

File Number:
HR11-D-H

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U.S. DEPARTMENT OF LABOR

OWCP/DFEC, PO BOX 34090
SAN ANTONIO, TX 78265
Phone: (202) 693-0045

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Date of Injury:
Employee:

Dear

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A preliminary review has been completed, and it has been determined that the case is not in posture for a hearing at this time. The decision of the District Office has been vacated and returned to the district office for further action as explained in the attached Remand Order.

Your case file has been returned to the New York City District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OWCP/DFEC, PO BOX 34090
SAN ANTONIO, TX 78265

Sincerely,

PAUL FELSER, ESQ
7393 HODGSON MEMORIAL DRIVE
SUITE 102
SAVANNAH, GA 31406

If you have a disability and are in need of communication assistance (such as alternate formats or sign language interpretation), accommodation(s) and/or modification(s), please contact OWCP.

Washington DC, July 02, 2020

U. S. DEPARTMENT OF LABOR
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

*In the matter of the claim for compensation under Title 5, U. S. Code 8101 et. seq. of
claimant, employed by the _____ case number _____*

*Merit consideration of the claim was completed in Washington D.C. Based on this review, the
decision of the district office dated _____ is set aside for the reasons set forth below.*

The issue for determination is whether the basis of the Office's denial of the claim was appropriate.

The claimant was employed as a city carrier with the _____, when she filed a CA2a Notice of Recurrence form under claim _____, for recurrence and work stoppage on _____. On this form, the claimant stated on _____ she was delivering mail when she had neck spasms and shoulder pain.

Under claim _____ the claimant filed a CA1 Notice of Traumatic Injury form claiming on _____, she was rear ended by another vehicle while in the performance of her duties. The nature of injury claimed involved her neck, shoulder, and back. The claimant stopped work following the injury and initially sought medical attention from a chiropractor. On _____ she came under the care of Board-certified physical medicine and rehabilitation physician, _____ M.D., and was referred to physical therapy. The claimant was released to modified duty as of _____. On _____ the Office accepted the claim for lumbar strain and cervical radiculopathy. On _____, the claimant underwent a cervical MRI which was interpreted as showing straightening of cervical spine possibly related muscle spasm, central herniated disc at C3-C4 with pressure on dural sac, and mid to right paracentral herniated disc at C4-C5 with pressure on dural sac. An _____ lumbar MRI was interpreted as a normal study. The claimant later underwent electrodiagnostic testing on _____ which revealed evidence of right C5-C6 radiculopathy as well as right carpal tunnel syndrome. On _____ the Office expanded the claim for the diagnosis of right shoulder sprain.

On _____, the Office received a CA7 Claim for Compensation form claiming leave without pay from _____ to _____. By letter dated _____ the Office advised the claimant that she needed to submit a CA2a Notice of Recurrence form, which the Office received on _____ along with another CA7 form claiming disability through _____. A right shoulder MRI report was received, which noted degenerative changes; small subchondral cysts humerus head; irregularity of the supraspinatus tendon suspicious for partial tear with no retraction; subacromial spur and questionable type II acromion with borderline impingement; and fluid in the sheath of the biceps tendon with thinning of the biceps tendon.

Washington DC, July 02, 2020

In a [redacted] medical report, Dr. [redacted] advised the MRI confirmed right biceps tendon tear and supraspinatus tendon tear and cervical disc herniation sustained on [redacted]. Dr. [redacted] advised the claimant was totally disabled as any movements of lift/carry activities placed her at risk for worsening of these tendon tears. He noted the claimant was unable to work from [redacted] through [redacted] and was now a candidate for more aggressive shoulder treatment, either injections or surgery.

On [redacted], the Office issued the claimant a recurrence development letter. The Office received the claimant's [redacted] responses to the development questionnaire. She stated she was delivering mail on [redacted], when she started getting spasm in her neck and pain in her shoulder. The claimant stated her disability was from the car accident and her symptoms had always been the same, and there was no other injury.

