

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

K.E., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Dayton, OH, Employer**

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**Docket No. 09-230
Issued: July 21, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 30, 2008 appellant filed a timely appeal from a September 26, 2008 decision of the Office of Workers' Compensation Programs denying her claim for a recurrence of total disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of total disability beginning April 11, 2008 causally related to her November 5, 2004 employment injury.

FACTUAL HISTORY

On November 5, 2004 appellant, then a 40-year-old part-time flexible mail handler, sustained work-related lumbar and cervical strains when she was pushing a heavy wire cart.¹ On

¹ Appellant has a preexisting nonwork-related herniated disc at L5-S1 for which she underwent a laminectomy and discectomy in either 1992 or 1994. The record is not clear as to the year of her surgery.

March 25, 2005 she was placed on light duty for four hours a day within her medical restrictions which included no lifting over five to seven pounds and no stooping, bending or squatting. As of June 24, 2005 appellant was released to work eight hours a day and her work restrictions were changed to no lifting over 10 to 15 pounds and no repetitive pushing, pulling or bending. Effective December 30, 2006, she began performing a permanent light-duty position with no pushing, pulling or lifting over 20 pounds and only occasional bending, stooping or twisting at the waist.

In notes dated January 22, 2008, Dr. Jonathan J. Paley, an attending orthopedic surgeon, stated that appellant's low back pain due to her November 5, 2004 employment injury was increasing in intensity. Appellant had difficulty sleeping due to pain which radiated into her right leg and was associated with significant numbness and tingling. Dr. Paley noted a history of low back surgery at the L5-S1 level. He provided findings on physical examination and recommended a magnetic resonance imaging (MRI) scan to check the progress of her low back condition. In a February 14, 2008 MRI scan report, Dr. Melissa Baujan Davis, a radiologist, stated that appellant had loss of signal in the L5-S1 disc level consistent with degenerative disc disease and mild facet joint hypertrophy at L4-5. There were degenerative end plate changes and degenerative disc disease at L5-S1 with disc protrusion and osteophyte toward the right causing right foraminal narrowing. Dr. Davis stated that these findings were similar in appearance to the December 29, 2004 MRI scan and there were no significant changes in the findings from the 2004 MRI scan. On March 18, 2008 Dr. Paley provided findings on physical examination and stated that appellant had severe ongoing low back pain on a daily basis radiating into her right leg. He recommended a neurological consultation.

On April 11, 2008 appellant filed a claim for a recurrence of total disability. She stated that her chronic low back pain began to worsen in January 2008 due to prolonged standing and bending.

In an April 23, 2008 report, Dr. Jamal Taha, a neurosurgeon, stated that appellant had experienced back pain since the November 5, 2004 employment injury. Appellant underwent right L5-S1 back surgery in 1992. She presented with constant, severe pain in her back, and right leg and buttock and right leg numbness. Dr. Taha provided findings on physical examination which were normal. He diagnosed a lumbar strain and recommended another MRI scan to further assess appellant's back condition.

On April 29, 2008 the Office asked appellant to provide medical evidence establishing that she was unable to perform her light-duty job due to a change in the nature and extent of her accepted lumbar and cervical strains or a change in the nature and extent of her light-duty job requirements.

In a May 28, 2008 report, Dr. Paley stated that appellant's lumbar spine condition had worsened over the past few months. The February 14, 2008 MRI scan revealed degenerative disc disease at L5-S1 with disc protrusion and osteophyte formation toward the right, causing right neural foraminal narrowing with neural encroachment. Appellant's significant pain affected her work activities. Dr. Paley placed her off work as of April 11, 2008 pending a neurosurgical consultation.

By decision dated June 3, 2008, the Office denied appellant's claim on the grounds that she failed to establish that her inability to perform her light-duty job was due to a change in the nature and extent of her accepted lumbar or cervical strains or a change in her light-duty job requirements.

On July 25, 2008 appellant requested reconsideration. She alleged that her recurrence of total disability was caused by the employing establishment's withdrawal of her light-duty job. Appellant provided no supporting documentation for this allegation.

