

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

ALILAH S. WAY, Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Jersey City, NJ, Employer**

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**Docket No. 04-1915
Issued: August 17, 2005**

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
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 26, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated November 17, 2003, which denied her recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she sustained a recurrence of disability on or after December 5, 2002, causally related to her September 12, 2002 employment injury.

FACTUAL HISTORY

On September 12, 2002 appellant, then a 24-year-old custodian, sustained a cervical sprain as a result of lifting a bag at work that day.¹ On October 9, 2002 appellant was found able

¹ X-rays of the cervical spine obtained on September 18, 2002 revealed straightening of the normal cervical lordosis without evidence of fracture.

to return to light-duty work for two weeks. Her symptoms were listed as “neck pain radiating to the left shoulder.” Physical restrictions were provided by Dr. Anita O. Jongco, a Board-certified internist, in an October 9, 2002 report. She advised appellant to return to light duty for at least two weeks with no lifting, pulling, pushing or stretching. On October 11, 2002 Dr. Jongco indicated that appellant’s restrictions were no carrying or lifting, no operating machinery and no reaching above the shoulder.

Appellant took leave without pay from December 7 to 31, 2002. On a December 23, 2002 Form CA-7, appellant claimed leave without pay from December 6 to 20, 2002.

By report dated December 6, 2002, Dr. Victor Daibo, a Board-certified orthopedic and hand surgeon, noted that appellant was under his care for a “? [Questionable] Herniation C5-6 (L).” He noted that “due to the above-stated diagnosis she is under my care and unable to work for an undetermined period of time (approximately 3 to 4 weeks). You will be notified when she will be able to return.” In a December 6, 2002 attending physician’s report, Form CA-2a, Dr. Daibo noted as history, “while lifting a heavy bag while at work she began to experience pain in neck and (L) shoulder.” He restate the diagnosis, noted that appellant was totally disabled for four to six weeks and that he referred her for a magnetic resonance imaging (MRI) scan of the cervical spine and left shoulder.

On December 19, 2002 appellant filed a claim alleging that she sustained a recurrence of disability beginning December 5, 2002 causally related to her September 12, 2002 cervical sprain condition. Appellant stopped work on December 5, 2002 due to her cervical strain injury. She noted that she had been on light duty at the time of the alleged recurrence.

On January 2, 2003 the Office requested that appellant submit further evidence in support of her claim. She responded by noting that, after 30 days on light duty, she still experienced pain and stiffness in her neck and shoulder. On December 2, 2002 the pain became worse and, on December 5, 2002, she was still immobile and in extreme pain. Appellant indicated that Dr. Daibo opined that she should be out of work for at least four to six weeks. Appellant also indicated that she was awaiting for approval for an MRI scan.

By decision dated February 6, 2003, the Office denied appellant’s recurrence of disability claim on the grounds that the medical evidence submitted failed to demonstrate that her disability was causally related to the September 12, 2002 cervical strain injury. The Office found that Dr. Daibo did not provide a firm diagnosis, indicating that the diagnosis of C5-6 disc herniation was questionable. The Office noted that appellant had been able to return to work on October 12, 2002.² On March 4, 2003 appellant requested an oral hearing.

A March 20, 2003 cervical MRI scan was interpreted by Dr. Bernard Beute, a Board-certified radiologist, as demonstrating mild multilevel degenerative disc changes of the cervical spine, a disc bulge at C4-5 and a moderate-sized left posterolateral foraminal disc herniation at C5-6. In a March 26, 2003 letter, Dr. Daibo indicated that appellant injured herself at work on September 12, 2002 and had complained of neck and left shoulder pain. Physical examination

² The previously submitted factual information indicated that appellant was cleared to return to light-duty work on October 9, 2002.

demonstrated weakness of her biceps, tenderness of the left trapezius and decreased left biceps reflexes. He stated that the MRI scan confirmed his diagnosis of a herniation of C5-6 on the left. Dr. Daibo opined that, to the best of his orthopedic knowledge, appellant's disc herniation at C5-6 was a direct result of the September 12, 2002 injury and he recommended light duty and physiotherapy.

On April 14, 2003 appellant's representative reiterated her request for an oral hearing. An oral hearing was held on September 22, 2003 at which appellant testified. She submitted the August 23, 2003 report of Dr. Diabo, who noted her chief complaint of neck, left shoulder and left arm pain which he attributed to the C5-6 disc herniation. Dr. Daibo recommended epidural nerve blocks and probably a cervical discectomy.

