

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

MALINDA M. SMITH, Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING &)
DISTRIBUTION CENTER, Lancaster, PA,)
Employer)

**Docket No. 05-902
Issued: September 23, 2005**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On March 9, 2005 appellant filed a timely appeal of a November 2, 2004 decision of the Office of Workers' Compensation Programs that denied her claims for right elbow and cervical spine conditions, recurrences of disability beginning July 7 and October 29, 2000 and a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issues are: (1) whether appellant's right elbow and cervical spine conditions are causally related to her employment; (2) whether appellant sustained recurrences of disability beginning July 7 and October 29, 2000; and (3) whether appellant has an impairment of the left arm that entitles her to a schedule award.

FACTUAL HISTORY

On April 4, 1997 appellant, then a 39-year-old mail processor, filed a claim for compensation for a traumatic injury sustained on January 23, 1997 by attempting to pull a cart on which the wheels were locked. She indicated that she strained her left shoulder and twisted her left elbow. The Office accepted that appellant sustained tendinitis of her left shoulder and lateral epicondylitis of her left elbow.

On August 4, 1997 Dr. Joseph H. Mehm, a Board-certified orthopedic surgeon, performed lateral epicondyle stripping surgery on appellant's left elbow. On September 22, 1997 appellant returned to work involving only use of her right hand. In a January 8, 1998 report, Dr. Mehm noted minor complaints of intermittent discomfort of the right elbow, but stated that appellant had a full functional result of her surgery and could return to work without restrictions. Appellant returned to her regular duty on January 8, 1998, but on February 16, 1998 complained of pain and burning of her left elbow.

In a May 12, 1998 report, Dr. Robert S. Mathews, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion evaluation, diagnosed persistent left elbow pain with extensor epicondylitis, which he stated was a residual of her January 23, 1997 employment injury. Dr. Mathews stated that appellant had not yet reached maximum medical improvement from her elbow surgery, that the repetitive nature of her full duty increased her localized symptoms and that her episodes of numbness and dropping of objects were directly related to weakness in her wrist and elbow which were directly related to her January 23, 1997 injury. He concluded that appellant could return to work without restrictions. The Office authorized further treatment of her left elbow condition, including physical therapy recommended by Dr. Mathews. In an August 12, 1998 report, Dr. Mehm stated that appellant had very little response to physical therapy, that she had increased symptoms on the right side and that she needed no further treatment. He recommended permanent restrictions of lifting no more than 10 pounds and working no more than four hours per day on the sorting machine.

On May 3, 1999 appellant filed a claim for compensation for a recurrence of disability on February 9, 1999, stating that on that date she sought treatment for soreness of her right elbow. She stated that in her permanent light-duty assignment, she lifted trays and cased letters primarily with her right arm. In an April 5, 1999 report, Dr. Gary Zartman, a Board-certified orthopedic surgeon, diagnosed right lateral epicondylitis which he treated with injections, physical therapy and splinting. In a June 8, 1999 report, he noted an impingement sign of both shoulders, but no tear or tendinitis on a magnetic resonance imaging (MRI) scan of the right shoulder. The Office accepted the additional condition of bilateral rotator cuff tendinitis.

In a May 9, 2000 report, Dr. Kenneth L. Hurst, a Board-certified family practitioner, stated that appellant's bilateral epicondylitis was now worse on the right and that "her bilateral epicondylitis is secondary to the injury to the left elbow and the consequent additional strain that placed on her right elbow while she was working with the left repaired, although the right elbow tendinitis was not involved with the initial injury." On June 16, 2000 Dr. Perry J. Argires, a Board-certified neurosurgeon, examined appellant for neck and arm pain and, to rule out cervical spondylosis or a herniated disc, had an MRI scan of her cervical spine performed, which was normal. In a July 7, 2000 report, Dr. Argires stated that appellant continued to have neck pain,

that she was unable to work secondary to her pain and that she did not have a neurosurgical problem but was having a myofascial pain-type syndrome, for which he referred her to Dr. Robert C. Steinman, a Board-certified psychiatrist. In an August 21, 2000 report, Dr. Steinman diagnosed bilateral lateral epicondylitis and mild cervical and shoulder girdle strain with myofascial pain and headaches. He stated that appellant developed the right lateral epicondylitis due to relative overuse of the right arm because of the chronic and prolonged trouble with the left arm and due to “the work itself, which requires some straining and repetitive activity.” Dr. Steinman indicated that appellant could perform limited duty with no lifting over eight pounds and working on the sorting machine half a day, sorting the other half.