A [redacted] narrative report from Dr. [redacted] gave a description of the injury, the claimant's symptoms, the objective findings on examination and MRI, and the diagnoses of cervical disc herniation, right rotator cuff tear, and cervical radiculopathy. He also outlined her limitations. Dr. [redacted] gave his explanation for the recurrence of disability on [redacted]. He stated the claimant attempted to return to work after the injury and there was no intervening cause, just the original trauma which damaged the components of neck and shoulder which were involved in day to day life and care. Dr. [redacted] explained that the claimant attended physical therapy while working, but had worsening pain at the neck and shoulder, more weakness at the right upper extremity, and worsening numbness at the right hand, despite continued therapy. Dr. [redacted] advised he determined it was medically necessary to remove the claimant from work as totally disabled as it was his opinion that continued repetitive work activities would result in permanent disability. He stated initially her right shoulder abduction was 100 degrees and it was now 70 degrees, she continued with positive Hawkins sign, and she would do continuous damage to the right shoulder during all work related movements. Dr. [redacted] indicated the claimant was in danger of developing frozen shoulder unless he could reverse the pattern of deterioration.

In a separate [redacted] report, Dr. [redacted] advised the claimant should be considered disabled due to a material worsening of her accepted work-related conditions. He stated this should be considered under "a recurrence of disability is defined as a work stoppage caused by 1.) a spontaneous change in the medical condition which resulted from a previous injury on [redacted], without an intervening injury". Dr. [redacted] explained the combination of cervical disc herniation, right cervical radiculopathy, and right shoulder rotator cuff tear resulted in her inability to use the right upper extremity to withstand loading pressures generated in activities of lift/carry, reaching and handling and fingering. Dr. [redacted] stated the pain, decreased range of motion, and decreased motor grade at right upper extremity prevented her from completing her job activities, and she was considered totally disabled as of [redacted].

On [redacted], the Office issued the claimant a letter advising that she had not experienced a recurrence and that she was really claiming a new traumatic injury caused by a specific event or series of events within a single work shift on [redacted], so a new traumatic injury claim was being administratively created based on her CA2a form.

Under the instant newly created case, the Office associated the claimant's CA2a form, her responses to the recurrence development, three CA7 forms, the electrodiagnostic study [redacted] and [redacted] evaluation forms from Dr. [redacted] and [redacted] physical therapy records, and Dr. Cortijo's [redacted] and [redacted] reports.

On [redacted] the Office issued the claimant an initial development letter advising the evidence was insufficient to establish the new claim. The Office requested additional factual and medical evidence to support a new injury on [redacted]. No response was received.

By decision dated [redacted], the Office denied the [redacted] traumatic injury claim for the reason the medical evidence was insufficient to establish a diagnosed medical condition causally related to work events on [redacted]. The claimant disagreed with this decision and by letter dated [redacted] through her attorney, requested an oral hearing.

Based on my preliminary review of the written evidence, the [redacted] decision is being set aside for the reasons set forth below.

An employee seeking benefits under the FECA has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident or exposure, which is alleged to have occurred. The second component is whether the employment incident or exposure caused a personal injury and generally can be established only by medical evidence.²

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.³

Based on my preliminary review, the claimant had a previous work-related motor vehicle accident on [redacted] under claim [redacted], which was accepted for lumbar strain, cervical radiculopathy, and right shoulder sprain, and for which she was under active treatment with Dr. [redacted]. She returned to work in [redacted], but stopped work again as of [redacted]. The claimant filed a CA7 Claim for Compensation form and a CA2a Notice of Recurrence form under the [redacted] injury claiming this work stoppage. In [redacted] and [redacted] narrative reports, Dr. [redacted] advised that additional diagnostic testing established the diagnoses of right biceps tendon tear and supraspinatus tendon tear and cervical disc herniation, which he opined were sustained on [redacted]. Dr. [redacted] also advised the claimant's work stoppage should be considered a recurrence of disability without intervening injury, and that despite undergoing physical therapy while working, her condition had worsened.

