

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

E.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 06-300
Issued: August 25, 2006**

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of the Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 18, 2005 appellant filed a timely appeal from a decision of an Office of Workers' Compensation Programs' hearing representative dated August 12, 2005. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of disability from October 3 through December 3, 2001 causally related to his accepted left shoulder and neck conditions.

FACTUAL HISTORY

Appellant, a 34-year-old mail handler, filed a claim for benefits on June 28, 2000, alleging that he injured his left shoulder and neck when he was struck by a container. The Office accepted it for left shoulder contusion, left shoulder sprain and cervical sprain. The claim was expanded for acceptance of left shoulder labral tear and synovial cyst. Appellant underwent left shoulder surgery on July 25, 2001. He accepted a light-duty position as a modified mail handler on September 1, 2001.

In a report dated October 3, 2001, Dr. Zohar Stark, Board-certified in orthopedic surgery, stated that appellant was complaining of pain in his neck which radiated to his shoulder and increased on range of motion. He related complaints of pain in appellant's left shoulder and numbness in his hands. Dr. Stark diagnosed degenerative disc disease of the cervical spine, bulging disc at C5-6, herniated intervertebral disc at C6-7, post arthroscopic surgery of the left shoulder and left carpal tunnel syndrome.

In a report dated October 4, 2001, Dr. Michael M. Cohen, Board-certified in psychiatry and neurology, stated, "When I evaluate the patient in two months I would like the patient to work six hours maximum, every other day."¹

In a report dated October 22, 2001, Dr. Easwaran Balasubramanian, Board-certified in orthopedic surgery, stated that appellant told him "he is presently working in a light-duty capacity using only the right arm." He opined that appellant had not recovered from his June 28, 2000 work injury. Dr. Balasubramanian advised that appellant was not able to return to regular duty, but could return to work in a full-time modified duty capacity with very limited use of the left upper extremity.

In order to determine appellant's current condition, the Office referred him to Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, for a second opinion examination.² In a report dated November 26, 2001, he stated:

"Today's examination revealed a mild restriction in motion of the left shoulder, attributable to the injury of June 28, 2000 and subsequent surgery. However, his range of motion was within the functional range and he has no significant functional limitation related to his shoulder motion. There is no evidence of any ongoing cervical strain, left shoulder contusion or ongoing labral tear.... The patient has complaints referable to cervical degenerative disease which is not part of this claim and represents a preexisting condition.... He was unable to work until the beginning of September when Dr. Lazarus returned him to limited duty. Thus his period of full disability was approximately five weeks in duration.

"In my opinion, with regard to the work-related shoulder injury, he is capable of returning to full-duty work without limitation or restriction."

On April 4, 2002 appellant filed a Form CA-2a claim for recurrence of disability, alleging that, from October 3 to December 2001, he sustained a recurrence of his June 28, 2000 accepted employment injury.

¹ Dr. Cohen reiterated this recommendation in a December 3, 2001 report, in which he noted that appellant's low back pain was unchanged. Previously, in a June 14, 2001 report, Dr. Cohen had indicated that he was treating appellant for lower back pain.

² The November 5, 2001 statement of accepted facts indicated that "he is currently working with restrictions, six hours per day, every other day." An employing establishment memorandum indicated that, as of October 4, 2001, appellant commenced working three days per week for six hours per day.

In an April 8, 2002 report, Dr. Cohen stated that he had examined appellant and approved his return to full-time duty for eight hours per day on a trial basis, with no change in his work restrictions.

The Office determined that there was a conflict in the medical evidence between Dr. Cohen, the attending physician, and Dr. Mandel, the second opinion physician, regarding whether appellant sustained a recurrence of disability between October 3 and December 3, 2001. The Office referred the case to Dr. Edward J. Resnick, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated June 24, 2002, Dr. Resnick stated:

“[T]he cervical strain appellant sustained on June 28, 2000 may have exacerbated a previously asymptomatic cervical degenerative condition or that the condition may have prolonged the effects of the cervical strain. In either case, I feel that this man does have sufficient cervical signs and symptoms to temporarily restrict his work.”

