United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 06-1789**
	)	**Issued: January 9, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer	)	

Appearances:
Stephen Murray, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2006 appellant filed a timely appeal of a June 22, 2006 decision by an Office of Workers' Compensation Programs' hearing representative who affirmed a June 28, 2005 decision denying his claim for a recurrence of 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 met his burden of proof to establish a recurrence of disability beginning May 16, 2005 causally related to his May 25, 2004 employment injury.

FACTUAL HISTORY

On May 27, 2004 appellant, then a 40-year-old building maintenance custodian, filed a traumatic injury claim alleging that, on May 25, 2004, he sustained an injury to his back while stacking empty trays in the performance of duty. He stopped work on May 27, 2004 and returned on June 1, 2004. The Office accepted the claim for lumbosacral strain.[1] Appellant received appropriate compensation benefits.

[1] The record reflects that appellant has several claims which include an accepted claim for a thoracic lumbar strain on September 15, 1989 and an accepted claim for a lumbar strain on November 30, 1992.

In a June 8, 2004 report, appellant's treating physician, Dr. George Whitelaw, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment. He advised that a previous magnetic resonance imaging (MRI) scan from October 11, 2002 revealed a disc extrusion into the left lateral recess with impingement on the left L5 nerve root, mild central stenosis and degenerative changes. Dr. Whitelaw opined that appellant had lumbar disc disease which was exacerbated by the May 25, 2004 employment injury.

In a June 28, 2004 report, Dr. Whitelaw noted that appellant was "making good progress" and was scheduled for physical therapy. He indicated that he would determine if appellant was ready to return to light-duty work after a follow-up evaluation in two weeks. Dr. Whitelaw continued to submit reports. On August 18, 2004 he further advised that appellant needed to reduce his weight. In an October 25, 2004 report, Dr. Whitelaw advised that appellant needed physical therapy. He submitted additional treatment notes and recommend therapy; however, he did not recommend that appellant return to work.

On November 23, 2004 the Office referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. David J. Cohen, Board-certified in internal medicine.

In a December 23, 2004 report, Dr. Cohen noted appellant's history of injury and treatment. He noted that appellant was morbidly obese and that this was a source of his problems. Dr. Cohen conducted a physical examination and advised that his weight limited his agility. He noted that the neurological examination failed to reveal any objective signs of lumbosacral radiculopathy. Dr. Cohen advised that appellant's "preexisting condition was limited [by] his ability to respond to conservative therapy in view of his massive obesity." He noted that appellant claimed that his back pain was easily activated, but that he did not appear to be suffering during his examination. Dr. Cohen opined that appellant could return to work as a custodian if he did not do a lot of bending and was allowed to move about freely after sitting or standing for any prolonged periods. He opined that appellant's morbid obesity was the source of his symptoms.

On January 13, 2005 the Office referred appellant together with a statement of accepted facts and the medical record to Dr. Gerald F. Winkler, a Board-certified neurologist, for an impartial medical evaluation to resolve the conflict in opinion between appellant's physician, Dr. Whitelaw, who opined that appellant could not return to work and Dr. Cohen, the second opinion physician, who opined that appellant could return to work with some restrictions.

In a February 22, 2005 report, Dr. Winkler noted appellant's history of injury and treatment, which included an "exacerbation of back and leg pain while bending over." He noted that as far back as 1993, diagnostic reports revealed a disc protrusion at L5-S1 and a disc extrusion at L4-5 pressing on the left L5 nerve root. Dr. Winkler noted that appellant's current activities included selling raffle tickets, using the computer and watching television. Appellant related that he stayed up all day, could tolerate driving for up to an hour, could sit long enough to watch a movie, and could walk up to half a mile. Dr. Winkler conducted an examination and advised that there were no abnormalities on neurologic examination. He opined that it was "not possible to determine whether [appellant] has returned to pain level that he was experiencing

before May 25, 2004" because no medical records prior to that date were submitted. Dr. Winkler concluded that appellant was capable of "carrying out gainful activity whose exertional requirements are similar to those of his reported current level of activity." He opined that appellant could do sedentary to light-level work with no lifting over 10 to 15 pounds, no bending or twisting and the opportunity to sit or stand as necessary. Dr. Winkler completed a work capacity evaluation and advised that appellant could return to work provided it was restricted to light sitting/standing work for eight hours a day with restrictions.

In a report dated February 24, 2005, Dr. John P. Latchaw, a Board-certified neurological surgeon and treating physician, noted appellant's history of injury and treatment. He conducted a physical examination and advised that appellant might benefit from lumbar epidural steroid injections. However, it was unlikely that the injections would be sufficient to return appellant to work.

