

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

AUDREY W. JOHNSON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Houston, TX, Employer**

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**Docket No. 05-409
Issued: December 22, 2005**

Appearances:
Audrey W. Johnson, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 6, 2004 appellant filed a timely appeal of the April 28 and August 5, 2004 merit decisions of the Office of Workers' Compensation Programs, denying her claim for recurrence of disability and the October 8, 2004 nonmerit decision, denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability on or after January 2, 2004 causally related to her accepted employment injuries; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This is the second appeal in this case before the Board. Appellant sustained a cervical strain in the performance of duty on May 25, 1992 and was reinjured on February 1, 1993. She returned to light duty on October 4, 1995. By decision dated October 4, 1995, the Office determined that appellant's actual earnings in her light-duty job represented her wage-earning capacity. She filed a claim for recurrence of disability on March 26, 1996.

In the first appeal, the Board found that appellant had not established a recurrence of total disability after February 26, 1996.¹ She filed another claim for recurrence of disability on March 8, 1997. The Office combined the cases under the master case file number 16219359. On August 2, 1999 appellant returned to full duty. By decision dated January 10, 2001, the Office found that her light-duty position fairly and reasonably represented her wage-earning capacity and terminated her compensation benefits because her actual wages met or exceeded the wages of the job she had when she was injured.

On March 11, 2002 appellant filed another claim for recurrence of disability that was accepted on February 18, 2002. After undergoing shoulder surgery, she returned to light duty on February 3, 2003, working three days per week for four hours per day and two days per week for eight hours per day. Appellant received intermittent leave without pay for physical therapy and doctor visits.

On November 4, 2003 Dr. Edward Talmage, a Board-certified anesthesiologist, modified appellant's restrictions to include working four hours per day five days per week.

On January 9, 2004 appellant filed a claim for lost wages for the period December 15, 2003 through January 9, 2004. In an attending physician's report dated January 4, 2004, Dr. Talmage stated that she was "unable to work until further notice" as of January 2, 2004.

By letter dated January 22, 2004, the Office requested medical evidence establishing appellant's disability for work for the period December 15, 2003 through January 9, 2004.

On January 21, 2004 appellant filed a claim for lost wages for the period January 10 through 23, 2004.

On March 11, 2002 appellant filed another claim for recurrence of disability that was accepted February 18, 2002. After undergoing shoulder surgery, she returned to light duty on February 3, 2003, working three days per week for four hours per day and two days per week for eight hours per day. The Office paid appellant intermittent leave without pay for physical therapy and doctor visits.

On November 4, 2003 Dr. Talmage, a Board-certified anesthesiologist, modified appellant's restrictions to include working four hours per day five days per week.

¹ Docket No. 97-1859, issued July 27, 1999.

On January 9, 2004 appellant filed a claim for lost wages for the period December 15, 2003 through January 9, 2004. In an attending physician's report dated January 4, 2004, Dr. Talmage stated that she was "unable to work until further notice" as of January 2, 2004.

By letter dated January 22, 2004, the Office requested medical evidence establishing appellant's disability for work for the period December 15, 2003 through January 9, 2004.

On January 21, 2004 appellant filed a claim for lost wages for the period January 10 through 23, 2004.

In a report dated January 13, 2004, Dr. Talmage indicated that appellant was experiencing severe pain in her left arm, headaches and inflammation in her shoulder trapezius and suprascapular area with irritation of the cervical nerve root. He stated that she had been trying to work in a modified position, but that, due to the deterioration of her condition, he had taken appellant off work until her condition could be upgraded.

In a January 12, 2004 report, Dr. Mark R. Rogers, a Board-certified orthopedic surgeon, stated that appellant had pain and spasms in her shoulders, that she experienced numbness and tingling that radiated down to her hand, that she had headaches on the left side of her head and neck, as well as a burning sensation down her arm. He expressed concern that she had an underlying radiculopathy that might be responsible for her pain.

Appellant submitted a January 19, 2004 report of a magnetic resonance imaging (MRI) scan of the cervical spine.

By letter dated January 28, 2004, the Office advised appellant to provide medical evidence that she was disabled for work during the entire period claimed from January 10 through 23, 2004.

