

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

CONNIE M. VINCK, Appellant)
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 DEPARTMENT OF TRANSPORTATION,) **Docket No. 04-2033**
 FEDERAL AVIATION ADMINISTRATION,) **Issued: April 18, 2005**
 BALTIMORE/WASHINGTON INTERNATIONAL)
 AIRPORT, Baltimore, MD, Employer)
)

Appearances:
 Ronald T. Tomasko, Esq., for the appellant
 Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
 COLLEEN DUFFY KIKO, Member
 DAVID S. GERSON, Alternate Member
 A. PETER KANJORSKI, Alternate Member

JURISDICTION

On August 16, 2004 appellant, through her attorney, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs' hearing representative dated May 12, 2004, in Office file number 25-0388640, finding that she did not sustain a recurrence of disability causally related to her August 23, 1989 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this decision. Appellant's attorney contends on appeal that the hearing representative's decision should be reversed and the case remanded to enable the Office to adequately consider the impact of any accepted employment-related injuries, *i.e.*, the subject of the current appeal as well as in Office file number 25-2004344, which also includes the back.¹

¹ The Board notes that no appeal has been filed from a final Office decision in Office file number 25-2004344; thus, the Board has no jurisdiction over it. *See* 20 C.F.R. § 501.2(c).

ISSUE

The issue is whether appellant sustained a recurrence of disability causally related to her August 23, 1989 employment injury.

FACTUAL HISTORY

On August 23, 1989 appellant, then a 33-year-old purchasing agent, filed a traumatic injury claim alleging on that date she hurt her lower back when she bent over to push a pallet of batteries out of the way of file cabinets. The Office accepted her claim for a lumbar strain. She was released to full-duty work effective September 25, 1989 by Dr. Ephraim E. Dagadu, her treating family practitioner.

On August 12, 2002 appellant filed a claim alleging that she sustained a recurrence of disability, commencing September 1989. She indicated that upon her return to work in September 1989, she continually suffered from intermittent periods of severe chronic pain. She noted that she received medical treatment from January 1990 to June 1995 with Dr. Charles R. Graham, Jr., a Board-certified internist; from June 1995 to September 1995 with Dr. Michael S. Shear, a Board-certified physiatrist; from October 1995 to June 2002 with Dr. Ira L. Fedder, a Board-certified orthopedic surgeon; and from July 2002 to the date of her recurrence of disability claim with Dr. John Kostuik, an orthopedic surgeon. Appellant submitted Dr. Fedder's June 7, 2002 attending physician's reports which revealed a history of her August 23, 1989 employment injury and diagnoses of discogenic back pain, spondylolisthesis at L3-4 and failed back syndrome. Dr. Fedder indicated with an affirmative mark that her conditions were caused by the accepted employment injury. He explained that her pain began after her 1989 work-related injury.

By letter dated September 24, 2002, the employing establishment advised the Office that appellant's case had been retired to the Federal Records Center and that her file may need to be retrieved. The employing establishment submitted numerous medical records dated between November 1994 and September 2002 which showed that appellant remained symptomatic in her back and that she was treated for several nonwork-related injuries. Dr. Dagadu noted in his March 15, 1990 attending physician's report that appellant was injured at work while moving a pile of batteries across the floor. He diagnosed a lumbar strain and he indicated with an affirmative mark that her condition was caused by her August 23, 1989 employment injury. He stated that it was unknown at that time whether appellant had any permanent effects of her condition.

In a June 12, 1995 letter, Dr. Shear advised Dr. Graham that he saw appellant on that date and that she complained about left-sided low back pain in the sacroiliac joint area. He noted that she had suffered from this pain for several years and she believed it may be related to her December 1985 automobile accident.² This sentence was crossed out to reflect that appellant believed her back pain may have been related to her August 23, 1989 employment injury.

² The record reveals that appellant was involved in an automobile accident on December 13, 1985 in which she sustained an injury to her left clavicle and right foot. She was previously involved in an automobile accident on November 8, 1994 in which she hurt her left elbow.

