

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

P.B., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
FINANCE & ACCOUNTING SERVICE,
Indianapolis, IN, Employer**

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**Docket No. 10-2175
Issued: June 9, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2010 appellant, through her attorney, filed a timely appeal from a July 13, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her claim for a recurrence. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant has established a recurrence of disability commencing October 6, 2009 causally related to her October 14, 2008 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the July 13, 2010 OWCP decision and on appeal, appellant submitted new evidence. However, the Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence, together with a written request for reconsideration to OWCP, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

On appeal, appellant's attorney contends that the July 13, 2010 OWCP decision was contrary to fact and law.

FACTUAL HISTORY

On November 10, 2008 appellant, then a 51-year-old accounting technician, filed a traumatic injury claim (Form CA-1) alleging that she injured her right hand, right wrist, right arm and right leg in the performance of duty on October 14, 2008. She also filed a Form CA-7 claim for compensation for intermittent periods beginning January 4, 2009.

On February 23, 2009 OWCP accepted appellant's claim for right bicipital tenosynovitis and right gamekeeper's thumb.

On April 27, 2009 OWCP notified appellant of her payment of compensation for the period April 12 to May 9, 2009.³

On June 16, 2009 the employing establishment offered appellant a limited-duty position as an accounting technician. The employing establishment noted that the job offer was consistent with the medical recommendations of Dr. Walter Short, a Board-certified orthopedic surgeon, who advised her to return full time on May 21, 2009. Appellant accepted the job offer on June 18, 2009.

On October 13, 2009 appellant requested authorization for a consultation by Dr. Thomas R. Haher, a Board-certified orthopedic surgeon, is concerning the right side of her neck.

On October 14, 2009 OWCP authorized a one-time consultation with Dr. Haher, who was to submit a medical report discussing the history of injury, diagnosis of all conditions, an opinion regarding the relationship of appellant's diagnosed conditions and her injury and work restrictions.

On November 20, 2009 appellant filed a notice of recurrence. She alleged that she started experiencing pain in her right arm and shoulder in September 2009. Appellant reported that the recurrence started in and around October 6, 2009 and the pain became severe on November 5, 2009.

Appellant submitted a November 9, 2009 medical report by Dr. Short, who reported that she was doing increased writing and typing at work and complained of increasing pain in her upper arm down into her wrist and hand. Dr. Short reported that she received a cortisone injection in the spring of 2009 which gave her relief from the similar shoulder like symptoms

³ By decision dated July 22, 2009, OWCP found that appellant was not at fault in the creation of a \$359.73 overpayment from May 27 through June 6, 2009. It denied waiver on two grounds: (1) appellant gave no basis to consider waiver as she did not provide a completed Form OWCP-20 with supporting financial documentation; and (2) she was still receiving benefits from OWCP. On November 27, 2009 OWCP notified appellant that it elected not to pursue further collection actions under 4 C.F.R. § 103.4 which states that a claim may be compromised if the cost of collection would not justify enforcing the collection of the full claim.

that have now recurred. He diagnosed shoulder and hand pain and opined that the incident described by appellant was a competent medical cause of her injury.

By letter dated December 2, 2009, OWCP requested appellant to submit additional evidence to support her claim and attached a recurrence development checklist for completion. It gave her 30 days to respond to its inquiries.

In a November 20, 2009 medical report, Dr. Hafer reported that appellant complained of pain in her cervical spine and upper right extremity radiation. He noted that she underwent a magnetic resonance imaging (MRI) scan, which showed evidence of a herniated disc at C5-6 which was compatible with her symptoms. Dr. Hafer diagnosed appellant with herniated cervical disc and opined that there was a causal relationship between the herniated disc and her fall at work.

Appellant submitted a recurrence development checklist on December 10, 2009. She reported that she had a cortisone shot in her upper right shoulder on May 21, 2009 and did not experience pain again until September 2009. Appellant stated that she sustained no other injuries prior to or since the date of original injury, October 14, 2008.

In a letter received by OWCP on December 28, 2009, appellant's supervisor indicated that appellant was transferred to the Funds Requirement Team at her own request in May 2009. Appellant requested medical accommodation on October 22, 2009 in the form of being moved to another team. She did not file the required paperwork for transfer, even after an extension was issued and remained in the same team. Appellant called out sick on November 5, 2009 complaining of shoulder pain; she stated that she was going to see a physician and reopen her workers' compensation case. She did not return to work.

