headaches and complained that she was depressed because she could not do her usual household chores. The report and treatment notes from Dr. Cueto, even though not well rationalized, suggest that appellant never completely recovered from the July 29, 1998 employment injury and that her pain increased on and after February 15, 2000. The evidence also indicates that her pain was in the same areas as the original injury, as indicated by Dr. Wulfsberg.

Dr. Wulfsberg examined appellant on March 28, 2000 and diagnosed her with herniated discs in the cervical spine with radiculopathy, an impingement syndrome and a partial thickness tear of the rotator cuff. He opined that appellant’s current condition and physical limitations were related to the original employment injury within a reasonable degree of medical certainty. Even though Dr. Wulfsberg’s report may lack medical rationale, it raises an uncontroverted inference that appellant’s condition on March 28, 2000 was causally related to the accepted employment injury.

The Board notes that, even though the medical reports of record are insufficiently rationalized, the body of evidence suggests that appellant’s condition worsened on and after February 15, 2000, due to the accepted employment injury.<sup>5</sup> The Board finds in this case that the medical reports are insufficient to meet appellant’s burden of proof to establish her claim, however, they raise an uncontroverted inference that appellant’s condition worsened in February

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<sup>5</sup> See *Robert A. Redmond*, 40 ECAB 796, 801 (1989). In a case with facts similar to those of the present case, *Mary A. Wright*, 48 ECAB 240 (1996), appellant filed a claim alleging that she sustained a recurrence of disability and indicated that she had continuous pain in the same area as the accepted employment injury and that it had progressively gotten worse. Appellant submitted medical evidence from her attending physician suggesting that the underlying cause of her current condition and her continuing back problems were related to the original employment injury. The Board found that, while the reports were insufficient to meet appellant’s burden of proof to establish her claim, they did raise an uncontroverted inference between her claimed recurrence of total disability and the original employment injury and were sufficient to require the Office to further develop the medical evidence and the case record.

2000 and that it was related to the original employment injury on July 29, 1998. Further, development of the record is warranted.

Accordingly, the case will be remanded to the Office for further evidentiary development regarding the issue of whether appellant sustained a recurrence of disability on and after February 15, 2000 causally related to the accepted employment injuries. After such development of the case record as the Office deems necessary, an appropriate decision shall be issued.

The December 18 and February 12, 2002 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC  
May 23, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member