Dr. Carlton C. Sexton, a Board-certified radiologist, noted in his September 20, 1995 report that appellant provided a history of chronic back pain that was perhaps originally caused by a car accident. He performed a lumbar discography and concluded that appellant had an annular tear at L3-4 with mild discogenic low back pain.

In an August 12, 1998 report, Dr. Lester A. Zuckerman, a Board-certified anesthesiologist, reported that appellant provided a history that she had been experiencing pain in her lower back and left lower extremity for four years due to her 1985 car accident. He also provided a history of her medical treatment and family background. He noted his findings on physical examination and ruled out sacroiliitis and facet arthropathy. Dr. Zuckerman diagnosed failed lumbar back syndrome, obesity and trochanteric bursitis. He concluded by recommending a course of treatment for appellant. In his March 8, 1999 report, Dr. Zuckerman reiterated the history that appellant experienced pain in her lower back and left lower extremity for four years and his diagnoses.

An October 17, 2001 disability certificate of Dr. Michael S. Kaplan, a Board-certified physiatrist, indicated that appellant had been treated for low back pain and that she was unable to work on that date.

In his July 17, 2002 report, Dr. Graham provided a history of appellant's medical condition which included her December 1985 car accident and August 23, 1989 employment injury. He opined that based on appellant's continuing medical concerns regarding thrombophlebitis, pulmonary emboli, lumbar spondylosis and prescribed medications, she should retire on disability.

Dr. Fedder stated in his July 24, 2002 treatment note that he had been treating appellant for her accepted employment injury since 1995. He noted medical treatment she had received from other physicians for her back condition and their findings regarding her physical abilities and medication. He opined that she should limit her travel or at least be in a situation when she is traveling to change her position or interrupt her travel and break it up into short segments. Dr. Fedder noted that it was going to be difficult and painful for her to commute from 45 minutes to over 1 hour a day and to travel long distances by airplane where she was unable to change her position.

In a December 31, 2002 letter, the Office informed appellant that the evidence submitted was insufficient to establish her recurrence of disability claim. The Office further advised her about the type of factual and medical evidence she needed to submit to establish her claim.

In response, appellant submitted a February 21, 2003 narrative statement in which she noted that employing establishment personnel employees were incompetent in handling issues related to the Office. She further noted that she continued to suffer from continuous chronic pain in her lower lumbar spine and sought continuous medical treatment since her August 23, 1989 employment injury. Appellant stated that she had several on-the-job falls that worsened her condition and caused recurrences of disability on June 3, 1993, January 7, 1998 and October 18, 2001. She also stated that the Office of Personnel Management approved her application for disability retirement on December 16, 2002. Appellant indicated that Dr. Dagadu's March 15, 1990 Form CA-16 indicated that it was unknown whether any

permanent damage had been done. She provided a description of her job duties and information on her December 13, 1985 car accident.

Appellant also submitted medical evidence which included Dr. Fedder's February 19, 2003 report indicating that in 1995 he began "aggressive conservative care" of her back condition which was caused by her August 23, 1989 employment injury. He provided a history of her accepted employment injury and back surgeries. He diagnosed failed back syndrome, back pain, spondylolisthesis and recurrent lumbar spinal stenosis. Dr. Fedder noted his findings on clinical examination, appellant's description of her work duties and his review of her medical history. He opined that based on appellant's history prior to the start of his treatment and his personal knowledge of her current pain and dysfunction, it was "more likely than not" that there was a causal relationship between her August 23, 1989 employment injury and continued problems up to that date.

Dr. Kaplan's September 24, 2002 report revealed that appellant underwent seven surgeries on the left shoulder and five to six surgeries on her right foot due to her 1985 car accident and she experienced low back pain and underwent back surgeries due to her August 23, 1989 employment injury. He provided a detailed review of appellant's medical records regarding her back, foot, shoulder, right knee and emotional problems and noted the findings of her physicians. Dr. Kaplan stated that there were multiple reasons as to why appellant was unable to work, citing she was unable to drive herself, her work performance had declined "secondary to issues of pain which are multifactoral," and depression due to the injuries. He opined that she was permanently disabled at that time.

