

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

V.V., Appellant

and

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

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**Docket No. 07-484
Issued: July 18, 2007**

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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 12, 2006 appellant, through his attorney, filed a timely appeal from a July 11, 2006 merit decision of the Office of Workers' Compensation Programs, denying modification of the finding that he did not sustain a recurrence of total disability beginning July 3, 2003. 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 has established that he sustained a recurrence of total disability from July 3, 2003 through October 17, 2004 causally related to his November 13, 1996 employment injury.

FACTUAL HISTORY

On November 13, 1996 appellant, then a 44-year-old mail handler, sustained a herniated disc in his back while lifting sacks of mail onto a conveyor belt. The Office accepted his claim for a herniated disc at L4-5 with radiculopathy. Appellant returned to limited-duty work on January 13, 1997. He underwent back surgery on March 12, 1997, June 29, 2000 and July 2001.

On July 14, 2003 appellant filed a claim alleging that he sustained a recurrence of total disability on July 3, 2003. He attributed the recurrence of disability to continual standing, walking and turning which caused pain in his back and legs. Appellant stopped work on July 3, 2003. He submitted several medical records regarding his ongoing back and leg problems and disability, including medical reports from Dr. Mark A.P. Filippone, an attending Board-certified physiatrist and Dr. Cary D. Glastein, a Board-certified orthopedic surgeon. On July 2 and 29, 2003 Dr. Filippone opined that appellant had lumbosacral radiculopathy and that he was totally disabled from all work. In narrative reports dated July 29, 2003 and January 8, 2004, he noted appellant's continuing back pain radiating into his lower extremities which rendered appellant totally disabled.

Dr. Glastein's July 9, 2003 report stated that appellant sustained "possible" sciatica and radicular symptoms at the level above his previous fusion. He indicated that appellant had recently been taken off work. In subsequent treatment notes, Dr. Glastein stated that appellant sustained a herniated nucleus pulposus at L3-4 and that he was totally disabled.

By letter dated March 25, 2004, the Office advised appellant of the factual and medical evidence needed to submit to establish a recurrence of total disability claim.

In an undated letter received by the Office on April 16, 2004, appellant further described the development of his recurrence of total disability. He stated that he was having trouble bending, walking, stretching, picking up trays and pushing hampers that were overloaded due to the pain he experienced in his legs and back. Appellant had to stop every few minutes due to pain. He contended that he was currently totally incapacitated for work.

On April 6, 2004 Dr. Filippone stated that appellant was totally disabled since July 3, 2003. On February 5, 2004 he noted that appellant sustained lumbosacral radiculopathy status post lumbar sprain. Dr. Filippone indicated with an affirmative mark that appellant's condition was caused by the November 13, 1996 employment injury. He opined that appellant was totally disabled.

In February 2004, Dr. Glastein stated that appellant sustained a herniated nucleus pulposus at L3-4. A July 23, 2003 disability certificate noted that appellant had a herniated lumbar disc and that he was totally incapacitated. His April 14, 2004 treatment notes diagnosed a herniated nucleus pulposus at L3-4 and repeated that he was totally disabled for work.

By decision dated May 12, 2004, the Office denied appellant's recurrence of total disability claim. It found that the medical evidence of record failed to establish that he sustained a recurrence of total disability beginning July 3, 2003 causally related to his November 13, 1996 employment injury.

In an April 6, 2004 report, Dr. Filippone related that there had been no interval history of trauma or injury since the last time he examined appellant on March 31, 2004. He stated that appellant was last able to work on July 3, 2003. Dr. Filippone noted appellant's back problems and medical treatment plan. On April 22, 2004 he reiterated that appellant last worked in 2003 and was disabled.

In a June 3, 2004 letter, appellant, through counsel, requested an oral hearing before an Office hearing representative. In reports dated June 17 to September 1, 2004, Dr. Filippone noted appellant's complaints of back pain. He reiterated that appellant had not worked since July 3, 2003 and was disabled. Dr. Filippone further opined that appellant's continuing residuals and disability were directly and solely the result of his November 13, 1996 employment injury.

Appellant also submitted reports from physical therapists dated July 28, 2003 to November 30, 2004.

On October 13, 2004 Dr. Filippone stated that appellant could return to limited-duty work on October 18, 2004 for four hours per day. He resumed full-time limited-duty work on January 24, 2005.

By decision dated June 3, 2005, an Office hearing representative affirmed the May 12, 2004 decision. The hearing representative found that appellant failed to establish that he sustained a recurrence of disability beginning July 3, 2003 causally related to his accepted employment injury.

In a letter dated June 29, 2005, appellant, through counsel, requested reconsideration. In a May 23, 2005 report, Dr. Filippone reviewed an April 20, 2005 electromyogram/nerve conduction studies of appellant's lower extremities. The results revealed evidence of right L5-S1 lumbosacral radiculopathy and left L3-5-S1 lumbosacral polyradiculopathy. Dr. Filippone noted that appellant continued to complain of low back pain with radiation into both lower extremities with spasms in the lumbar paraspinal muscles bilaterally. His findings on neurological examination remained unchanged. Dr. Filippone diagnosed lumbosacral radiculopathy. He stated that appellant could continue to perform limited-duty work on a full-time basis with the same restrictions. Dr. Filippone opined that appellant's abnormalities were directly and solely the result of his work-related injury and were permanent in nature. In reports of June 23 to October 26, 2005, he noted appellant's complaint of numbness in the right finger and pain and spasms in the low back. Dr. Filippone indicated that there was no interval history of trauma or injury. Appellant could continue to perform limited-duty work while taking medication.

In a November 16, 2005 decision, the Office denied modification of the hearing representative's June 3, 2005 decision.