In a May 5, 2005 disability certificate, Dr. Paley stated that appellant was unable to work from May 7 to June 2, 2008 due to her low back injury. In a June 30, 2008 report, he provided findings on physical examination which included focal spasms and tenderness in the right paraspinal musculature, very guarded range of motion with forward flexion and lateral bending, an antalgic gait favoring her right side and two plus deep tendon reflexes of the bilateral lower extremities. Range of motion of appellant's right hip and knee was of 4/5 strength. Appellant was neurologically intact in both lower extremities. Dr. Paley noted that appellant presented with neck and low back pain which she attributed to her November 5, 2004 employment injury. In a July 7, 2008 disability certificate, he stated that appellant should remain off work until approximately September 1, 2008. Dr. Paley noted that appellant was going to have surgery due to her work-related injury. In a July 23, 2008 report, he stated that appellant had ongoing severe low back pain due to her November 5, 2004 employment injury. Appellant was doing well after back surgery in 1994 until her 2004 employment injury. Over the past three and one-half years, appellant complained of back pain and pain, tingling and numbness in the right leg. Findings on her last physical examination on June 30, 2008 included an antalgic gait favoring the right leg, tenderness to palpation in her low back in the bilateral paraspinal musculature and bilateral sacroiliac region. There was diminished sensation to light touch and pinprick in the right leg when compared with the left leg. Dr. Paley stated that a February 14, 2008 MRI scan revealed severe end plate and degenerative disc disease at the L5-S1 level which had contributed to right neural foraminal compromise. He stated that the MRI scan correlated very highly with appellant's ongoing pain complaints and clinical examination findings. Dr. Paley opined that appellant's absence from work was a direct and proximate result of her November 5, 2004 employment injury. He stated that appellant was unable to work due to significant difficulty with prolonged sitting or standing. Appellant was most comfortable when lying down. She was taking pain medication to allow her to maintain daily living activities.

In a July 2, 2008 report, Dr. Taha stated that appellant had back and right leg and buttock pain. Conservative treatment had not been successful and he recommended a surgical discectomy and fusion at L5-S1.

In an August 19, 2008 MRI scan report, Dr. Patrick Pagur, a radiologist, stated that there was no subluxation, spondylolisthesis, compression deformity or fracture in appellant's spine. There was disc dessication with mild disc space narrowing and some reactive end plate changes at L5-S1. Some minor anterior and posterior spurring was seen at that level also. There was no recurrent or residual disc herniation from the previous right L5 laminectomy surgery. There was mild disc bulging with some facet hypertrophy and mild foraminal narrowing. Remaining disc levels were adequate. Paraspinal muscles demonstrated normal signal and morphology. There was no paraspinal soft tissue edema. Dr. Pagur's impression was postoperative changes from the

right L5 laminectomy without recurrent disc herniation and multilevel disc disease with some facet hypertrophy.

By decision dated September 26, 2008, the Office denied appellant's claim on the grounds that the evidence did not establish that she sustained a recurrence of total disability beginning April 11, 2008 causally related to her November 5, 2004 employment injury.²

LEGAL PRECEDENT

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 of record establishes that he or 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 show that he or she cannot such light duty. As part of this burden, the employee must show either 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.³ To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history, and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.⁴

ANALYSIS

Appellant has the burden to provide medical evidence establishing that she was totally disabled beginning April 11, 2008 due to a worsening of her accepted lumbar and cervical strains, or a change in her job duties such that she was unable to perform her light-duty work. She alleged that her chronic low back pain began to worsen in January 2008 due to prolonged standing and bending. Appellant later alleged that her recurrence of total disability was caused by the employing establishment's withdrawal of her light-duty job. There is no evidence of record that the employing establishment modified her light-duty job, which she had performed since December 2006, or that it withdrew the light-duty job.

Dr. Taha stated that appellant had experienced back pain since the November 5, 2004 employment injury. He noted that appellant underwent right L5-S1 back surgery in 1992.

² Subsequent to the September 26, 2008 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

³ *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986); 20 C.F.R. § 10.5(x) provides, "*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 had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. 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 (RIF)), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."

⁴ *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack*, 50 ECAB 498, 503 (1999).