At the hearing appellant claimed that from November 29 through December 5, 2002 she was forced to work full duty and that from December 6, 2002 through February 21, 2003 she was totally disabled until she returned to light duty.

By decision dated November 17, 2003, the hearing representative affirmed the February 6, 2003 decision, finding that appellant had failed to establish a recurrence of disability causally related to the September 12, 2002 cervical strain injury. The hearing representative found that Dr. Daibo's opinion that appellant was totally disabled after December 5, 2002 was not supported by adequate medical rationale.

LEGAL PRECEDENT

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, 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. 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 job duty requirements.³

Whether a particular injury causes an employee to be disabled for work and the duration of such disability are generally medical issues which must be established by a preponderance of the reliable and probative medical evidence.⁴ The opinion of the physician must be one of reasonable medical certainty and supported by medical rationale explaining the nature of the causal relationship found between the diagnosed condition and employment injury.⁵

ANALYSIS

The Board finds that appellant has not established that she sustained a recurrence of total disability on December 5, 2002 causally related to her accepted cervical strain condition or to changes in her light-duty job requirements.

³ *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁵ *See Leslie C. Moore*, 52 ECAB 132 (2000).

Appellant sustained a cervical strain on September 12, 2002. Thereafter, her treating physicians indicated that as of October 9, 2002 she was able to return to light duty for two weeks, with no lifting, pulling or stretching. Her symptoms indicated “neck pain radiating to the left shoulder.” Dr. Jongco advised that appellant return to light duty for at least two weeks with no lifting, pulling, pushing or stretching. Dr. Jongco subsequently extended the restrictions of no carrying or lifting, no operating machinery and no reaching above the shoulder.

Appellant described her claim for recurrence of disability on December 19, 2002, noting that she was returned to limited duty. Appellant claimed that after 30 days on light duty, she was experiencing pain and stiffness in her neck and shoulder and that, on December 2, 2002, it became worse. On December 5, 2002 she was immobile and in extreme pain. Thereafter, she saw Dr. Daibo.

On December 6, 2002 Dr. Daibo noted the diagnosis of a questionable herniation at C5-6 and opined that appellant would be unable to work for about three to four weeks. However, he did not provide a firm diagnosis for this period of disability or discuss how the September 12, 2002 injury, accepted for a cervical stain, caused a herniated cervical disc. Dr. Daibo’s December 6, 2002 report is of diminished probative value on whether appellant sustained a recurrence of disability. Dr. Daibo also provided a December 6, 2002 Form CA-17, which lacked any information about appellant’s work restrictions and checked marked “yes” that his diagnosis of a C5-6 disc herniation was related to the accepted injury. It is well established that such an opinion on causal relationship on a form report has little probative value.⁶

A March 19, 2003 MRI scan demonstrated mild cervical spine degeneration, a disc bulge at C4-5 and a herniated disc at C5-6 to the left. In a March 26, 2003 medical note, Dr. Daibo stated that these findings confirmed the diagnosis of a herniated disc at C5-6. He stated: “To the best of my orthopedic knowledge, these injuries in the form of herniation of C5-6 were a direct result of the work-related injury on September 12, 2002.” Although the physician generally supported a causal relationship between the diagnosed herniated disc and the accepted injury, Dr. Daibo did not provide any explanation for his one sentence conclusion. Dr. Daibo did not provide a full background of appellant’s cervical history or discuss with rationale how her activities of lifting a bag at work would cause or contribute to the C5-6 disc herniation or degeneration of the cervical spine. Again, he provided insufficient rationale to support that her disability commencing December 5, 2002 was related to the accepted cervical strain injury. On August 23, 2003 Dr. Daibo discussed his examination of appellant on December 6, 2002, his findings on physical examination and the MRI scan studies of her cervical spine. He described the C5-6 disc herniation as very symptomatic but did not provide adequate rationale for explaining how the lifting activities of September 12, 2002 caused or aggravated his diagnosed condition. Further he did not address the issue of her disability for work as of December 6, 2002, noting only that after physical therapy appellant was returned to light duty.

No change in the nature and extent of appellant’s job duties has been documented and no change in the nature and extent of her accepted cervical strain has been established by probative

⁶ See Gary J. Watling, 52 ECAB 278 (2001).

and substantial medical evidence. Appellant has not established that she sustained a recurrence of total disability causally related to her cervical strain condition.

CONCLUSION

The Board finds that appellant has failed to establish her disability commencing December 5, 2002 was causally related to her September 12, 2002 injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 17, 2003 is affirmed.

Issued: August 17, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

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