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T.S., Appellant)	
)	
and)	Docket No. 11-531
)	Issued: November 3, 2011
U.S. POSTAL SERVICE, POST OFFICE,)	
Detroit, MI, Employer)	
)	

Case Submitted on the Record

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

On December 30, 2010 appellant filed a timely appeal of an October 22, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her recurrence claim. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

The issue is whether appellant has established that she sustained a recurrence of total disability for intermittent periods from July 4 to August 6, 2009 and total disability for the period

¹ 5 U.S.C. §§ 8101-8193.

September 3 to December 8, 2009 causally related to her accepted employment-related conditions.

FACTUAL HISTORY

On November 6, 2007 appellant, then a 35-year-old city letter carrier, was descending stairs when a step crumbled and she caught hold of a rail and twisted her back. OWCP accepted the claim for aggravation of degenerative disc disease and right ankle sprain. It approved an L3-4 decompression and fusion, which appellant underwent on June 5, 2008, as well as a recurrence of May 6, 2008.

On April 21, 2009 Dr. Peter L. Bono, an orthopedic surgeon and appellant's treating physician, stated that appellant was capable of returning to work part time with restrictions of no lifting more than 10 pounds; sitting and standing as tolerated and limited bending for one month. Thereafter, he opined that appellant would be capable of working full time with restrictions. Appellant returned to part-time limited-duty work on or about April 27, 2009; however, after she worked four hours on April 27, 2009, the employing establishment sent her home with no available work. She returned to part-time limited-duty work on or about July 13, 2009. On July 14, 2009 appellant reinjured her back. Under claim number xxxxxx509, OWCP accepted a lumbar contusion and cervical strain. Appellant lost time from work from July 14 to 20, 2009. She returned to work July 21, 2009 with the same restrictions held under the current claim for four hours daily. Appellant received compensation for four hours daily from April 27 through September 25, 2009.

On September 3, 2009 Dr. Eric A. Kovan, a Board-certified physiatrist, provided a history of the November 6, 2007 injury and subsequent surgery, which he noted was performed on December 5, 2008. Appellant complained of increased neck and right arm pain. She was neurologically intact on examination with intact sensation and decreased lumbar extension. An impression of back pain secondary to fusion postlaminectomy syndrome with radicular pain and right C6-C7 radiculopathy was provided. Dr. Kovan noted that appellant was off work and advised lumbar epidurals and repeat electromyogram (EMG) and magnetic resonance imaging (MRI) testing. In an accompanying form report, he indicated that appellant was "unable to return to employment at this time" due to back/neck pain. Dr. Kovan also filled out a form referring appellant for an epidural injection.

On September 4, 2009 appellant filed a Form CA-2a, recurrence of disability claim, indicating that her physician took her off work on September 3, 2009 due to worsening symptoms. She also claimed total disability during the period July 4 through September 25, 2009, for a total of 351.85 hours. This consisted of intermittent periods July 4 to 10,² 16 to 20, 2009;³ and August 5 to 6, 2009. The record indicates that appellant performed limited-duty part-time work July 13 and 14, July 21 through 24, July 27 through 31, August 3 and 4, 2009 and, as noted, received four hours compensation for the period July 4 through September 25, 2009.

² Appellant claimed eight hours disability on July 4, 7, 8, 9 and 10, 2009.

³ Appellant claimed eight hours disability on July 16, 17 and 20, 2009.

In an October 15, 2009 letter, OWCP advised appellant that her claim for wage-loss compensation for the period July 4 through September 25, 2009 had been processed for a total of 218.54 hours of leave without pay. It indicated that she had been medically released to work part time four (4) hours per day with restrictions; therefore she was compensated for four hours of leave without pay instead of the eight hours claimed on dates July 4 through 10, 2009 and August 4 through 6, 2009. OWCP noted that appellant received continuation of pay under claim number xxxxx509 for the dates July 15 to 20, 2009. It also noted the deficiencies in her recurrence claim and advised her of the evidence necessary to support a recurrence claim either because her limited-duty assignment had changed or her condition worsened.