In a November 29, 2005 report, Dr. Filippone noted that appellant continued to perform limited-duty work with impairment of his daily living activities. He outlined restrictions in an accompanying CA-17 form report. On January 25, 2006 Dr. Filippone provided a diagnosis of displacement of intervertebral disc, site unspecified, without myelopathy and appellant's physical restrictions. In subsequent reports, he noted appellant's continuing back pain while performing limited-duty work.

By letter dated May 4, 2006, appellant, through counsel, requested reconsideration of the Office's November 16, 2005 decision. He submitted Dr. Filippone's April 24, 2006 report which provided a history of the July 3, 2003 recurrence of disability. Counsel reiterated that appellant continued to experience back pain and spasms that were treated by prescribed medication. On June 6, 2006 he repeated that appellant had lumbosacral radiculopathy and physical restrictions.

Dr. Filippone reiterated that appellant had continuing complaints of low back pain and spasms and he continued working within his restrictions.

On July 11, 2006 the Office denied modification of the November 16, 2005 decision. It found that the evidence submitted by appellant was insufficient to establish that he sustained a recurrence of disability due to his accepted employment-related injury.¹

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.² 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.³

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he 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 he cannot perform such limited-duty work. 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 limited-duty job requirements.⁴

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.⁵

ANALYSIS

The November 13, 1996 injury was accepted for a herniated disc at L4-5 with radiculopathy. Appellant returned to work in a part-time limited-duty capacity on

¹ Following the issuance of the Office's July 11, 2006 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

² 20 C.F.R. § 10.5(x).

³ *Id.*

⁴ *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁵ *James H. Botts*, 50 ECAB 265 (1999).

January 13, 1997. He claimed a recurrence of total disability on July 3, 2003 causally related to the accepted employment injury. Appellant must demonstrate either that his condition has changed such that he could not perform the activities required by his modified job or that the requirements of the limited-duty job changed or were withdrawn. The Board finds that the record contains no evidence that the limited-duty job requirements were changed or withdrawn or that appellant's employment-related condition has changed to the point that it precludes him from engaging in light-duty work.

Appellant submitted medical evidence from Dr. Filippone and Dr. Glastein. Dr. Filippone found that appellant had pain in his back and lower extremity and was totally disabled. A July 23, 2003 disability certificate and April 14, 2004 treatment notes found that appellant sustained a herniated disc and noted that he was totally disabled since July 3, 2003. Dr. Glastein's treatment notes stated that appellant sustained a herniated nucleus pulposus at L3-4 and that he was totally disabled. On July 9, 2003 he opined that appellant sustained possible sciatica and had possible radicular symptoms at the level above his previous fusion. Dr. Glastein indicated that appellant had recently been taken off work. Neither Dr. Filippone nor Dr. Glastein explained how appellant's disability for work was causally related to his accepted November 13, 1996 employment injury. Dr. Glastein did not provide a definitive diagnosis in his July 9, 2003 report. The Board finds that the medical evidence from Dr. Filippone and Dr. Glastein are of diminished probative value as the physician did not adequately address the issue of causal relation.

Dr. Filippone's February 5, 2004 report found that appellant sustained lumbosacral radiculopathy status post lumbar sprain. He indicated with an affirmative mark that his condition was caused by the November 13, 1996 employment injury. Dr. Filippone opined that appellant was totally disabled for an unknown period. His report is insufficient to establish appellant's claim. It is well established that a report which only addresses causal relationship with a checkmark without more by way of medical rationale explaining how the incident caused the injury, is insufficient to establish causal relationship and is of diminished probative value.⁶

Dr. Filippone's July 2, 2003 report noted that appellant had lumbosacral radiculopathy. Dr. Glastein's February 2004 form report stated that appellant sustained a herniated disc at L3-4. Neither Dr. Filippone nor Dr. Glastein provided any additional opinion on causal relationship or medical rationale explaining how and why these conditions would arise nearly seven years after the November 13, 1996 employment injury. The Board has held that medical reports not supported by medical rationale are of limited probative value.⁷

Dr. Filippone's July 20 and August 11, 2004 reports found that appellant's continuing residuals and total disability were directly and solely caused by the November 13, 1996 employment injury. He did not provide medical rationale explaining the basis for his stated conclusion that appellant's recurrence of total disability was caused by the accepted employment injury. Subsequent reports of Dr. Filippone stated that appellant sustained lumbosacral radiculopathy but that he could continue working in his limited-duty position. He did not

⁶ See *Frederick H. Coward, Jr.*, 41 ECAB 843 (1990); *Lillian M. Jones*, 34 ECAB 379 (1982).

⁷ *Lucrecia M. Nielson*, 42 ECAB 583 (1991).

specifically address whether appellant sustained a recurrence of total disability beginning July 3, 2003 causally related to his November 13, 1996 employment injury. The Board finds that his reports are insufficient to establish appellant's claim.

The reports and treatment notes from appellant's physical therapists covering intermittent dates from July 28, 2003 to November 30, 2004 do not constitute probative medical evidence inasmuch as a physical therapist is not considered a "physician" under the Federal Employees' Compensation Act.⁸

The Board finds that appellant has not submitted sufficiently rationalized medical evidence establishing that he was totally disabled during the period July 3, 2003 through October 17, 2004 due to his November 13, 1996 employment-related herniated disc at L4-5 with radiculopathy. There is no evidence showing that appellant experienced a change in the nature and extent of the limited-duty requirements or was required to perform duties which exceeded his medical restrictions.

Appellant has not met his 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 him from performing the limited-duty position he assumed after he returned to work.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of total disability from July 3, 2003 through October 17, 2004 causally related to his November 13, 1996 employment injury.

⁸ 5 U.S.C. §§ 8101-8193; 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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