On February 20, 2004 appellant filed a claim for lost wages for the period January 26 through February 20, 2004. On February 13, 2004 she filed a claim for compensation for the period December 13, 2003 through February 13, 2004.

In a February 11, 2004 report, Dr. Talmage indicated that his examination of appellant and recent MRI scan revealed mild strength deficit in the left shoulder, painful arc, mild annular disc bulges at C3-4, C4-5, and C5-6 levels.

In a January 24, 2004 report, Dr. Rogers stated that the January 19, 2004 MRI scan showed a herniated disc at C7-T1 to the left with some bulging discs at multiple other levels. He indicated that appellant still experienced numbness from the left neck to her left hand.

By letter dated March 3, 2004, the Office informed appellant that the CA-7 forms that she had filed for the period December 13, 2003 through February 13, 2004 suggested that she may have a claim for a recurrence of disability or for a new occupational or traumatic injury claim. The Office advised her to file the appropriate form and to submit additional information and evidence in support of her claim.

On March 24, 2004 appellant filed a claim for a recurrence of disability effective January 2, 2004, reflecting that she had stopped working on that date. She alleged that on January 2, 2004 she awoke with severe pain and swelling in her neck and shoulder. Appellant claimed that she had experienced headaches and muscle spasms in her neck and shoulders since she returned to light duty.

Appellant submitted reports from Dr. Rogers dated October 8, November 10 and December 10, 2003 and January 12, 2004, reflecting that she had developed bilateral carpal tunnel syndrome, that her range of motion was painful past 120 degrees, and that she had a painful arc and mild strength deficit in her left shoulder.

Appellant submitted a March 4, 2004 report from Dr. Robert Lowry, a treating physician, who stated that he had reviewed her nerve conduction and electromyogram (EMG) studies, as well as her entire medical history. He provided impressions of subtle electrophysiological evidence of cervical radiculopathy involving the left C6 nerve root recorded in needle EMG examination of the left upper extremity, cervical radiculopathy manifested in increased reinnervation potential activity recorded in C6 innervated paraspinals and distal musculature within the left upper extremity, and mild to light carpal tunnel syndrome.

In a report dated March 26, 2004, Dr. Talmage diagnosed muscle spasms with moderate levels of pain and tenderness throughout the cervical thoracic area with associated trigger points. He described bruising to the left arm and numbness and tingling radially to the left hand, as well as headaches associated with cervical pain. Dr. Talmage indicated that recent diagnostic tests noted disc bulges at C3-4, C4-5 and C5-6 levels. He opined that "as of now [appellant] has been and is unable to work until her condition is upgraded."

By decision dated April 28, 2004, the Office denied appellant's claim for a recurrence of disability, finding that the evidence was insufficient to establish that her claimed disability for work beginning December 13, 2003 was due to her accepted injury.

By letter dated May 11, 2004, appellant requested reconsideration.

In a narrative report dated July 7, 2004, Dr. Talmage provided a history of appellant's treatment, indicating that he had treated her since July 1993 for intractable incapacitating cervical radicular left-sided pain which developed following the work-related injury of February 1, 2003 in which appellant sustained a severe cervical sprain injury and an avulsion injury of the upper left brachial plexus accompanied by the development of cervical epidural fibrosis and adhesions with neuropathic cervical root pain. He further stated that "occipital cervical headaches have accompanied the neuropathic pain syndrome." Dr. Talmage noted that appellant's cervical disc problems developed while she was in "regular employment" and that it was "inevitable that her condition would become worse with the passage of time and repetitive efforts connected with her employment." He further concluded that her current condition was "a direct progression of appellant's original injury to her present disability."

By decision dated August 5, 2004, the Office denied modification of its April 28, 2004 decision. The Office found that appellant's current condition, which Dr. Talmage opined was

caused by repetitive employment duties, constituted a new occupational injury, rather than a recurrence of disability.