OWCP received several medical reports. In an October 8, 2009 report, Dr. Kovan noted that appellant had continued complaints of pain in the neck and arm. He noted that the EMG was normal and the MRI scan revealed disc changes consistent with C6 radiculopathy. Examination findings revealed weakness in the right arm. Dr. Kovan diagnosed back pain and right C6-7 radiculopathy secondary to work injuries. He recommended cervical epidural injections and follow-up in one month after receiving the shots. Dr. Kovan did not comment on appellant's work status. In a November 5, 2009 report, he noted improving right arm radicular pain. Dr. Kovan stated that appellant was unable to work without restrictions and opined that she could work a sedentary job. Appellant underwent cervical epidural injections on October 15, November 3 and 17, 2009.

On December 1, 2009 appellant called OWCP and indicated that the employing establishment did not have work to accommodate her for four hours daily. She was advised to submit evidence supporting this.

In his December 3, 2009 report, Dr. Kovan provided the same history of injury, as noted in prior reports. Examination findings revealed nonfocal regarding strength, reflexes and sensation. Dr. Kovan opined that there was some minimal weakness in the right arm and that appellant's gait improved. He provided the same diagnosis, as noted in previous reports and released appellant to work with restrictions.

On December 31, 2009 appellant sustained a new injury. Under claim number xxxxxx071, OWCP accepted the condition of sciatica.

By decision dated January 13, 2010, OWCP denied compensation for intermittent lost time for July 4 to August 6, 2009 and total disability beginning September 3, 2009 on the basis that the medical evidence failed to establish a worsening of the accepted injury-related conditions.

On February 11, 2010 appellant requested an oral hearing, which was held on May 25, 2010. She testified that she stopped work September 3 through December 8, 2009 due to increased pain, tingling and numbness of her arms, legs, shoulders and low back. Appellant's attorney noted that Dr. Kovan took appellant off work September 3, 2009 and that she underwent several epidural injections in October and November 2009, which would have rendered her totally disabled for at least the day of the procedure. Treatment notes reflecting ongoing care was received into evidence; however, it did not contain a medical opinion addressing the period July 2009 through December 2009.

By decision dated August 25, 2010, an OWCP hearing representative affirmed the January 13, 2010 decision as the medical evidence failed to establish a recurrence of total disability for the periods claimed, but modified the prior decision to reflect entitlement to an additional four hours of compensation for medical treatment received on October 15, November 3 and 17, 2009.⁴

On September 16, 2010 appellant requested reconsideration. In support of her request, duplicative evidence previously of record was submitted along with new evidence from Dr. Kovan. In a July 23, 2010 report, Dr. Kovan stated that appellant's pain issue was secondary to her status post fusion and laminectomy which caused her to have residual effects. He noted that she had episodes of missing work beginning September 3, 2009, proceeded with several weeks of two disabilities on July 4 to 10, 2009 and August 4 to 9, 2009. Dr. Kovan opined that due to appellant's myofascial issues secondary to her back pain those were appropriate times to be off work. On September 20, 2010 he noted appellant's treatment and progress. No discussion on the period of claimed disability was provided. In a September 22, 2010 report, Dr. Kovan addressed appellant's period of disability from September 3 to December 8, 2009. He stated that the medical evidence indicative of total disability included positive MRI scan with disc abnormalities of the neck area. Dr. Kovan also stated that appellant had weakness, which he had noted in his reports, which was consistent with radiculopathy and lumbar abnormalities. Thus, he recommended that she only do a sedentary job.

By decision dated October 22, 2010, OWCP affirmed the denial of appellant's recurrence claim.

LEGAL PRECEDENT

OWCP's regulations define the term recurrence of disability as follows:

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 or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁵ OWCP's procedure manual provides that a recurrence of disability also includes worsening of disability due to an accepted consequential injury.⁶

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

⁴ This was processed under subsidiary claim number xxxxxx509.

⁵ 20 C.F.R. § 10.5(x).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997).

to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform 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 requirements.⁷ 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.⁸

ANALYSIS

Appellant's claim was accepted for aggravation preexisting degenerative disc disease, lumbar strain and a right ankle strain. She underwent an authorized lumbar fusion on June 5, 2008. Appellant's treating physician Dr. Bono, released appellant to light duty four hours daily with restrictions on April 21, 2009. Under claim number xxxxxx509, OWCP accepted the conditions of cervical and lumbar strains due to a July 14, 2009 injury. Appellant was off work from July 14 to 21, 2009. She returned to her prior light-duty assignment four hours daily with lifting restrictions. Under claim number xxxxxx071, OWCP accepted sciatica for a December 31, 2009 injury.⁹ Appellant claimed intermittent periods of disability for the period July 4 to August 6, 2009 and for the period September 3 to December 8, 2009. The record reflects that she performed limited duties four hours daily until she stopped working entirely on September 3, 2009. Appellant was paid four hours of compensation for each day. On October 15, 2009 OWCP advised her of the type of medical and factual evidence needed to establish her claim for a recurrence of disability.