By letters dated March 8 and 10, 2005, the employing establishment provided appellant with a limited-duty job offer in accordance with the medical restrictions provided by Dr. Winkler on March 10, 2005. The position, was entitled "modified building maintenance custodian" and included duties which consisted of dusting and cleaning carrier cases, moving and organizing the custodial area, answering telephones and other duties (within restrictions) assigned by manager/supervisor. The physical requirements included light-level work within restrictions, no pushing, pulling, or lifting over 10 to 15 pounds, no twisting, no bending/stopping, no squatting, no kneeling, no climbing and changing positions at will, with sitting and standing as necessary.

By letter dated March 17, 2005, the Office advised appellant that the modified building maintenance custodian position had been found to be suitable to his capabilities and was currently available. It indicated that the impartial medical examiner, Dr. Winkler had examined appellant on February 22, 2005 and provided work restrictions that were consistent with the offered position. Appellant was advised that he should accept the position or provide an explanation for refusing the position within 30 days. The Office informed appellant that, if he failed to accept the offered position and failed to demonstrate that the failure was justified, his compensation would be terminated. Appellant subsequently accepted the modified position and returned to full-time light-duty work on March 22, 2005.

The Office authorized a lumbar myelogram with computerized tomography (CT) scan and electromyography (EMG) scan on April 14, 2005. This was performed by Dr. Latchaw on May 12, 2005.

In an April 25, 2005 report, Dr. Whitelaw noted that appellant had gastric bypass surgery in March and lost 40 pounds. He advised that appellant was already back to light duty and noted that it was "a bit of a struggle for him. Appellant is having to take a fair amount of pain medication to get through the day, but he seems to be making it." Dr. Whitelaw advised that he would have appellant continue with his work-up with Dr. Latchaw and proceed from there.

In a May 18, 2005 report, Dr. Latchaw determined that appellant had postoperative fibrosis, a well-known surgical complication from foraminotomies and lumbar disc excision. He opined that appellant was totally disabled for heavy lifting and the significant physical activity of

his job. In a May 19, 2005 report, Dr. Latchaw diagnosed L4-5 disc herniation and checked the box "yes" that he believed the condition was caused or aggravated by an employment activity. He advised that appellant could not return to work and opined that appellant needed to lose 100 pounds prior to lumbar surgery.

On May 20, 2005 appellant alleged a recurrence of disability commencing May 13, 2005.[2] He alleged that "[s]ince I returned to work, I have been in constant pain." Appellant stated that the "old injury never went away." He noted that, after a recent follow-up medical examination, he was advised not to work.

On May 24, 2005 the employing establishment informed the Office that appellant had been back to work for two months and was working within his "suitable limited-duty assignment."

By letter dated May 27, 2005, the Office advised appellant that it had received his claim for a recurrence of disability. It requested that appellant provide additional information to support his claim and allotted him 30 days to submit the requested information.

By decision dated June 28, 2005, the Office denied appellant's claim for compensation. It found that the medical evidence was insufficient to establish that he was unable to perform the restricted-duty work to which he was assigned because of a material worsening of the accepted condition.

On July 10, 2005 appellant requested a hearing, which was held on March 29, 2006.

In a July 11, 2005 report, Dr. Whitelaw advised that appellant was not capable of working because he had to lie down for two hours to alleviate pain. He opined that appellant remained disabled from his work as a custodian or answering telephones because he had to lay down for two hours every hour or two.

In an October 4, 2005 report, Dr. Latchaw determined that the diagnostic myelography performed in May 2005 revealed a neurosurgically operable lesion. He noted that appellant wished to consider surgery and would continue losing weight. Dr. Latchaw advised that appellant was temporarily disabled for heavy lifting and significant physical activity from his job and opined that his current condition was directly related to the work-related injury of May 25, 2004. He continued to treat appellant and opine that he was disabled.

The Office received a March 29, 2006 statement from appellant which described the circumstances surrounding his injury. In a May 9, 2006 statement, the employing establishment questioned whether appellant was disabled due to his work-related injury or due to his weight condition.

In a June 22, 2006 decision, the Office hearing representative affirmed the June 28, 2005 decision.

[2] Appellant filled in the date of May 16, 2005 as the date his pay stopped after the recurrence.