On August 2, 2000 appellant filed a claim for compensation for a recurrence of disability beginning on July 7, 2000 which she attributed to elbow, shoulder and neck pain and headaches. In an August 9, 2000 report, Dr. Hurst stated that the Office’s guidelines for recovery from tendinitis were not absolutes and could not be applied in every instance and that appellant’s situation was “not a simple tendinitis or epicondylitis but is a combination of a number of factors including postoperative and also recruitment of several additional problems to the one she first started with which really complicates the matter and is frustrating for everyone, especially the patient.”

In a November 14, 2000 report, of appellant’s work tolerance limitations, Dr. Hurst indicated appellant could work only six hours per day and that she should avoid the sorting machine. On December 22, 2000 appellant filed a claim for compensation for the period December 9 to 22, 2000, during which she worked six hours each scheduled workday, except for December 14, 17 and 20, when she did not work.¹

In a January 2, 2001 report, Dr. Raymond Peart, a Board-certified orthopedic surgeon, to whom the Office referred appellant for the stated reason of resolving a conflict of medical opinion, diagnosed “persistent bilateral upper extremity complaints with cervical complaints and an atypical, somewhat exaggerated pain response.” Dr. Peart concluded that appellant’s left elbow condition was likely related to her 1997 employment injury, but that her cervical myofascial pain syndrome was not truly a work-related condition. He recommended long-term restrictions, including a 10-pound limit on lifting, pushing and pulling. Dr. Peart did not respond to an Office inquiry whether appellant’s right elbow epicondylitis was related to her employment.

By decision dated May 4, 2001, the Office found that the evidence failed to establish that appellant’s claimed recurrence of July 7, 2000 was causally related to her employment.

On June 4, 2001 appellant filed a claim for compensation for a recurrence of disability from October 29 to November 15, 2001. She stated that her repetitive work caused pain in her arms, hands, neck and headaches. Appellant submitted an October 31, 2000 report from Dr. Hurst which stated that she should be excused from work for two weeks “due to her profound incapacity aggravated by work.” In a September 17, 2001 report, Dr. Hurst stated: “There are times when a chronic condition needs more drastic measures to be favorably affected and a work leave of a few weeks to a month is often helpful in interrupting the ongoing aggravating effects

¹ It does not appear that the Office adjudicated this claim.

from work and also to test the hypothesis that it is the work that is aggravating it in the first place.” In a November 6, 2001 report, Dr. Hurst stated that appellant was unable to tolerate work without aggravating her symptoms and that the appearance of more trigger points qualified her for the diagnosis of fibromyalgia.

On February 18, 2002 appellant filed a claim for a schedule award. She submitted a November 8, 2001 report from Dr. Nicholas Diamond, an osteopath, who stated that application of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to appellant’s weakness of grip, her shoulder motion, and her motor and sensory deficits resulted in a 42 percent impairment of the right arm and a 53 percent impairment of the left arm.

By decision dated February 21, 2002, an Office hearing representative found that Dr. Peart was not an impartial medical specialist resolving a conflict of medical opinion, as there was no conflict on the claimed recurrence of disability at the time of the referral. The hearing representative remanded the case to the Office for referral to an impartial medical specialist to address residuals of the accepted condition, the causal relation of appellant’s cervical spine condition and the recurrences of disability in July and December 2000.