¹ *James B. Bowers, III*, 44 ECAB (Docket No. 92-542, issued October 8, 1992).

² *Gary L. Fowler*, 45 ECAB [redacted] (Docket No. 92-2107, issued January 24, 1994).

³ *John W. Montoya*, 54 ECAB 306 (2003).

Dr. [redacted] reported that the claimant was unable to continue performing her work activities because of the weakness in the right upper extremity due to the conditions he attributed to the [redacted] injury, and that he took her off work as of [redacted] as any movements of lift/carry activities placed her at risk for worsening of these tendon tears, noting she now required more aggressive intervention. The claimant also provided her factual responses to the development questionnaire, noting that on [redacted] after she started delivering mail she started getting neck spasms and shoulder pain. She stated her disability was due to the accident and there was no other injury.

It appears that based solely on this statement, as no other evidence could be found in either claim, the Office created a new traumatic injury claim finding the claimant identified a new injury had occurred on [redacted] while delivering mail. The Office later denied the [redacted] claim based on the medical evidence and the fifth basic element of Causal Relationship.

However, I find the Office did not document how it determined there was any new work injury or factor of employment to substantiate Fact of Injury – Factual, in order to create a new claim or to accept that a new injury was being factually claimed as having occurred on [redacted]. On the CA2a form and in her statement, the claimant never identified any new work factor or exposure on [redacted] or [redacted]. She merely noted when her increased symptoms occurred, which happened to be while delivering mail. The claimant did not factually attribute the increased symptoms to delivering mail or to any other new work factor. She indicated that her disability was due to the accident and that there was no new injury. While the Office noted "lifting and delivering mail" as the new injury in the denial, the claimant never factually identified lifting, or that delivering mail during one work shift was a contributing factor to her condition or disability in order to support the creation of a new claim. Further, the Office ignored the medical evidence on record at the time it created the instant CA1 form, which did not lend support to a new injury. In his [redacted] and [redacted] reports, Dr. [redacted] clearly attributed the claimant's upgraded diagnoses and disability from all work to the [redacted] injury, specifically advising this was a recurrence of disability due to a worsening of her conditions without intervening injury. He also did not identify any new work event or factor as causing or contributing to her conditions or disability, but rather stated she was unable to perform her duties due to the [redacted] injury and he took her off work to avoid her work activities causing further damage.

As such, the Office's administrative action to create a new CA1 traumatic injury claim was premature and unsubstantiated by the evidence, and has now placed the claimant in a situation with little recourse as no formal decision with appeal rights was made under the claim. Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility to see that justice is done.⁴ For all practical purposes, the instant [redacted] claim is essentially a duplicate of the original CA2a recurrence claim.

On remand, the Office should double the instant claim into master claim [redacted]. The Office should then carefully reassess all the evidence to date to further address the claimant's increased disability as of [redacted]. The medical evidence from Dr. [redacted] is at the very least *prima facie* to require development of expansion of the [redacted] claim for more serious right shoulder and cervical diagnoses, which would be relevant to the claims for recurrence/wage loss.

⁴ Phillip L. Barnes, 55 ECAB 426 (2004); Jimmy A. Hammons, 51 ECAB 219 (1999).

⁵ No new factual or medical evidence was received in the November 4, 2019 claim.

After conducting any further development as needed to fully address whether the evidence supports increased disability due to the accepted injury, the Office should issue an appropriate decision regarding entitlement to recurrent wage loss compensation as claimed.

If the claimant actually sustains a new work injury or attributes her condition to a new period of work exposure, it is at her discretion to file the appropriate claim.

Accordingly, the decision date _____, is hereby set aside and the case is returned to the district office for further actions as noted above.

ISSUED:

WASHINGTON, D.C.

Hearing Representative
Branch of Hearings and Review
For
Director, Office of Workers'
Compensation Programs