By letter dated July 11, 2002, the Office asked Dr. Resnick for a supplemental report to clarify his findings that appellant had a “minor persistent objective impairment of the cervical spine” and “minimal residual impairment of the left shoulder.”

By letter dated July 12, 2002, the Office, noting that Dr. Resnick only made findings regarding appellant’s accepted cervical condition in his report, indicated it had requested a supplemental report from Dr. Resnick containing treatment for both conditions.

By decision dated July 12, 2002, the Office denied appellant compensation for a recurrence of his accepted left shoulder and neck conditions. The Office found that appellant failed to submit medical evidence sufficient to establish that the claimed condition or disability as of October 3, 2001 was caused or aggravated by his accepted conditions.³

By letter dated July 17, 2002, appellant’s attorney requested an oral hearing, which was held on March 11, 2003.

By decision dated June 16, 2003, an Office hearing representative set aside the July 12, 2002 decision, finding that there was an unresolved conflict in the medical evidence. The hearing representative noted that the Office had requested clarification and a supplemental opinion from Dr. Resnick, the referee examiner; however, it issued a decision denying compensation prior to receiving the supplemental report. The hearing representative remanded the case back to the Office and instructed it to secure Dr. Resnick’s supplemental report.

By decision dated October 7, 2003, the Office denied the claim for recurrence of disability. The Office stated that, although it had obtained a referee report from Dr. Resnick, the purpose of the evaluation was not to address the claimed recurrence, as there was no medical

³ The Office did not rely on or mention Dr. Resnick’s referee report in rendering this decision. By letter dated July 12, 2002, the Office indicated it had requested a supplemental report from Dr. Resnick containing treatment for both conditions.

opinion supporting a recurrence of disability and, therefore, no conflict in the medical evidence. Rather, the Office found the conflict in the medical evidence concerned whether appellant was capable of working his assigned light duty for the period October 3 to December 3, 2001. The Office noted that Dr. Resnick's opinion was not relied upon in the July 12, 2003 decision because it was not required to resolve the purported conflict regarding an alleged recurrence of disability. The Office found that appellant failed to establish he was totally disabled during the period October 3 to December 3, 2001 due to his accepted conditions.

By letter dated October 9, 2003, appellant's attorney requested an oral hearing.

By decision dated May 26, 2004, the Office hearing representative found that the case was not in posture for an oral hearing. The hearing representative reiterated the instructions he outlined in the June 16, 2003 decision and noted that until such time as the case was referred back to Dr. Resnick for a supplemental report to resolve the conflict in medical evidence, the case would not be in posture for decision.

In a July 15, 2004 supplemental report, Dr. Resnick concluded that, although appellant experienced some residual disability from his accepted left shoulder and cervical conditions, he was not totally disabled during the period October 3 to December 3, 2001.

By decision dated August 11, 2004, the Office denied appellant's claim for recurrence of disability. The Office found that Dr. Resnick's referee opinion represented the weight of the medical evidence.

By letter dated August 23, 2004, appellant's attorney requested an oral hearing, which was held on May 23, 2005.

By decision dated August 12, 2005, an Office hearing representative affirmed the August 11, 2004 decision denying compensation for a recurrence of disability from October 3 to December 3, 2001. The Office found that appellant failed to submit contemporaneous medical evidence establishing that he sustained any additional disability causally related to his accepted conditions.

LEGAL PRECEDENT

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability. As part of this burden, 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.⁴

⁴ *Terry Hedman*, 38 ECAB 222 (1986).

ANALYSIS

The record does not contain any medical opinion showing a change in the nature and extent of appellant's injury-related conditions. Appellant failed to submit any medical opinion containing a rationalized, probative report which relates his condition or disability as of October 3, 2001 to his accepted employment conditions. For this reason, he has not discharged her burden of proof to establish his claim that he sustained a recurrence of disability as a result of his accepted employment conditions.