On March 21, 2002 the Office referred appellant, the case record and a statement of accepted facts to Dr. Gregory A. Hanks, a Board-certified orthopedic surgeon, for a reasoned opinion whether appellant had residuals of her January 23, 1997 injury, whether her cervical spine condition was related to that injury and whether she had injury-related restrictions for work. In an April 10, 2002 report, Dr. Hanks reviewed appellant’s history and the prior medical reports and stated that examination showed full range of motion of the elbows and a strength deficit in a nonanatomic distribution. He stated that appellant’s diagnoses with respect to her employment injury were left lateral epicondylitis and resolved left shoulder tendinitis, that only her ongoing left elbow complaints were related to that injury and that there were no objective findings or documented work injuries to account for her neck and right arm symptoms. He opined that her right arm symptoms were not caused by her left elbow injury and that her cervical complaints and myofascial syndrome were more related to fibromyalgia and not related to work. The only injury-related work restrictions he imposed were no repetitive lifting or pulling of objects weighing more than 20 pounds with the left arm.

By decision dated June 3, 2002, the Office found that the weight of the medical evidence did not support appellant’s claims for recurrences of disability or for a work-related cervical spine condition. An Office medical adviser reviewed Dr. Hanks’ report on June 7, 2002 and stated that it showed no impairment, as there was a full range of motion, no sensory deficit, nonanatomic weakness that meant it was not due to motor nerve dysfunction and pain that was not attributed to the accepted conditions. In an August 20, 2002 report, Dr. Hurst stated that appellant’s chronic myofascial pain was secondary to old injuries around the shoulder girdles and neck. By decision dated October 30, 2002, the Office found that appellant did not have a permanent impairment and was not entitled to a schedule award.

Following a hearing held at appellant’s request on February 18, 2004, an Office hearing representative, by decision dated April 30, 2004, found that the April 10, 2002 report from Dr. Hanks was not sufficient to resolve the conflict of medical opinion, as it did not provide

rationale on the relationship to the employment injury of the cervical spine and right arm conditions and did not address the claimed July and October 2000 recurrences of disability. The Office referred appellant back to Dr. Hanks, who, in a September 17, 2004 report, stated that the magnitude of her left elbow complaints of pain was more than he usually would see or expect from similar injuries and that her pain distribution was in an atypical, nonanatomic distribution which led him to conclude that she had significant contribution from myofascial pain syndrome. In response to the Office's question whether appellant's right elbow condition was a consequence of her January 23, 1997 injury, Dr. Hanks stated that there was "no medical documentation of any injury to the right upper extremity nor is there any anatomic link between her right arm and left elbow injury" and "no medical evidence to substantiate a claim that right elbow overuse is due in any way to a left elbow epicondylitis." In response to the question whether appellant was disabled from July 7 to August 21, 2000 and beginning October 29, 2000, he stated that he did not see any evidence in the medical reports that would prohibit her from working due to her left elbow injury and no reason why she would have been unable to perform modified duty during these time periods.

By decision dated November 2, 2004, the Office found that appellant's right elbow and cervical spine conditions and her claimed recurrences of disability beginning July 7 and October 29, 2000 were not related to her employment and that she was not entitled to a schedule award. The basis of the decision was that Dr. Hanks' September 17, 2004 report represented the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that her condition was caused or adversely affected by her employment. As part of this burden she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relation. The mere fact that a disease manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two. Neither the fact that the disease became apparent during a period of employment, nor the belief of appellant that the disease was caused or aggravated by employment conditions is sufficient to establish causal relation.² If a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury.³

ANALYSIS -- ISSUE 1

Appellant has not established that her cervical spine condition is causally related to her employment. Dr. Hurst's August 20, 2002 report stating that her chronic myofascial pain was secondary to old injuries around the shoulder girdles and neck, when read in conjunction with his December 19, 2000 report stating that appellant's neck pain was from myofascitis, lends some support to the claim that her cervical spine condition is related to her employment. Dr. Hurst,

² *Froilan Negron Marrero*, 33 ECAB 796 (1982).

³ *Sandra Dixon-Mills*, 44 ECAB 882 (1993).

however, provided no rationale explaining how a cervical spine condition was related to appellant's January 23, 1997 injury to her elbow or to her employment duties and his reports are insufficient to meet her burden of proof. There is no other medical evidence that supports the claim that the cervical spine condition is related to her employment and Drs. Peart and Hanks concluded that there was no such relationship. Given the weakness of the support for causal relation, there was no conflict of medical opinion on this issue. Instead, the medical evidence was simply insufficient to meet appellant's burden of proof on this condition.