Appellant submitted a duplicate copy of Dr. Fedder's July 24, 2002 treatment note. She also submitted her job description, a January 27, 2003 letter in which she requested that the Office grant her additional time to respond to its December 31, 2002 developmental letter, Office of Personnel Management's December 16, 2002 letter regarding her disability retirement and several SF-50 forms.

By decision dated March 3, 2003, the Office found that appellant failed to submit rationalized medical evidence establishing that she sustained a recurrence of disability causally related to her August 23, 1989 employment injury. Accordingly, the Office denied her claim.

Following the issuance of its March 3, 2003 decision, the Office received Dr. Kaplan's February 24, 2003 work capacity evaluation in which he stated that appellant suffered from a work-related medical problem and she was disabled for work.

In an April 1, 2003 letter, appellant requested an oral hearing before an Office hearing representative. By letter dated April 5, 2004, she submitted additional information to clarify errors that appeared in her medical records regarding the question about what incident caused which injury. She also submitted duplicate copies of medical records previously of record. In addition, she submitted hospital records that were either partially or completely illegible, treatment notes from her physical therapists and medical records that predated her August 23, 1989 employment injury.

On May 12, 2004 the Office hearing representative issued a decision affirming the Office's March 3, 2003 decision.

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment.³

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.⁴ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.⁵ Where no such rationale is present, medical evidence is of diminished probative value.⁶

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's claimed condition became apparent during a period of employment nor her belief that her condition was aggravated by her employment is sufficient to establish causal relationship.⁷

ANALYSIS

The Office accepted that appellant sustained a lumbar strain on August 23, 1989 while in the performance of duty. Although appellant has submitted numerous medical records in support of her recurrence of disability claim, she has not submitted a rationalized medical report explaining how her continuing residuals and disability are related to the employment injury she sustained on August 23, 1989.

Dr. Dagadu's March 15, 1990 attending physician's report provided a history that appellant was injured at work on August 23, 1989 while moving a pile of batteries across the floor. He indicated with an affirmative mark that her lumbar strain was caused by her August 23, 1989 employment injury and that it was unknown at that time whether she had any permanent effects of her condition. The Board has held that a physician's form report which merely checks the box marked "yes" to the inquiry as to whether the condition for which treatment is rendered is causally related to the history of injury as given, is of diminished

³ 20 C.F.R. § 10.5(x) (2002).

⁴ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

⁵ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁶ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁷ *See Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

probative value as it constitutes a conclusion without the benefit of any medical rationale.⁸ Although Dr. Dagadu advised in his March 15, 1990 report that appellant sustained a work-related injury, the Board finds that he did not provide any rationale to discharge appellant's burden of proving, by the weight of the reliable, substantial and probative evidence that her current back condition is causally related to her August 23, 1989 employment injury, as he did not explain his opinion with medical reasoning.⁹

Similarly, Dr. Fedder's June 6, 2002 attending physician's reports indicated with an affirmative mark that appellant's discogenic back pain, spondylolisthesis at L3-4 and failed back syndrome were caused by her August 23, 1989 employment injury. Although he stated that appellant's pain began in 1989 after her work-related injury and that it was permanent, he did not explain how or why her conditions were caused by the accepted employment injury, why it was permanent and why she was precluded from working.

Dr. Shear's June 12, 1995 statement that appellant believed her low back pain may be related to her December 1985 car accident was crossed out to reflect that that back pain may have been related to the August 23, 1989 employment injury. The anonymous change on the report about the cause of ongoing back pain renders the history given by Dr. Shear unclear. Therefore the report is entitled to little probative value in establishing claims for compensation.¹⁰

In his September 20, 1995 report, Dr. Sexton reported the history as related by appellant that she believed her back pain was perhaps originally caused by a car accident prior to performing a lumbar discography after which he concluded that appellant had an annular tear at L3-4 with mild discogenic low back pain. Dr. Fedder also provided a history in his August 12, 1998 and March 8, 1999 reports that appellant experienced pain in her lower back and left lower extremity for four years due to her December 1985 car accident. Based on his physical findings, he diagnosed failed lumbar back syndrome, obesity and trochanteric bursitis. The Board finds that as neither Dr. Sexton nor Dr. Fedder opined that appellant's ongoing back problems were somehow caused by her August 23, 1989 employment injury, their reports are insufficient to establish her burden.