Findings on physical examination were normal. Dr. Taha diagnosed a lumbar strain and recommended surgical discectomy and fusion at L5-S1. He provided no medical rationale explaining the cause of appellant's back pain in 2008 or need for surgery. Such rationale is especially necessary because appellant had a preexisting back condition for which she underwent surgery at the L5-S1, the same level for which Dr. Taha proposed surgery in 2008. Dr. Taha did not opine that appellant was totally disabled as of April 11, 2008 due to a change in the nature or extent of her accepted lumbar and cervical strains, or a change in her job duties such that she was unable to perform her light-duty work. Therefore, his reports are not sufficient to establish that appellant sustained a recurrence of total disability on April 11, 2008 causally related to her November 5, 2004 employment injury.

In January 2008 Dr. Paley stated that appellant's low back pain due to her November 5, 2004 employment injury was increasing in intensity. The pain radiated into her right leg and was associated with significant numbness and tingling. Dr. Paley noted a history of low back surgery at the L5-S1 level. On May 28, 2008 he stated that appellant's lumbar spine condition had worsened over the past few months and her significant pain affected her work activities. Dr. Paley placed appellant off work as of April 11, 2008 pending a neurosurgical consultation. However, he did not explain, with medical rationale, how appellant's disability beginning April 11, 2008 was due to a change in the nature or extent of her November 5, 2004 accepted lumbar and cervical strains such that she could not perform her light-duty job requirements. Therefore, these reports are not sufficient to establish appellant's claim for a work-related recurrence of total disability on April 11, 2008.

In a May 5, 2008 disability certificate, Dr. Paley stated that appellant was unable to work from May 7 to June 2, 2008 due to her low back injury, but he did not explain how her disability was causally related to her November 5, 2004 employment injury, nor did Dr. Paley explain why appellant was unable to perform her light-duty job. On June 30, 2008 he noted findings on physical examination which included focal spasms and tenderness in the right paraspinal musculature,⁵ guarded range of motion with forward flexion and lateral bending and an antalgic gait favoring her right side. Appellant was neurologically intact in both lower extremities. Dr. Paley noted that she presented with neck and low back pain which she attributed to her November 5, 2004 employment injury. However, he did not explain, with medical rationale, how appellant's neck and low back pain were caused by a change in the nature and extent of her accepted cervical and lumbar strains. In a July 23, 2008 report, Dr. Paley stated that appellant had ongoing severe low back pain due to her November 5, 2004 employment injury. He noted that a February 14, 2008 MRI scan revealed severe end plate and degenerative disc disease at the L5-S1 level which contributed to right neural foraminal compromise. Dr. Paley stated that the MRI scan correlated with appellant's ongoing pain complaints and clinical examination findings. Dr. Davis stated in the February 14, 2008 MRI scan report that the findings were similar to those in the December 29, 2004 MRI scan and there was no significant change between 2004 and 2008. Therefore, Dr. Paley's opinion that the February 14, 2008 MRI scan supported causal relationship between appellant's neck and back problems in 2008 is not consistent with Dr. Davis' opinion that the MRI scan revealed no significant changes from the 2004 MRI scan.

⁵ Dr. Pagur noted in his August 19, 2008 MRI scan report that appellant's paraspinal muscles demonstrated normal signal and morphology and there was no paraspinal soft tissue edema.

Dr. Paley opined that appellant's absence from work in 2008 was a direct and proximate result of her November 5, 2004 employment injury; however, he provided no rationalized medical opinion explaining how her disability was due to a change in the nature and extent of her accepted cervical and lumbar strains. He opined that appellant was totally disabled due to prolonged sitting or standing, but he did not explain, nor does the evidence show, that appellant's light-duty job requirements changed such that she had prolonged sitting or standing which rendered her unable to perform the light-duty job that she had performed since December 2006. In his reports, Dr. Paley did not provide sufficient medical rationale explaining how there was a worsening of appellant's accepted lumbar and cervical strains or a change in her light-duty job requirements such that it resulted in a recurrence of total disability on April 11, 2008.

The Board finds that appellant failed to establish that she was totally disabled beginning April 11, 2008 due to a change in the nature and extent of her employment-related lumbar and cervical strains, or a change in the nature and extent of her light-duty job requirements. Therefore, the Office properly denied appellant's claim for a recurrence of total disability.

CONCLUSION

The Board finds that appellant failed to establish that she sustained a recurrence of total disability beginning April 11, 2008 causally related to her November 5, 2004 employment-related lumbar and cervical strains.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 26, 2008 is affirmed.

Issued: July 21, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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