On the right elbow condition, there also was not a conflict of medical opinion at the time of the Office's referrals to Dr. Peart or Dr. Hanks, Board-certified orthopedic surgeons, whom the Office characterized as impartial medical specialists resolving conflicts of medical opinion. At the time of these referrals, the only medical evidence addressing the causal relation of these injuries to appellant's employment supported such a relationship. In a May 9, 2000 report, Dr. Hurst attributed her right elbow epicondylitis to the left elbow injury and the consequent additional strain on her right elbow while working. This supports a consequential injury and an injury due to the work appellant performed after her January 23, 1997 injury, as does an August 21, 2000 report from Dr. Steinman, a Board-certified physiatrist, who attributed her right elbow epicondylitis to overuse because of her left arm trouble and to the repetitive nature of the work itself.

The reports of Dr. Hanks thus did not resolve a conflict of medical opinion on the causal relation of appellant's right elbow condition to her employment, but rather caused one. In his April 10, 2002 report, Dr. Hanks stated that appellant's right arm symptoms were not caused by her left elbow injury and in his September 17, 2004 report explained that there was no anatomic link between the right and left arms and no medical evidence to substantiate right elbow overuse due to left elbow epicondylitis.

LEGAL PRECEDENT -- ISSUE 2

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee 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 to show that he or 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.⁴

ANALYSIS -- ISSUE 2

Appellant has not met her burden of proving that she sustained a recurrence of disability beginning July 7, 2000 or beginning October 29, 2000. On both these dates she was performing limited duty and she does not contend that the requirements of this duty changed. She also has not shown a change in the nature and extent of her injury-related condition.

⁴ *Terry R. Hedman*, 38 ECAB 222 (1986).

Dr. Argires, a Board-certified neurosurgeon, examined appellant on July 7, 2000 the date of one of her claimed recurrences of disability and stated that she could not work secondary to neck pain. As appellant has not established that her neck condition is related to her employment, his report attributes her disability beginning July 7, 2000 to a condition not related to her employment. An August 9, 2000 report from Dr. Hurst did not indicate that she was disabled and Dr. Steinman's August 21, 2000 report indicated that appellant could perform the limited duty she had been performing up to July 7, 2000.

In an October 31, 2000 report, Dr. Hurst stated that appellant should be excused for two weeks "due to profound incapacity aggravated by work." This addresses the period of the claimed recurrence of total disability from October 29 to November 15, 2000, but does not show that the nature and extent appellant's injury-related condition changed. Neither does Dr. Hanks' September 17, 2001 report which stated that taking a few weeks off work was "often helpful in interrupting the ongoing aggravating effects from work."

LEGAL PRECEDENT -- ISSUE 3

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulations⁶ sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.

ANALYSIS -- ISSUE 3

There is presently an unresolved conflict of medical opinion on the issue of whether appellant has an impairment of the left arm related to her January 23, 1997 employment injury. Dr. Diamond concluded in a November 8, 2001 report, that appellant had a 53 percent impairment of the left arm and correlated the specific impairments of grip, strength and loss of motion to percentages from tables in the A.M.A., *Guides*. An Office medical adviser reviewed Dr. Hanks' April 10, 2002 report and explained why it showed no permanent impairment, stating that the weakness was not anatomic, the motion was full and the pain was not related to the employment injury.

CONCLUSION

The Board finds that appellant has not established that her cervical spine condition is causally related to her employment and has not established that she sustained recurrences of disability beginning July 7 or October 29, 2000 related to her employment injury. The Board further finds that there are conflicts of medical opinion on the issue of whether appellant's right

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

elbow condition is related to her employment duties and/or as a consequential injury and on the issue of whether she has an impairment of her left arm.

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2004 decision of the Office of Workers' Compensation Programs is affirmed with regard to the cervical spine condition and the recurrences of disability beginning July 7 and October 29, 2000. With regard to the right elbow condition and entitlement to a schedule award for the left arm, the November 2, 2004 Office decision is set aside and the case remanded to the Office for resolution of the conflicts of medical opinion on these issues, to be followed by an appropriate decision.

Issued: September 23, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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