

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

JULIO THEN, Appellant

and

**U.S. POSTAL SERVICE, AUDUBON STATION,
New York, NY, Employer**

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**Docket No. 02-1826
Issued: January 26, 2004**

Appearances:
Julio Then, pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument December 11, 2003

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 28, 2002 appellant filed a timely appeal of a June 10, 2002 decision of the Office of Workers' Compensation Programs which denied her recurrence of disability claims. 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 met his burden of proof to establish that he sustained recurrences of disability on June 21 and July 19, 2001.

FACTUAL HISTORY

On November 27, 2000 appellant, then a 41-year-old city letter carrier, filed an occupational disease claim, alleging that factors of employment aggravated his back pain, which was causally related to a July 17, 1992 work injury. After initially denying the claim in a decision dated January 23, 2001, on June 12, 2001 the Office set aside the January 23, 2001 decision and accepted that appellant sustained an employment-related exacerbation of chronic low back syndrome with radiculopathy. On June 26, 2001 he accepted a limited-duty position,

which was in accordance with the physical restrictions provided by his treating Board-certified psychiatrist, Dr. Elena Robert.¹ Appellant subsequently filed two claims, alleging recurrences of disability on June 21 and July 19, 2001.

In letters dated July 5 and July 20, 2001, the employing establishment described appellant's work duties, stating that he had been granted light-duty status in November 2000, that the job limitations were within the restrictions provided by medical documentation and that the duties included casing mail, writing notices and sedentary work. By letter dated August 18, 2001, the Office informed appellant of the type of evidence needed to establish the two recurrence of disability claims.

In support of his claims, appellant submitted form disability reports from Dr. Robert dating from June 20 to August 9, 2001, who diagnosed chronic low back syndrome secondary to discogenic disease and advised that appellant was unable to work. In a September 9, 2001 report, Dr. Robert noted that magnetic resonance imaging (MRI) scan of the lumbar spine performed on May 29, 2000 demonstrated an L4-5 disc herniation on the left with displacement of the L5 nerve root. An electromyogram (EMG) of February 16, 2001 demonstrated chronic, moderately severe L3-4-5 radiculopathy. She advised that appellant had suffered an exacerbation of chronic low back syndrome and radiculopathy as a result of an episode of heavy lifting superimposed on repetitive daily trauma, noting that the injury had a tendency to frequent exacerbation. Dr. Robert concluded that appellant was totally disabled.

By decision dated November 5, 2001, the Office found that appellant did not sustain recurrences of disability on June 20 and July 19, 2001.

On November 14, 2001 appellant requested reconsideration and submitted additional medical evidence including reports dated September 5 and October 15, 2001, in which Dr. Howard M. Baruch, a Board-certified orthopedic surgeon, noted the history of injury and the MRI and EMG findings. He made findings on examination and diagnosed lumbar herniated nucleus pulposus, stating that it was causally related to the employment injury. Dr. Baruch concluded that appellant was totally disabled. Appellant submitted reports from Dr. Alberto Comas Espinal, a Board-certified pediatrician, dated November 29 and December 7, 2001, who advised that appellant was totally disabled. In disability slips dated December 5, 2001 and January 3, 2002, Dr. Robert also advised that appellant was totally disabled. In a report dated February 6, 2002, Dr. Steven Halle, Board-certified in anesthesiology, reported that he saw appellant in consultation for pain management. He noted the history of injury and diagnosed chronic low back pain with bilateral radiculopathy, multilevel degenerative disc disease and a herniated disc at L4-5.

By decision dated February 15, 2002, the Office denied modification of the November 5, 2001 decision.

¹ The restrictions included that appellant was not to perform repetitive bending, stressful pulling or pushing or heavy lifting. He was to box mail, answer the telephone and "kill" mail.

On March 14, 2002 appellant requested reconsideration and submitted additional evidence. In a March 5, 2002 report, Dr. Robert noted that she began treating appellant on November 16, 2000, stated that she had last seen him on January 3, 2002 and described his course of treatment. She advised that appellant continued to present with symptoms of chronic severe radiculopathy and indicated that he was to undergo epidural injections. On March 11, 2002 appellant's disability retirement was approved by the Office of Personnel and Management. In a decision dated June 10, 2002, the Office denied modification of the February 15, 2002 decision.

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 establishes that the employee 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 he or she cannot perform such light duty. 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.²

Causal relationship is a medical issue,³ and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁴

Under the Federal Employees' Compensation Act,⁵ the term "disability" means incapacity because of the employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages she was receiving at the time of injury, has no disability as that term is used in the Act.⁶

ANALYSIS

The Board finds that this case is not in posture for a decision.

² *Barry C. Peterson*, 52 ECAB 120 (2000).

³ *Mary J. Briggs*, 37 ECAB 578 (1986).

⁴ *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

The Board notes that it is unclear from the record whether the herniated disc at L4-5 has been accepted as employment related. In the memorandum, in support of the June 12, 2001 decision, the Office accepted that appellant sustained an employment-related exacerbation of chronic low back syndrome and radiculopathy causally related to the work injury of July 17, 1992. The Office noted that it relied upon the opinion of appellant's treating physician, Dr. Robert. The Office indicated that Dr. Robert referenced the MRI findings of herniated disc at L4-5 and EMG findings of moderately severe L3-4-5 radiculopathy before concluding that appellant developed "exacerbation of chronic low back syndrome and radiculopathy as a result of episode of heavy lifting superimposed on repetitive daily trauma."

The determination of whether appellant has established that he sustained recurrences of disability on June 21 and July 19, 2001 is predicated on establishing the exact conditions that have been accepted as employment related. The case will be remanded to the Office for this determination. The Board notes that the medical evidence contemporaneous to the period of claimed disability indicates that the disability is due to the underlying degenerative disc disease and herniated disc at L4-5. Beginning on June 20, 2001, Dr. Robert found that appellant was totally disabled secondary to discogenic disease. Similarly, both Dr. Baruch and Dr. Comas Espinal opined that appellant was totally disabled due to his back condition. While these reports do not establish appellant's claim, it is well established that proceedings under the Act are not adversarial in nature and the Office shares responsibility in the development of the evidence.⁷ The case will be remanded to the Office. Upon remand, the Office shall compile an updated statement of accepted facts to include the accepted conditions and develop the medical evidence to obtain a detailed opinion regarding whether appellant's condition and disability subsequent to June 20, 2001 were causally related to the accepted employment conditions. After such development as the Office deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The case is, therefore, remanded to the Office for further development regarding whether appellant established that he sustained recurrences of disability on June 21 and July 19, 2001.

⁷ Claudio Vazquez, 52 ECAB 496 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 10 and February 15, 2002 and November 5, 2001 be vacated and the case remanded to the Office for proceedings consistent with this opinion.

Issued: January 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member