

Appellant filed a recurrence of disability on December 28, 2000 alleging that on November 2, 2000 he developed numbness in both legs. He stopped work on November 2, 2000 and returned to light-duty work on November 13, 2000. Appellant filed a second recurrence of disability claim on December 29, 2000 alleging a recurrence of totally disability on December 20, 2000. The Office authorized compensation beginning December 23, 2000. Appellant underwent a laminectomy and lumbar fusion at L5-S1. He returned to light-duty work four hours a day on May 30, 2001. Appellant returned to full-time light-duty work on August 3, 2001. The Office authorized additional surgery on December 11, 2001. Appellant underwent a laminectomy at L4-5 and decompression of L4-5 and L5-S1 on December 13, 2001. The Office entered appellant on the periodic rolls on February 6, 2002. Dr. John W. Dietz, a Board-certified orthopedic surgeon, released appellant to return to light-duty work on July 29, 2002. Appellant returned to light-duty work four hours a day on July 31, 2002.

By decision dated April 6, 2004, the Office found that appellant's light-duty position at the employing establishment represented his wage-earning capacity and reduced his compensation benefits based on his actual earnings in this position.

Appellant underwent a laminectomy L3-4 on the left with decompression of the left L4 nerve root on February 4, 2005. The Office accepted this surgery and resultant period of disability as a work-related injury. Appellant returned to light-duty work on March 21, 2005.

Dr. Rick C. Sasso, a Board-certified orthopedic surgeon, examined appellant on August 24, 2005 and noted that his left leg pain had substantially resolved. He noted, however, that appellant began developing right leg pain two weeks prior to his examination. Dr. Sasso recommended physical therapy. He examined appellant on February 15, 2006. Dr. Sasso reported that appellant experienced significant right leg pain and that he had been unable to work due to this pain. Appellant felt incapacitated due to this right leg pain. Dr. Sasso opined that appellant was experiencing L4 radiculopathy on the right side due to significant degenerative change and transitional syndrome at L3-4. He recommended a selective nerve root sleeve injection at L4 on the right. Dr. Sasso stated that, if this injection was positive, then appellant should consider surgical decompression of the L3-4 segment on the right side and extending his fusion one level higher. Appellant's right L4 selective nerve root injection resulted in 100 percent relief of pain and was highly correlative for right L4 radiculopathy. On March 27, 2006 Dr. Sasso noted that appellant felt "miserable in regards to his present symptoms and ... can[not] perform his normal activities of daily living. [Appellant] is having a hard time with his normal activities." Dr. Sasso recommended additional surgery. He completed a form report on April 12, 2006 noting appellant's two-week history of right leg pain and diagnosing lumbar radiculopathy. Dr. Sasso indicated that appellant was totally disabled beginning April 8, 2006 and that surgery was pending.

On April 12, 2006 appellant completed a claim for compensation and requested wage-loss compensation for leave without pay from April 8 through 21, 2006. On the reverse of the form appellant's supervisor indicated that appellant used sick leave from April 8 through 12, 2006 and began using leave without pay on April 13, 2006. Appellant filed a recurrence of disability claim on April 20, 2006 alleging that on June 1, 2005 he sustained a recurrence of disability. He stopped work on April 8, 2006. Appellant stated that he developed weakness and

severe pain in his right leg which necessitated increased pain medication. He alleged that his level of medication was a safety concern.

By letter dated April 26, 2006, the Office noted that the employing establishment reported that appellant used leave for the period covered by his April 12, 2006 CA-7 and directed him to file a leave buyback application for this period. It noted that Dr. Sasso had not provided medical documentation stating why appellant was totally disabled. The Office stated: "Please have Dr. Sasso submit a follow[-]up report which gives the objective physical assessment findings which have convinced him that you could not work in any capacity and specific work duties of your current position that you could not perform." The Office allowed 30 days for a response.

The Office referred appellant's request for surgery to the Office medical adviser on April 26, 2006. On May 2, 2006 the Office medical adviser stated that the medical evidence was not sufficient to allow a decision regarding appellant's need for additional surgery. She recommended a second opinion evaluation to determine the appropriate treatment for appellant.

In a letter dated May 10, 2006, the Office acknowledged receipt of appellant's claim for recurrence and requested additional factual and medical evidence in support of his claim. The Office allowed 30 days for a response.

By decision dated June 19, 2006, the Office denied appellant's claim for total disability beginning April 8, 2006. It found that Dr. Sasso had not provided sufficient detailed medical opinion evidence to support appellant's claim for a recurrence of total disability.

Appellant requested a review of the written record by an Office hearing representative on June 29, 2006 and submitted additional medical evidence. On May 22, 2006 Dr. Sasso indicated that appellant could return to work on May 30, 2006. Appellant's restrictions included sedentary work only with no lifting over five pounds, no repetitive bending or twisting and no prolonged sitting or standing. In a report dated May 26, 2006, Dr. Sasso described appellant's history of injury on January 13, 2000 and his medical treatment. He reviewed his notes and reiterated appellant's inability to perform his activities of daily living beginning March 27, 2006. On June 7, 2006 Dr. Sasso diagnosed right L4 radiculopathy. He noted that appellant returned to work in May 2006 and that, while his initial return was successful, appellant began to develop increasing right leg pain. Dr. Sasso noted no weakness of the quadriceps or iliopsoas musculature on the right, but Grade 1 degenerative spondylolisthesis at L3-4 on x-ray. He recommended a second nerve root sleeve injection. In a work release note dated June 7, 2006, Dr. Sasso stated that appellant was off work from April 8 until May 30, 2006 due "to incapacitating back pain and treatment for this pain." On July 19, 2006 he stated that appellant's selective nerve root sleeve injection on June 26, 2006 resulted in 100 percent relief of his right leg pain and was positive from L4 radiculopathy on the right.

