

This case has previously been before the Board. In an October 13, 2006 decision, the Board set aside an Office decision and remanded the case for further development regarding

whether appellant had more than 43 percent impairment to her left leg.¹ In a November 6, 2008 decision, the Board affirmed the Office's February 9, 2007 decision which found appellant had no more than 43 percent impairment of the left leg.² The Board also affirmed a November 19, 2007 Office decision which found appellant failed to establish that she sustained a recurrence of disability beginning on July 28, 2007 causally related to her accepted employment-related injuries. The facts of the case as set forth in the Board's prior decisions are incorporated herein by reference. The facts relevant to the present appeal are set forth.

On September 16, 2009 appellant requested reconsideration. Her attorney argued that by virtue of the large schedule award and associated findings of permanent impairment previously established as well as the acceptance of the first recurrence in her case, appellant would always have a degree of disability with the work injury, the subsequent authorized surgery and sequelae. Counsel stated that hypercoagulability (the propensity to develop thrombosis or blood clots) was generally a multifactorial disease and that thrombotic events occur when more of the circumstantial risk factors arise. He stated that the causes for lymphedema also included traumatic injury and surgery and asserted that whether or not appellant had predisposition or history of these conditions, the work injury and sequelae exacerbated and permanently aggravated them. In support of his argument, counsel submitted a medical report from Dr. Robert Jubelirer, a Board-certified general surgeon.

In the May 11, 2009 report, Dr. Jubelirer noted examining appellant on April 8, 2009 and provided a history as related by appellant and her attorney. He noted that the recurrence of total disability commenced July 29, 2007 when symptoms of DVT and cellulitis recurred when appellant was sitting and that she was out of work for seven months. Dr. Jubelirer listed examination findings and diagnosed lymphedema of the left leg that resulted from venous thrombosis following arthroscopic surgery for injuries sustained in a fall at work. He opined that the fall at work was the turning point in appellant's condition as the fall led to an aggravation of her DVT. Dr. Jubelirer noted that, prior to the aggravation of DVT, appellant never had swelling (lymphedema). He also advised appellant had a propensity to exacerbation of the lymphedema with open draining sores and cellulitis. Dr. Jubelirer explained that appellant's DVT injured the venous valves and normal sequelae of DVT was the development of venous valvular insufficiency and leg pain and lymphedema. He stated that appellant's main problem was her huge, chronically swollen leg. Dr. Jubelirer indicated that this had only been since the fall at work and was due to DVT, chronic venous insufficiency and lymphedema. He stated that she remained prone to exacerbations of cellulitis open sores and pain. Appellant was more prone to developing subsequent episodes of thrombophlebitis that could be triggered by activity. Dr. Jubelirer noted that such occurrences were not due to the activity but were due to the severity of her ongoing condition. He stated that, because of the permanent DVT aggravation, appellant was prone to sequelae of lymphedema, including cellulitis that caused her hospitalization on

¹ Docket No. 06-520 (issued October 13, 2006). The Office accepted the claim for contusion to the elbow and forearm, tenosynovitis of the left foot and ankle, contusion of the left knee, left sprain and strain of the ankle, and aggravation of preexisting deep venous thrombosis (DVT) resulting in permanent restrictions and authorized all appropriate objective testing, including a July 21, 2003 arthroscopic surgery to evaluate the cause of appellant's ankle swelling and pain.

² Docket No. 08-834 (issued November 6, 2008).

July 29, 2007. Dr. Jubelirer opined that the lymphedema was caused by the traumatic injury and surgery. Appellant's work injury and its sequelae exacerbated and permanently aggravated them. Dr. Jubelirer advised appellant would continue to have episodic flare-ups and be unable to work during those periods. He opined that the recurrence of her severe symptoms after her workday on July 28, 2007 was a direct result of the previous permanent aggravation of her DVT that flared at that time and necessitated her July 29, 2007 hospitalization which did not sufficiently improve to allow her to return to work until January 14, 2008.

The record also contains a July 10, 2008 report from Dr. Edwin L. Merow, an osteopath, who indicated that appellant had a recurrence on July 28, 2007 which consisted of cellulitis and an abscess on her left leg. Dr. Merow stated that appellant had significant ambulatory dysfunction and edema since her August 2001 work accident and that her condition never improved. He reviewed appellant's hospitalizations as well as her medical conditions and advised her cellulitis progressively worsened because her left leg had acute chronic swelling (edema). Dr. Merow noted that there were other health issues which could be a contributing factor. He advised that recurrences of cellulitis and abscesses were caused by severe swelling that was due to the standing and walking that worsened her condition. Dr. Merow explained that once appellant was up and walking, gravity created swelling and tremendous discomfort and pain. He opined that her duties at work, which require standing with little elevation of her left leg, were attributable to a recurrence of her work-related injury. Dr. Merow also indicated that her right leg and knee were affected because of the constant pressure placed on the right leg.