On September 13, 2004 appellant submitted a request for reconsideration. Medical evidence submitted in support of her request for reconsideration, included reports from Dr. James C. Lai, a pain consultant, dated May 26, June 30, August 23 and 26, 2004, diagnosing degenerative disc disease of the cervical spine, cervicgia and cervical radiculopathy. Appellant also submitted physical therapy notes dated September 28, 2004 and two reports from Dr. Rogers, whose April 13, 2004 report contained illegible remarks. September 20, 2004 notes reflected that she had headaches and weakness in her left arm and negative impingement signs.

By decision dated October 8, 2004, the Office denied appellant's request for reconsideration.²

LEGAL PRECEDENT -- ISSUE 1

An employee 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 she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish 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 medical reasoning.³

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between her current condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury and must explain from a medical perspective how the current condition is related to the injury.⁴ Where no such rationale is present, the medical evidence is of diminished probative value.⁵ An award of compensation may not be based on appellant's belief

² The Board notes that on November 29, 2004 appellant submitted another request for reconsideration. However, prior to the Office's decision on her request, she filed this appeal with the Board. It is well established that the Board and the Office may not exercise concurrent jurisdiction over the same issue in the same case. *Cathy B. Millin*, 51 ECAB 331 (2000); *Douglas E. Billings*, 41 ECAB 880 (1990). The Board assumed jurisdiction in this case upon the filing of the appeal and the October 8, 2004 nonmerit decision is null and void. The Board also notes that appellant submitted additional evidence after the Office rendered its June 2, 2004 decision. As the Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision, this new evidence cannot be considered by the Board on appeal. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to the Office, together with a formal request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

³ *Ronald A. Eldridge*, 53 ECAB ____ (Docket No. 01-67, issued November 14, 2001).

⁴ *See Joan R. Donovan*, 54 ECAB ____ (Docket No. 03-297, issued June 13, 2003); *see also John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

⁵ *Mary A. Ceglia*, 55 ECAB ____ (Docket No. 04-113, issued July 22, 2004).

of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.⁶

20 C.F.R. § 10.5(x) provides in part: “*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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.” (Emphasis in the original).⁷

When an employee who is disabled from the job she held is injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability and that she cannot perform the light-duty position. As part of this burden of proof, the employee must show either 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.⁸ To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the recurrence of disability.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of disability on January 2, 2004 causally related to her February 1, 1993 employment injury. While reports from her physicians indicate that her condition worsened, the medical evidence of record does not establish that appellant’s disability was caused by a spontaneous change in her accepted cervical condition resulting from her accepted injury. Rather, the evidence reflects that her disability was caused by new exposure to the work environment. Therefore, by definition, appellant did not sustain a recurrence of disability.¹⁰

In a January 9, 2004 report, Dr. Talmage opined that appellant was “unable to work until further notice” as of January 2, 2004. On January 13, 2004 he indicated that she was experiencing severe pain in her left arm, headaches and inflammation in her shoulder trapezius

⁶ *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

⁷ *See Phillip L. Barnes*, 55 ECAB ____ (Docket No. 02-1441, issued March 31, 2004). The Office procedure manual provides that a recurrence of disability includes a work stoppage caused by an objective, spontaneous, material change in the accepted condition, a recurrence or worsening of disability due to an accepted consequential injury or withdrawal of a light-duty assignment made to accommodate the work-related condition, for reasons other than misconduct or nonperformance. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, Recurrences, Chapter 2.1500.3(b) (May 1997).

⁸ *See Bryant F. Blackmon*, 56 ECAB ____ (Docket No. 04-564, issued September 23, 2005); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

⁹ *See James H. Botts*, 50 ECAB 265 (1999).

¹⁰ *See supra* note 7.