By decision dated January 7, 2010, OWCP denied appellant's claim for a recurrence on the grounds that the evidence did not establish that she sustained a recurrence of disability commencing on October 8, 2009 causally related to the October 14, 2008 employment injury.

On January 21, 2010 appellant requested an oral hearing *via* telephone before OWCP's hearing representative.

Appellant submitted two radiologic reports dated October 2, 2009. An x-ray of her dorsal spine revealed tilting of the lower thoracic spine to the right secondary to a moderate scoliosis of the upper lumbar spine convex to the right. An x-ray for appellant's cervical spine revealed moderate disc narrowing at C5-6 and C6-7, tilting of the cervical spine to the left and mild straightening of the normal lordotic curvature.

In an October 14, 2009 medical report, Dr. Richard Zogby, a Board-certified orthopedic surgeon, indicated that appellant complained of cervical spine pain and did not recall any specific inciting injury or event. He diagnosed cervical spondylosis and opined that it was not related to her work injury to her upper extremity.

In a November 6, 2009 MRI scan report, Dr. Michael W. Fries, a Board-certified radiologist, diagnosed degenerative changes in the disc of appellant's cervical spine with posterior changes, most prominent at C5-7.

In a December 15, 2009 medical report, Dr. Short indicated that appellant's pain in the right side of her neck and right shoulder began for no apparent reason. He reported that her complaints of a right upper extremity radiculopathy appeared to have a relevant cervical component and a more peripheral component involved as well.

A telephonic hearing was conducted by OWCP's hearing representative on April 26, 2010. Appellant testified that her permanent-duty assignment as an accounting technician required more writing and typing than the job wherein she sustained an employment injury on October 14, 2008.

By decision dated July 13, 2010, OWCP denied appellant's claim for a recurrence on the grounds that the factual and medical evidence submitted was insufficient to establish that she sustained a recurrence of disability commencing on October 6, 2009 causally related to the October 14, 2008 employment injury.

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁴ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁵

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-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 to show that she cannot perform such limited-duty work. 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 limited-duty job requirements.⁶

ANALYSIS

On February 23, 2009 OWCP accepted appellant's claim for right bicipital tenosynovitis and right gamekeeper's thumb. The issue on appeal is whether she has established a recurrence of disability commencing on October 6, 2009 as a result of her October 14, 2008 employment injury. Although appellant testified that her limited-duty job required more writing and typing

⁴ 20 C.F.R. § 10.5(x). See *T.S.*, Docket No. 09-1256 (issued April 15, 2010).

⁵ *Id.*

⁶ See *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); *A.M.*, Docket No. 09-1895 (issued April 23, 2010).

than the job wherein she sustained the October 14, 2008 employment injury, she did not submit evidence to show that the requirements of her job changed from the time she began work. She therefore has the burden of proof to show a change in the nature and extent of her injury-related condition.

In a November 9, 2009 medical report, Dr. Short reported that appellant's symptoms from her October 14, 2008 employment injury had recurred. He diagnosed shoulder and hand pain and opined that the incident described by her was a competent medical cause of her injury. In a December 15, 2009 medical report, Dr. Short indicated that appellant's shoulder pain began for no apparent reason. He did not provide a report establishing a spontaneous change in the accepted employment-related injuries. While Dr. Short indicated knowledge of a recurrence of disability at work, he did not provide a well-reasoned medical narrative report explaining how factors of appellant's federal employment materially worsened or aggravated her right bicipital tenosynovitis and right gamekeeper's thumb conditions to the point where she could no longer perform the function of her duties causing her to be totally disabled for work. Therefore, appellant met her burden of proof.

OWCP did not accept a cervical condition causally related to appellant's October 14, 2008 employment injury prior to the filing of her claim on November 20, 2009. Drs. Zogby, Haher and Short provided medical reports regarding a cervical condition. As OWCP had not accepted a cervical condition as employment related, appellant had the burden of proof to establish a nexus between cervical condition and the October 14, 2008 employment injury.⁷ Appellant has failed to do so. The issue here is a recurrence of accepted medical conditions. She has not met her burden of proof.

The Board finds that the evidence submitted by appellant does not provide adequate rationale to show a change in the nature and extent of the injury-related condition of October 14, 2008. Therefore, appellant did not meet her burden of proof to establish a recurrence of disability.

Appellant may submit new evidence or argument with a written request for reconsideration to the Office within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden to establish that she sustained a recurrence of disability commencing October 6, 2009 causally related to her October 14, 2008 employment injury.

⁷ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 9, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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