United States Department of Labor
Employees' Compensation Appeals Board

V.S., Appellant	)	
	)	
and	)	**Docket No. 07-1863**
	)	**Issued: March 3, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 6, 2007 appellant, through counsel, filed a timely appeal from the July 31, 2006 merit decision of the Office of Workers' Compensation Programs' hearing representative which affirmed the termination of his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office's August 22, 2006 and March 21, 2007 merit decisions denying his recurrence of disability claim.

ISSUES

The issues are: (1) whether the Office properly terminated compensation for the June 13, 2002 employment injury; and (2) whether appellant sustained a recurrence of total disability on or about September 13, 2005.

FACTUAL HISTORY

On June 13, 2002 appellant, then a 47-year-old manual distribution clerk, sustained an injury in the performance of duty: "I bent down to pick up a tray of mail off of an [all-purpose

container] and when I rose I felt pain on right side of back, buttocks and thigh." The Office accepted her claim for lumbar radiculopathy.[1] Appellant received compensation for disability. She returned to work four hours a day with restrictions on October 26, 2004.

On May 23, 2005 Dr. Kenneth S. Weiss, appellant's osteopath, reported that she could work four hours a day. On June 2, 2005 Dr. Laura E. Ross, appellant's orthopedic surgeon, recommended six hours a day, in line with a recent functional assessment. On June 20, 2005 Dr. Weiss found that appellant should maintain her four-hour workday. Dr. Robert A. Smith, an orthopedic surgeon and Office referral physician, reported on June 28, 2005 that appellant could work full time with a permanent lifting restriction. He stated that, while an electromyogram (EMG) showed that lumbar radiculopathy remained active, the condition appeared stable and mild based on his examination. On July 26, 2005 Dr. Ross reported that appellant could work only six hours a day, due to objective findings, clinical complaints and the results of the functional assessment.

The Office found a conflict in medical opinion and referred appellant, together with the case record and a statement of accepted facts, to Dr. David A. Bundens, a Board-certified orthopedic surgeon, for an impartial medical examination. On November 15, 2005 Dr. Bundens related appellant's history and current complaints. He described his findings on physical examination and reviewed appellant's medical records. Dr. Bundens then addressed the issue of appellant's injury-related disability:

> "It is my opinion that [appellant] did, indeed, have an injury in June 2002, when bending.
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> "I feel that she likely had preexisting degenerative disease in the lumbar spine, *i.e.*, facet hypertrophy and mild foraminal narrowing and I feel that this bending episode in all likelihood pinched a lumbar nerve root resulting in the right[-]sided radiculopathy; *i.e.*, the pain in the buttock radiating down the right leg.
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> "[Appellant] at this time has minimal symptoms in the right leg. Her complaints are mainly to the back and the left buttock/hip area. I believe that the right[-]sided radiculopathy is not a major problem at this time.
>
> "I think that [appellant's] major problem is her degenerative nature of her spine. The MRI [magnetic resonance imaging] [scan] of November 2, 2002 revealed degenerative facets. There was bulging at T11-T12 which I think was probably an incidental finding. This disc bulge at T11-T12 would not be causing a right-sided radiculopathy.
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> "[Appellant's] current symptoms are due to the degenerative facets associated with her morbid obesity and not due to the single bend when she lifted a tray of mail. The degenerative facets come over time. [Appellant] has no herniation and no apparent acute injury on her MRI [scans].

[1] Both appellant's claim form and the contemporaneous medical evidence showed that the radiculopathy was right sided.

"I do feel that [appellant] is disabled but on a degenerative -- not a work injury -- basis. She states that she is capable of sustained sitting only about one-half hour and, therefore, she would have to be considered totally disabled.

"The only way to be more objective about this would be a [f]unctional [c]apacity [e]valuation."

On November 29, 2005 Dr. Weiss reported that appellant remained out of work with terrible pain in the low back, left hip, buttocks areas bilaterally and both legs. "It is my rationalized opinion," he stated, "that [appellant] is having significant pain and not able to work at this time...."