By decision dated December 18, 2009, the Office denied modification of its prior decision.

LEGAL PRECEDENT

A 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.³ 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), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁴

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-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 limited-duty work. As part of this burden,

³ 20 C.F.R. § 10.5(x).

⁴ *Id.*

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 limited-duty job requirements.⁵

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.⁶

ANALYSIS

Appellant claimed a recurrence of total disability commencing on July 28, 2007 causally related to her accepted employment injuries. She has the burden to provide medical evidence establishing that she sustained a recurrence of disability on July 28, 2007 causally related to her accepted work-related conditions, which include aggravation of preexisting DVT in the left lower extremity resulting in permanent restrictions.

In support of her claim, appellant submitted a May 11, 2009 report from Dr. Jubelirer who diagnosed appellant with lymphedema of the left lower extremity. Dr. Jubelirer opined that appellant's lymphedema of the left lower extremity resulted from venous thrombosis following arthroscopic surgery for injuries sustained in her fall at work. The Board notes that Dr. Jubelirer did not address the August 27, 2007 venous duplex Doppler of the left leg that indicated no visible thrombosis. This diminishes the value of Dr. Jubelirer's opinion on causation.⁷ Dr. Jubelirer further opined that the fall at work led to the aggravation of her DVT as she never had swelling (lymphedema) prior to the aggravation of the DVT. However, a physician's opinion supporting causal relationship only because a claimant was asymptomatic before an injury is insufficient to establish causal relationship without supporting rationale.⁸ While Dr. Jubelirer explained that a normal sequelae of DVT was the development of venous valvular insufficiency, lower extremity pain, lymphedema and its sequelae, which included open draining sores and cellulitis, he also stated appellant was more prone to episodes of thrombophlebitis, which could be triggered by activity and were due to the severity of her ongoing condition. Dr. Jubelirer did not adequately explain how or why the recurrence of her symptoms on July 28, 2007 following her workday was caused by the accepted DVT aggravation or the sequelae of lymphedema, including cellulitis, rather than from thrombophlebitis resulting from her work activity. This deficiency further lessens the probative value of his opinion.

In a July 10, 2008 report, Dr. Merow opined that appellant's duties at work which required standing, with little elevation of her left leg, attributed to a recurrence of her work-related injury. However, he did not present adequate rationale to show how the July 28, 2007

⁵ *Barry C. Peterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁶ *James H. Botts*, 50 ECAB 265 (1999).

⁷ See *Arthur N. Meyers*, 23 ECAB 111, 113 (1971) (where the Board found a physician's opinion to be of diminished probative value where the physician's opinion in support of causal relationship was based on a history of injury that was not corroborated by the contemporaneous medical history contained in the case record).

⁸ *Jaja K. Asaramo*, 55 ECAB 2000 (2004).

recurrence, which consisted of cellulitis and an abscess on her left leg, conditions not accepted by the Office, were causally related to the August 15, 2001 work injury and her accepted conditions. Dr. Merow stated that appellant had significant ambulatory dysfunction and edema since her August 2001 work accident and her condition never improved. As previously noted, a physician's opinion supporting causal relationship only because a claimant was asymptomatic before an injury is insufficient to establish causal relationship without supporting rationale.⁹ Dr. Merow stated appellant's cellulitis progressively worsened because of her acute chronic swelling in the left leg and opined that her significant ambulatory dysfunction was due to the chronic phase of her lymphedema. He explained that recurrences of cellulitis and abscesses caused by severe swelling which were due to standing and walking that worsened her condition, but he did not explain how such acute chronic swelling in the left leg was caused or contributed to by her accepted conditions other than generally attributing such to standing and walking. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship between appellant's conditions beginning July 28, 2007 to the accepted work injury and her accepted conditions.

The Board finds that appellant has not submitted sufficiently rationalized medical evidence to establish that she was totally disabled beginning July 28, 2007 due to her employment-related conditions. Furthermore, there is no evidence, nor has appellant alleged, showing that she experienced a change in the nature and extent of the limited-duty requirements or was required to perform duties which exceeded her medical restrictions.

On appeal, appellant's attorney asserts arguments similar to those asserted on reconsideration before the Office. However, as explained, appellant has not met her burden of proof to establish her claim for a recurrence of disability.¹⁰

CONCLUSION

The Board finds that appellant has failed to establish that she sustained a recurrence of total disability beginning on July 28, 2007 causally related to her accepted employment-related injuries.

⁹ *Id.*

¹⁰ Among appellant's arguments is that her significant impairment rating supports her recurrence of disability claim. The Board has held that disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. *Maxine J. Sanders*, 46 ECAB 835 (1995).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated December 18, 2009 is affirmed.

Issued: December 1, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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