Dr. Kaplan's October 17, 2001 disability certificate which indicated that appellant was being treated for low back pain and that she was unable to work on that date is insufficient to establish appellant's burden because it failed to address whether her back pain and resultant disability for work were caused by her August 23, 1989 employment injury.¹¹ Similarly, in his September 24, 2002 report, Dr. Kaplan did not address whether appellant's disability for work was caused by her accepted employment injury. He reviewed the findings of appellant's physicians regarding her back, foot, shoulder, right knee and emotional problems and stated that

⁸ *Barbara J. Williams*, 40 ECAB 649 (1989).

⁹ *Kathleen M. Fava (John F. Malley)*, 49 ECAB 519 (1998); *Beverly J. Duffey*, 48 ECAB 569 (1997); *Lee R. Haywood*, 48 ECAB 145 (1996).

¹⁰ *Clarence E. Brockman*, 40 ECAB 753 (1989); *Carl E. Hendrickson*, 35 ECAB 593 (1984); *James A. Wyrich*, 31 ECAB 1805 (1980); *John W. Pettigrew*, 6 ECAB 941 (1954).

¹¹ *Daniel Deparini*, 44 ECAB 657, 659 (1993).

there were multiple reasons why she was unable to work. However, he did not specifically identify the reasons appellant was disabled for work. Further, in his February 24, 2003 work capacity evaluation, Dr. Kaplan opined that appellant suffered from a work-related medical problem and that she was disabled for work. He did not explain how or why appellant's medical problem and disability for work were caused by her accepted employment injury.

Dr. Graham, in his July 17, 2002 report, opined that appellant should retire on disability due to continuing medical concerns about her thrombophlebitis, pulmonary emboli, lumbar spondylosis and prescribed medications. In his September 13, 2002 letter, Dr. Graham noted his treatment of appellant's back problems from January 1990 through June 1995. As Dr. Graham did not address whether appellant's ongoing medical problems were caused by the August 23, 1989 employment injury, his July 17, 2002 report and September 13, 2002 letter are insufficient to establish appellant's burden.

Dr. Fedder's July 24, 2002 treatment note which revealed appellant's travel limitations due to her back condition did not discuss whether her condition and limitations were caused by her accepted employment injury. Further, he did not explain his March 30, 2004 opinion that the treatment services he provided to appellant in 1995 and in a subsequent period were causally related to her August 23, 1989 employment injury. Thus, the Board finds that Dr. Fedder's July 24, 2002 and March 30, 2004 opinions are insufficient to establish that appellant sustained a recurrence of disability causally related to the August 23, 1989 employment injury.

Dr. Fedder's February 19, 2003 opinion that it was "more likely than not" that there was a causal relationship between appellant's August 23, 1989 employment injury and her continued problems which included failed back syndrome, spondylolisthesis, back pain and recurrent lumbar spinal stenosis, without more by way of an explanation, is likewise insufficient as it is speculative about the cause of appellant's ongoing back problems. The medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty; however, such opinion should not be speculative or equivocal.¹²

The treatment notes from appellant's physical therapists do not constitute competent medical evidence inasmuch as a physical therapist is not considered a "physician" under the Federal Employees' Compensation Act.¹³ The medical records submitted by appellant covering the period August 1983 through July 1988 are irrelevant to the issue of whether she has any continuing employment-related residuals or disability causally related to an August 23, 1989 employment injury as they predate the date of the August 23, 1989 employment injury and alleged recurrence of disability and, thus, do not address whether or how appellant's disability was caused by her August 23, 1989 employment injury or whether or how the conditions found in August 1983 or July 1988 are otherwise related.

¹² *Samuel Senkow*, 50 ECAB 370 (1999).

¹³ 5 U.S.C. §§ 8101-8193, 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).

CONCLUSION

As appellant has failed to submit rationalized medical evidence establishing that she sustained a recurrence of disability causally related to her August 23, 1989 employment injury, she has not met her burden of proof.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁴ *Ricky S. Storms*, 52 ECAB 349 (2001).