In a supplemental report dated November 30, 2005, Dr. Bundens again explained that appellant no longer had residuals of her June 13, 2002 employment injury: "The injury at that time was pain in the right buttock radiating down the right leg due to a pinched nerve and this has resolved. Her current back and left hip symptoms are due to the degenerative nature of her spine as detailed in my previous report and not due to the work injury." He added: "The work injury referred to as 'lumbar radiculopathy' has resolved on a clinical symptom basis. Certainly, if [appellant] had an EMG/[n]erve [c]onduction [s]tudy this might show some neurologic findings but on a symptomatic and disability basis, I do not think that the right-sided radiculopathy is significant."

On December 12, 2005 Dr. Theodore D. Conliffe, a physiatrist and consultant to Dr. Weiss, related appellant's history and complaints and described his findings on physical examination. He diagnosed chronic lower back pain, probable lumbar disc herniation, lumbar radiculopathy and chronic pain syndrome. He stated that he would obtain further radiographic studies. "At this time," Dr. Conliffe reported, "[appellant] would only be capable of working a four-hour shift with no lifting or carrying permitted and only sedentary occupation. [Appellant] would not be able to stand or walk throughout the facility. These restrictions will be at least until her next office visit."

On December 29, 2005 Dr. Weiss reported that he strongly disagreed with Dr. Bundens, stating: "[Appellant] has been consistent with her complaints since the injury and is now seeing a new orthopedist who we hope will help her get back to work and become productive once more."

On January 20, 2006 the Office terminated appellant's compensation effective that date. It found that the opinion of the impartial medical specialist represented the weight of the evidence and established that appellant's current condition was not related to the June 13, 2002 work injury. In a decision dated July 31, 2006, an Office hearing representative affirmed the January 20, 2006 decision.

When the Office referred appellant to Dr. Bundens to resolve the conflict on the extent of her injury-related disability, appellant notified the Office that her pain had become much worse and that she was not currently working. Appellant filed a claim for compensation alleging total disability beginning September 13, 2005. In his November 30, 2005 supplemental report,

Dr. Bundens addressed the issue: "The recurrence of total disability on September 13, 2005 is not secondary to her June 13, 2002 work injury."

In a decision dated August 22, 2006, the Office denied appellant's claim of recurrence. It found that she submitted no factual evidence explaining the basis of her recurrence claim and that the weight of the medical evidence supported that the recurrence was not related to residuals of the work injury. The Office observed that on October 5, 2005 Dr. Weiss reported that appellant was involved in a motor vehicle accident as an occupant in a streetcar, but that she did not report this accident to Dr. Bundens when he examined her.

On March 21, 2007 an Office hearing representative affirmed the denial of appellant's claim of recurrence. He found that the evidence failed to establish a change in the nature and extent of the injury-related condition or a change in appellant's light-duty assignment.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[2] Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[4]

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[5] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

ANALYSIS -- ISSUE 1

In the summer of 2005, a disagreement arose between appellant's physicians, Dr. Weiss, Dr. Ross and the Office referral physician, Dr. Smith, on the extent of appellant's injury-related disability. Dr. Weiss reported that appellant could work four hours a day. Dr. Ross reported that she could work six hours a day and Dr. Smith reported that appellant could work full time, with

[2] 5 U.S.C. § 8102(a).

[3] *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[5] 5 U.S.C. § 8123(a).

[6] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

restrictions. The Office properly referred appellant to an impartial medical specialist to resolve the issue.

The Office provided Dr. Bundens, a Board-certified orthopedic surgeon, with the entire case record and a statement of accepted facts so that he could base his opinion on a proper factual and medical history. Dr. Bundens' review of the record was evident when, notwithstanding the Office's nonspecific acceptance of "lumbar radiculopathy," he noted that appellant's symptomatology at the time of the June 13, 2002 incident was right-sided radiculopathy, with pain in the buttock radiating down the right leg. This is supported by appellant's description of the nature of her injury and the medical reports contemporaneous to the June 13, 2002 injury.

Dr. Bundens addressed the mechanism of the June 13, 2002 injury. He noted that appellant's November 2, 2002 MRI scan showed degenerative facets. Dr. Bundens explained that these degenerative facets developed over time. He concluded, therefore, that appellant likely had a preexisting facet hypertrophy and mild foraminal narrowing and that the bending episode on June 13, 2002 in all likelihood pinched a lumbar nerve root resulting in the right-sided radiculopathy. He reasoned, however, that this was no longer a major problem because, on examination, appellant's complaints were mainly to the back and left buttock or hip area. These symptoms were not due to a single bending episode in 2002 but were instead due to the degenerative facets associated with her morbid obesity. Dr. Bundens buttressed his opinion by noting that appellant had no disc herniation and no apparent acute injury on her MRI scans.