and suprascapular area with irritation of the cervical root. Dr. Talmage noted that appellant had been trying to work a modified position, but that, due to the deterioration of her condition, he had taken her off work until her condition could be upgraded. In a February 11, 2004 report, he stated that his examination of appellant and a recent MRI scan revealed mild strength deficit in the left shoulder, painful arc, mild annular disc bulges at C3-4, C4-5 and C5-6 levels. On March 26, 2004 Dr. Talmage diagnosed muscle spasms with moderate levels of pain and tenderness throughout the cervical thoracic area with associated trigger points. He described bruising to the left arm and numbness and tingling radially to the left hand, as well as headaches associated with cervical pain. Dr. Talmage opined that “as of now [appellant] has been and is unable to work until her condition is upgraded.” None of these reports provide a rationalized medical opinion as to the cause of appellant’s current condition. Dr. Talmage did not address how the accepted cervical strain caused or contributed to the conditions for which he treated her in January 2004. Therefore, the reports are of diminished probative value.¹¹ In his July 7, 2004 report, Dr. Talmage provided some discussion of causal relationship. However, his opinion does not support appellant’s claim for recurrence of disability. Rather, Dr. Talmage noted that her cervical disc problems developed while she was in “regular employment” and that it was “inevitable that appellant’s condition would become worse with the passage of time and repetitive efforts connected with her employment.” His statement on causal relation infers that new employment factors caused appellant’s current condition, undermining her claim for a spontaneous recurrence of disability. Dr. Talmage also stated that her current condition was “a direct progression of appellant’s original injury to her present disability.” He provided, however, only conjectural opinion, but no discussion of the factual record to substantiate a causal relationship between appellant’s current condition and the 1992 or 1993 injury. Dr. Talmage did not explain the relationship of her newly diagnosed condition to the accepted employment injuries or provide medical evidence of bridging symptoms between her current condition and the accepted injury which support the conclusion of a causal relationship.¹² Because Dr. Talmage has failed to do so, his opinion is of diminished probative value.

Appellant also submitted several reports from Dr. Rogers. However, none of the reports provided an explanation as to how her deteriorated condition occurred or a rationalized opinion connecting appellant’s current condition to her accepted injuries. The Board notes that several of Dr. Rogers’ diagnoses, including carpal tunnel syndrome, are beyond the scope of the accepted condition and, therefore, not relevant to her claim for recurrence of disability. Similarly, reports from Dr. Lowry and Dr. Lai fail to provide any discussion of a causal relationship between appellant’s current condition and the accepted injury and, therefore, lack probative value.

Appellant has neither alleged, nor shown a change in the nature and extent of the limited-duty requirements. She has alleged a change in the nature and extent of the injury-related condition. However, the Board finds that the evidence of record does not involve a spontaneous change in her accepted medical condition arising from her employment injuries. Rather, her

¹¹ See *Mary A. Ceglia*, *supra* note 5.

¹² *Id.*

current condition resulted from exposure to new employment factors.¹³ For this reason, the Board will affirm the Office's denial of appellant's claim for recurrence of disability.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,¹⁴ the Office regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) submit relevant and pertinent new evidence not previously considered by the Office.¹⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁶ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS -- ISSUE 2

The Board finds that the Office's denial of merit review did not constitute an abuse of discretion.

In order for appellant to obtain further review of the merits of her claim, she must either show that the Office erroneously applied or interpreted a point of law; advance a point of law or fact not previously considered by the Office; or submit relevant and pertinent evidence not previously considered by the Office.¹⁷ She did not contend that the Office had erroneously applied or interpreted a point of law; nor did she advance a point of law or fact not previously considered by the Office. Instead, she submitted reports from Dr. Lai, physical therapy notes and two reports from Dr. Rogers. The Board finds that the medical evidence submitted by appellant in support of her request for reconsideration is cumulative in nature and did not constitute new relevant and pertinent medical evidence. The medical evidence of record is duplicative of that previously submitted and considered by the Office.¹⁸ Therefore, appellant failed to satisfy any of the standards which would have entitled her to a merit review under the

¹³ The Board notes that appellant may file a new claim with the Office for an occupational injury based upon the facts of this case.

¹⁴ Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

¹⁵ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁶ *Id.* at § 10.607(a).

¹⁷ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁸ Evidence that repeats or duplicates that already of record does not constitute a basis for reopening a claim for merit review. *See James E. Norris*, 52 ECAB 93 (2000).

Act. Accordingly, the Board finds that the Office properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that appellant has failed to meet her burden of proving that she sustained a recurrence of disability or after January 2, 2004 causally related to her accepted February 1, 1993 employment injury. The Board further finds that the Office properly refused to reopen her claim for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 8, August 5 and April 28, 2004 are affirmed.

Issued: December 22, 2005
Washington, DC

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

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board