

CLERK'S OFFICE U.S. DIST. COURT
 AT ROANOKE, VA
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 BY: JOHN F. CORCORAN, CLERK
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**IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF VIRGINIA
 ROANOKE DIVISION**

NANCY C. CREECH,)	
Plaintiff,)	
)	Civil Action No. 7:06cv00279
v.)	
)	
UNITED STATES OF AMERICA,)	By: Hon. Michael F. Urbanski
Defendant.)	United States Magistrate Judge
)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on plaintiff's motion to amend the complaint to increase the ad damnum and defendant's motion for a continuance of the trial date. The parties appeared before the undersigned for a hearing on the record on March 14, 2007.

I.

In this Federal Tort Claims Act ("FTCA") suit, plaintiff demanded five hundred thousand dollars (\$500,000.00) for injuries and damages sustained in a motor vehicle accident occurring on June 7, 2004. Plaintiff now seeks to double the ad damnum to one million dollars (\$1,000,000.00) pursuant to Rule 15 of the Fed. R. Civ. P. Defendant contends that because plaintiff identified a claim amount of only five hundred thousand dollars (\$500,000.00) in her administrative claim to the United States Postal Service and because plaintiff fails to fall within either of the two provisions allowing amendment to an amount in excess of the administrative claim under 28 U.S.C. § 2675(b), plaintiff's motion should be denied.

Damages brought under the FTCA are limited to the amount of the administrative claim "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and

proof of intervening facts, relating to the amount of the claim.” 28 U.S.C. § 2675(b). Plaintiff bears the burden of establishing that she is entitled to damages in excess of her administrative claim. Kielwien v. United States, 540 F.2d 676, 680 (4th Cir. 1976), cert. denied, 429 U.S. 979 (1976). However, in determining what constitutes “newly discovered facts” and/or “intervening facts,” the Fourth Circuit has adopted an approach favoring the injured party. See Spivey v. United States, 912 F.2d 80, 85 (4th Cir. 1990) (holding that the development of possible known side effects of medical treatment after administrative claim was submitted constituted “newly discovered” evidence within § 2675(b)); Murphy v. United States, 833 F.Supp. 1199, 1204 (E.D. Va. 1993) (finding that where plaintiff and health care providers were not aware of full extent of plaintiff’s injuries when the administrative claim was filed, plaintiff was entitled to increase ad damnum)

Plaintiff seeks to increase the ad damnum to an amount in excess of her administrative claim based upon her rotator cuff injury and her C5-6 radiculopathy.¹ As noted in her administrative claim, plaintiff began experiencing shoulder and neck pain immediately after the accident. Def.’s Resp. Pl’s Mot. Am. Ex. A. The torn rotator cuff in plaintiff’s right shoulder was identified following an MRI in March 2006; however, a treating physician, Dr. Pack, recommended physical therapy and non-operative treatment. Def.’s Resp. Pl’s Mot. Am. Ex. A.-1. Similarly, on April 3, 2006, another treating physician, Dr. McCoig, noted that non-operative treatment was indicated for the rotator cuff injury; however, he also noted that if plaintiff did not respond to physical therapy and injections, “open rotator cuff repair” may be needed. Id.

¹Cervical radiculopathy is a disease of the cervical nerve roots, often manifesting as neck or shoulder pain. Dorland’s Illustrated Medical Dictionary 1562 (30th Ed. 2003).

Plaintiff has now presented evidence from Dr. Henderson, in the form of a letter dated March 5, 2007, stating that although rotator cuff surgery is still not needed at present, she expects plaintiff will need to undergo surgical repair of the rotator cuff within five years. Hr'g Mar. 14, 2007, Pl.'s Ex. 1.

Plaintiff's administrative claim was denied on April 27, 2006; therefore, plaintiff had up until that date to modify her damages claim. See 28 C.F.R. § 14.2(c). As the torn rotator cuff injury was diagnosed in March 2006 and by early April 2006, plaintiff's treating physician noted that surgical repair may be necessary to fully relieve plaintiff's discomfort, the court finds there was evidence in the record at the time plaintiff's administrative claim was pending indicating that plaintiff may eventually need surgery to fully repair her rotator cuff. The letter from Dr. Henderson is not new evidence, rather it is merely a statement that the 'worst case scenario' identified by Dr. McCoig - the need for surgical repair of the rotator cuff - will be realized within the next five years. Accordingly, the court finds this evidence is merely cumulative and confirmative of Dr. McCoig's April 3, 2006 note and is insufficient to warrant allowing plaintiff to increase her ad damnum. See Kielwien, 540 F.2d at 680; cf. United States v. Alexander, 238 F.2d 314, 318 (5th Cir. 1956) (finding where plaintiff did not know his shoulder may not heal without surgical repair until after administrative claim was denied, plaintiff was entitled to increase the damages sought).

However, it is clear that plaintiff's C5-6 radiculopathy was not diagnosed until September 2006, several months after her administrative claim was denied. Thus, it is plain to the court that this is new evidence not discoverable at the time the administrative claim was filed. Defendant argues that because plaintiff had some neck pain when she filed her complaint, she bore the

burden of discovering the source of her discomfort through all available diagnostic testing before filing an administrative claim for relief. The court finds this argument unpersuasive. Defendant does not contest that at the time the administrative claim was pending plaintiff sought significant medical care and was being treated by various physicians for a multitude of accident induced injuries and had undergone multiple x-rays and an MRI. The radiculopathy was simply not diagnosed at the time the complaint was filed despite plaintiff and her physicians' best efforts to identify and treat her injuries. Thus, this injury clearly falls within the purview of Murphy, and constitutes "newly discovered" evidence sufficient to warrant granting plaintiff's motion to amend to increase the ad damnum. See Murphy, 833 F.Supp. at 1204, cf. Vice v. United States, 861 F.Supp. 38, 39-40 (S.D. Tex. 1994) (finding that plaintiff's failure to seek medical attention until after his administrative claim was denied despite knowing that he had suffered some physical injury, amounted to a lack of reasonable diligence and precluded the court from granting his motion to for modification of his FTCA claim).

Accordingly, it is hereby **ORDERED** that plaintiff's motion to increase the ad damnum to one millions dollars (\$1,000,000.00) is **GRANTED**.

II.

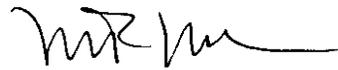
Defendant moves the court to grant a continuance of the March 29, 2007 trial date. Plaintiff does not oppose the motion to the extent another trial date can be set within thirty days of March 29, 2007. After argument, the court orally granted the defendant's motion on the condition that a mutually agreeable trial date within approximately thirty days of the previously scheduled trial date could be found. Following the hearing, the parties and the court could not find a mutually agreeable day. Accordingly, it is hereby **ORDERED** that defendant's motion for

a continuance is **DENIED** and this matter shall be heard on the previously scheduled trial date of March 29, 2007.

III.

It is so ordered.

ENTER: This 16th day of March, 2007.



Michael F. Urbanski
United States Magistrate Judge