The Board finds that the Office has met its burden of proof to justify the termination of appellant's compensation. The opinion of the impartial medical specialist is well reasoned and is entitled to special weight in resolving the conflict on the extent of appellant's injury-related disability. He has well explained that appellant's current disability for work was due to her preexisting degenerative condition and not due to a single bending episode on June 13, 2002. That injury, he reported, had resolved on a clinical symptom basis.

Because Dr. Weiss was one of the physicians who created the conflict in the medical evidence that Dr. Bundens resolved, his further reports are insufficient to overcome the weight of the evidence.[7] Dr. Conliffe, the physiatrist and consultant to Dr. Weiss, did not take issue with Dr. Bundens' opinion. He offered no rationalized opinion to support that appellant continued to be disabled for work as a result of what happened at work on June 13, 2002. The Board will affirm the Office hearing representative's July 31, 2006 decision affirming the termination of appellant's compensation.

LEGAL PRECEDENT -- ISSUE 2

The Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[8] "Disability" means the incapacity, because

[7] *John M. Tornello*, 35 ECAB 234 (1983).

[8] 5 U.S.C. § 8102(a).

of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[9]

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a light-duty position, or the medical evidence of record establishes that she 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 she cannot perform such light-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 light-duty job requirements.[10]

ANALYSIS -- ISSUE 2

On October 26, 2004 appellant returned to work four hours a day with restrictions. She then claimed compensation for total disability beginning September 13, 2005. Appellant, therefore, has the burden to show a change in the nature and extent of her injury-related condition or a change in the nature and extent of her light-duty job requirements. She has shown neither.

There is no evidence that the employing establishment changed her light-duty job requirements such that her June 13, 2002 employment injury prevented her from working light duty. There is no medical evidence explaining how the June 13, 2002 employment injury worsened to the point that she could no longer work light duty as of September 13, 2005. Indeed, the only medical evidence that directly addresses appellant's claim is one that negates any causal relationship between the accepted employment injury and appellant's total disability for work beginning September 13, 2005. In his November 30, 2005 supplemental report, Dr. Bundens stated: "The recurrence of total disability on September 13, 2005 is not secondary to her June 13, 2002 work injury." It was Dr. Bundens' opinion that appellant's 2002 employment injury had resolved by the time he examined her on November 15, 2005. Consistent with this, it was his opinion that the employment injury had not worsened to cause total disability for work only two months earlier.[11]

No other medical evidence directly addresses appellant's claim that she sustained a recurrence of total disability on or about September 13, 2005. Dr. Weiss reported on November 18, 2005 that she was totally disabled for work, but he did not explain how this was a result of what happened on June 13, 2002. Dr. Bundens also reported that appellant was totally disabled for work, but he explained that this was on a degenerative basis, not because of a single bending episode in 2002. In his December 29, 2005 report, Dr. Weiss strongly disagreed with Dr. Bundens that appellant's current condition was not related to the 2002 employment injury. He did not address total disability for work beginning September 13, 2005, much less whether

[9] 20 C.F.R. § 10.5(f) (1999).

[10] *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[11] Dr. Bundens' status on this issue is not that of an impartial medical specialist. He was selected to resolve a different issue. Dr. Bundens' status on the issue of recurrence is simply that of an Office referral physician.

this total disability was a result of the bending episode in 2002 or was instead the result of the motor vehicle accident he noted in his October 5, 2005 report. Because appellant submitted little or no probative evidence to support her claim of recurrence, she has not met her burden of proof. The Board will affirm the Office decisions denying compensation for total disability.

CONCLUSION

The Board finds that the Office properly terminated compensation for the June 13, 2002 employment injury. The Board also finds that appellant did not meet her burden to establish that she sustained a recurrence of total disability on or about September 13, 2005.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2007, August 22 and July 31, 2006 decision of the Office of Workers' Compensation Programs are affirmed.

Issued: March 3, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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