LEGAL PRECEDENT

Section 10.5(x) of the Office's regulations provides that 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]

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.[4]

Causal relationship is a medical issue,[5] and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. This consists of 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.[6] The physician's opinion 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.[7]

ANALYSIS

The Office accepted that appellant sustained a lumbosacral strain in the performance of duty on May 25, 2004. Appellant subsequently alleged recurrence of total disability commencing on May 16, 2005. On May 27, 2005 the Office advised appellant of the type of medical and factual evidence needed to establish his claim for a recurrence of disability. However, appellant did not submit medical reports which contained a rationalized opinion from a physician who, on the basis of a complete and accurate factual and medical history, concluded that appellant's disability commencing on or after May 16, 2005 was causally related to the employment injury and supported that conclusion with sound medical reasoning.[8] The Board also notes that there is no evidence showing a change in the nature and extent of the light-duty job requirements.

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[3] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[4] *Richard E. Konnen*, 47 ECAB 388 (1996); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[5] *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

[6] *Duane B. Harris*, 49 ECAB 170, 173 (1997).

[7] *Gary L. Fowler*, 45 ECAB 365, 371 (1994).

[8] *See Helen K. Holt*, 50 ECAB 279 (1999).

Appellant submitted several reports from Dr. Latchaw. In a May 18, 2005 report, Dr. Latchaw determined that appellant had postoperative fibrosis, which he explained was a well-known surgical complication from foraminotomies and lumbar disc excision. He further opined that appellant was totally disabled from heavy lifting and significant physical activity from his job. However, appellant's claim was accepted for a lumbosacral strain. Furthermore, appellant had a preexisting problems including morbid obesity. Dr. Latchaw did not provide adequate medical rationale to explain why any such disability would be necessitated by the accepted injury.[9] In a May 19, 2005 report, he diagnosed an L4-5 disc herniation and checked the box "yes" that he believed the condition was caused or aggravated by an employment activity. Dr. Latchaw advised that appellant could not return to work and opined that appellant needed to lose 100 pounds prior to lumbar surgery. However, this report is of diminished probative value. The Board has held that the checking of a box "yes" on a form report, without additional explanation or rationale, is insufficient to establish causal relationship.[10] Additionally, Dr. Latchaw did not explain how appellant's condition had worsened such that he was no longer able to perform his limited-duty work during this time frame.[11] Without additional explanation or rationale, this report is insufficient to establish causal relationship or show that appellant's condition has worsened such that he was no longer able to perform his limited-duty position.

Dr. Whitelaw advised that appellant remained disabled from his work as a custodian or answering telephones because he had to lay down for two hours every hour or two to alleviate his pain. However, he failed to support his opinion with objective findings.[12] The Board notes that the modified position specified duties within his restrictions, which were prescribed by the impartial medical examiner, and which included that appellant could move about freely after sitting or standing for any prolonged periods. Dr. Whitelaw did not provide any objective findings to explain why appellant now had to lie down every two hours other than to say it was due to pain. His opinion is of limited probative value and is insufficient to establish causal relationship or show that appellant's condition has worsened such that he was no longer able to perform his limited-duty position.

In an October 4, 2005 report, Dr. Latchaw determined that appellant had a neurosurgically operable lesion and opined that appellant was temporarily disabled for heavy lifting and significant physical activity from his job. He opined that appellant's current condition was directly related to the work-related injury of May 25, 2004. The Board notes that the accepted condition was a lumbosacral strain and Dr. Latchaw did not provide a reasoned opinion

[9] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

[10] *Calvin E. King*, 51 ECAB 394 (2000).

[11] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[12] *See Laurie S. Swanson*, 53 ECAB 517 (2002) (where a physician's report does not indicate an objective worsening of a claimant's condition, and the physician's statements regarding a claimant's ability to work consist primarily of a repetition of the claimant's complaints that she hurt too much to work, this is not a basis for payment of compensation).

on causal relationship. In the absence of a medical report providing a diagnosed condition and a reasoned opinion on causal relationship with the employment incident, appellant did not meet his burden of proof.[13] While Dr. Latchaw indicated that appellant could not do heavy lifting or significant physical activity, he did not address the duties of the modified position. The Board notes that the modified position did not include any heavy lifting, but rather was comprised of modified activities not to exceed lifting over 10 to 15 pounds. Dr. Latchaw's opinion is of diminished probative value.

Consequently, appellant did not meet his burden of proof to establish a recurrence of disability beginning May 16, 2005 causally related to the May 25, 2004 employment injury.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a recurrence of disability beginning May 16, 2005 causally related to the May 25, 2004 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2006 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Issued: January 9, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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

[13] *Deborah L. Beatty*, 54 ECAB 340 (2003).