Appellant asserted on December 1, 2009 that the employer could not accommodate her limited duty four hours daily. However, there is no evidence of file to support this assertion. Appellant worked limited duty four hours daily for intermittent dates during her claimed period of disability. Thus, she has not established a change in the nature and extent of her light-duty job requirements. Appellant must thus provide medical evidence establishing that she was disabled due to a worsening of her accepted work-related conditions.¹⁰

With regard to the period July 4 to August 6, 2009, there is no medical evidence of record establishing that appellant was disabled from working limited duty during that period due to the work injury. The record reflects that she sustained a new injury July 14, 2009 and was compensated until July 21, 2009. Appellant then resumed four hours light duty and then was off work on August 5 and 6, 2009. As there is no medical evidence establishing that she had

⁷ *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁸ *Maurissa Mack*, 50 ECAB 498 (1999).

⁹ Claim numbers xxxxx509 and xxxxx071 have been administratively combined into the current claim, as the master file.

¹⁰ *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

increased disability from July 4 to August 6, 2009 as a result of her work-related conditions, she is not entitled to additional compensation for time lost from work during that period.

For the period September 3 to December 8, 2009, appellant submitted numerous medical reports from Dr. Kovan. It is noted that Dr. Bono, the treating physician of record, opined that her condition had improved since the surgery and that she was capable of working part time with restrictions to gradually increase to eight hours per day with restrictions. In his September 3, 2009 report, Dr. Kovan noted the history of the November 6, 2007 injury. While he advised that appellant had radicular pain due to secondary postlaminectomy syndrome, in addition to cervical radiculopathy, he failed to provide objective findings that her accepted conditions had worsened to the extent that she could not work in her part-time limited-duty position. Dr. Kovan did not offer any opinion to explain why appellant was unable to perform her part-time limited-duty position and the examination findings were generally within normal limits with only decreased extension of the lumbar spine noted. His October 8, 2009 report did not comment on her work status. In his November 5, 2009 report, Dr. Kovan opined that appellant was able to work a sedentary job but failed to provide any details or indicate how such a sedentary position would differ from her part-time limited-duty position that was provided by the employing establishment. On July 23, 2010 he opined that her pain issues were secondary to the L3-4 decompression and fusion of June 5, 2008 and that she had residual deficits. While Dr. Kovan opines that it was appropriate for appellant to be off work due to her myofascial issues secondary to back pain, he failed to provide any objective findings to explain how her accepted conditions had worsened. In his September 22, 2010 report, he opined that appellant was totally disabled from September 3 to December 8, 2009 due to cervical radiculopathy and lumbar pain, stenosis, which was demonstrated by MRI scan and weakness in the extremities on examination. However, Dr. Kovan failed to provide a well-rationalized medical explanation as to how this resulted from a spontaneous material worsening of the accepted conditions. Furthermore, he did not address how appellant was unable to perform the light duties she was working at the time she stopped working on September 3, 2009. Thus, Dr. Kovan's reports are insufficient to establish that she sustained a material worsening of her accepted work-related conditions. Other reports submitted by appellant did not address her claimed recurrent disability on or after September 3, 2009.

Appellant has not met her burden of proof in establishing that there was a change in the nature or extent of the injury-related condition or a change in the nature and extent of the light-duty requirements which would prohibit her from performing the light-duty position she assumed after she returned to work.

On appeal, appellant's counsel argues that OWCP's decision is contrary to fact and law. However, the issue is medical in nature. As noted above, appellant did not meet her burden of proof to submit medical evidence establishing that she was unable to perform her light-duty position for intermittent periods from July 4 to August 6, 2009 and for the period September 3 to December 8, 2009 due to a spontaneous change in her accepted conditions.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish a recurrence of disability for the intermittent period July 4 to August 6, 2009 and for the period September 3 to December 8, 2009 causally related to her accepted employment conditions.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 22, 2010 is affirmed.

Issued: November 3, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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