The only contemporaneous medical evidence which appellant submitted consisted of the reports from Dr. Cohen and Dr. Stark. The weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.⁵ Dr. Cohen's reports indicated generally that appellant complained of neck and left shoulder pain and documented that his work hours were reduced from 40 to 18 as of October 2001. However, he did not provide a probative, rationalized medical opinion sufficient to establish that appellant's disability as of October 3, 2001 was causally related to the accepted left shoulder and cervical conditions. Dr. Cohen did not explain the medical process by which any of the accepted conditions would have been competent to cause the alleged recurrence of disability. His opinion, therefore, is of diminished probative value as it does not contain medical rationale explaining how or why appellant's accepted conditions caused or contributed to his alleged recurrence of disability.⁶ Dr. Stark noted complaints of pain in appellant's neck and left shoulder and diagnosed degenerative disc disease of the cervical spine, bulging disc at C5-6, herniated intervertebral disc at C6-7, post arthroscopic surgery of the left shoulder and left carpal tunnel syndrome. However, he did not provide a rationalized medical opinion as to whether appellant's accepted neck and shoulder conditions resulted in his being partially disability from work; *i.e.*, cutting back from 40 to 18 hours per week in his modified job. Neither Dr. Cohen nor Dr. Stark, therefore, supported that appellant's accepted conditions contributed to his alleged recurrence of disability on October 3, 2001 with probative, rationalized medical evidence.

The reports from Drs. Cohen and Stark do not constitute sufficient medical evidence demonstrating a causal connection between appellant's employment-related conditions and his alleged recurrence of disability. Causal relationship must be established by rationalized medical opinion evidence. The reports submitted by appellant failed to provide an explanation in support of his claim that he became disabled as of October 3, 2001. These reports do not establish a worsening of appellant's condition and, therefore, do not constitute probative, rationalized evidence demonstrating that a change occurred in the nature and extent of the injury-related condition.⁷

⁵ See *Ann C. Leanza*, 48 ECAB 115 (1996).

⁶ *William C. Thomas*, 45 ECAB 591 (1994).

⁷ *Id.*

Although Dr. Resnick was at one point identified as an impartial medical specialist, the Board finds that there was no conflict in the medical evidence, requiring referral to an impartial medical specialist. There was no evidence of record that appellant's accepted conditions caused increased disability from work as of October 3, 2001. Ultimately Dr. Resnick's reports did not support a finding that appellant sustained additional disability due to his accepted conditions after October 3, 2001.

The Board finds that the evidence fails to establish that there was a change in the nature and extent of appellant's limited-duty assignment such that he no longer was physically able to perform the requirements of her light-duty job. The record demonstrates that appellant returned to work on September 1, 2001. Although appellant began working for only three hours per week, six hours per day on October 4, 2001, a schedule which he maintained until December 3, 2001, he has submitted no factual evidence to support a change occurred in the nature and extent of his limited-duty assignment during the period claimed. Accordingly, as appellant has not submitted any factual or medical evidence supporting his claim that he was totally disabled from performing his light-duty assignment in October 2001 as a result of his employment, appellant failed to meet his burden of proof.

As appellant has not submitted sufficient medical evidence to establish that the claimed condition and disability as of October 3, 2001 was caused or aggravated by his employment injury, appellant has not met his burden of proof in establishing that he sustained a recurrence of disability. The Board therefore affirms the August 12, 2003 Office decision affirming the August 11, 2004 denial of compensation based on a recurrence of his work-related disability.

CONCLUSION

The Board finds that appellant has not met his burden to establish that he was entitled to compensation for a recurrence of disability for the period October 3 to December 3, 2001 causally related to his accepted left shoulder and cervical conditions.

ORDER

IT IS HEREBY ORDERED THAT the August 12, 2005 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: August 25, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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