The Office referred appellant for a second opinion evaluation on July 18, 2006. Dr. Jeffrey A. Heavilon, a Board-certified orthopedic surgeon, completed his evaluation on August 2, 2006. He reviewed appellant's history of injury and medical treatment. Dr. Heavilon stated that appellant sustained a recurrence of his problems six months after the January 2005 surgery. He noted that appellant reported numbness from the waist down and electrical shocks in

the right leg as well as loss of hot and cold sensations. On neurological examination appellant exhibited balance problems and generalized weakness as well as reduced quadriceps reflexes on the right. Dr. Heavilon diagnosed chronic neurologic dysfunction of the lower limbs related to arachnoiditis, mild low back pain syndrome and degenerative changes at the L3-4 level with degenerative spondylolisthesis. He opined that surgical intervention had only a small chance of improving appellant's lower extremity symptoms. The Office requested a supplemental report from Dr. Heavilon on October 6, 2006. In a report dated October 18, 2006, Dr. Heavilon opined that appellant's current L3-4 disc condition was the direct result of his previous surgical procedures. He stated that the proposed decompression and fusion of the L3-4 level was the best surgical treatment for appellant's condition.

By decision dated November 13, 2006, the hearing representative reviewed Dr. Sasso's reports and found that there was not sufficient medical opinion evidence explaining why appellant was unable to work from April 8 to May 5, 2005 due to his accepted employment-related condition.

In a letter dated November 14, 2006, the Office approved appellant's requested L3-4 spinal fusion. On December 4, 2006 Dr. Sasso examined appellant and recommended that he proceed with surgery.

Appellant requested reconsideration of the hearing representative's November 13, 2006 decision on December 30, 2006. He described his condition from April 8 to May 30, 2006 and stated that he did not work due to "pain management" prescribed by Dr. Sasso. Appellant submitted a note from Dr. Sasso completed on July 27, 2006 and in which he repeated that appellant's response to the injection supported an L4-5 radiculopathy. Dr. Sasso also stated that appellant should continue his work restrictions.

Appellant underwent laminectomy at L3-4 on the right with removal of hardware and posterior lumbar fusion at L3-4 on January 11, 2007.

Dr. Sasso completed a form report on January 30, 2007 and diagnosed lumbar radiculopathy. He noted appellant's history of injury in January 2000 and indicated with a checkmark "yes" that appellant's condition was caused or aggravated by his employment. Dr. Sasso indicated that appellant was totally disabled through April 2, 2007.

By decision dated March 9, 2007, the Office stated that it had declined to reopen appellant's claim for consideration of the merits. However, the claims examiner noted that Dr. Sasso's January 30, 2007 report diagnosed lumbar radiculopathy and provided appellant's period of disability due to this condition. He found that this report did not contain rationale and did not demonstrate a change in the clinical presentation.¹

¹ The Board finds that the claims examiner did in fact conduct a merit review of the medical evidence. *See* note 4, *infra* and accompanying text.

LEGAL PRECEDENT

A recurrence of disability is the 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 which caused the illness. The 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.² 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.³

ANALYSIS

Appellant filed a claim for recurrence of disability alleging that he was totally disabled beginning April 8, 2006 due to his accepted condition. The Office denied his claim finding that he had not submitted sufficient medical evidence to establish a causal relationship between his alleged disability and his accepted employment injury on June 19, 2006. Appellant requested a review of the written record and by decision dated November 13, 2006, the hearing representative affirmed the Office's decision. He requested reconsideration and by decision dated March 9, 2007, the Office stated that it had not reviewed appellant's claim on the merits and denied his request for reconsideration. Although the Office's March 9, 2007 decision indicates on its face that it was not a review of the merits of appellant's claim, perusal of this decision establishes that it did in fact constitute a merit review. This decision evaluates the weight of the evidence especially the January 30, 2007 report of Dr. Sasso, a Board-certified orthopedic surgeon. As the March 9, 2007 decision of the Office in fact reviewed the merits of appellant's claim, the Board will do so on the present appeal.⁴

Dr. Sasso opined that appellant's disability beginning February 15, 2006 was due to right leg pain caused by significant degenerative changes and transitional syndrome at L3-4. He found that appellant was totally disabled beginning April 8, 2006. Dr. Sasso diagnosed right L4 radiculopathy on June 7, 2006 as well as Grade 1 degenerative spondylolisthesis at L3-4 as demonstrated by x-ray. In a separate form report, he stated that appellant was totally disabled from April 8 to May 30, 2006 due to incapacitating back pain. Dr. Sasso again diagnosed lumbar radiculopathy on January 30, 2007, attributed this condition to appellant's employment injuries

² 20 C.F.R. § 10.5(x).

³ *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁴ *Delphyne L. Glover*, 51 ECAB 146, 147 (1999).

and resultant surgeries and found that he was totally disabled from April 8, 2006 to April 2, 2007. The Office referral physician, Dr. Heavilon, a Board-certified orthopedic surgeon, completed reports on August 2 and October 18, 2006 diagnosing degenerative changes at the L3-4 level with degenerative spondylolisthesis. He opined that this condition was the direct result of appellant's previous back surgeries.

The Board finds that the detailed reports from Dr. Heavilon and Dr. Sasso are sufficient to establish that appellant sustained a recurrence of total disability commencing April 8, 2006 due to a change in the nature and extent of his back condition as a result of the accepted employment injuries and resultant surgeries. Both physicians' diagnosed degenerative changes at the L3-4 level with degenerative spondylolisthesis, both attributed these changes to appellant's employment-related injuries and surgeries and both physicians recommended further surgery. The Office approved appellant's request for surgery on November 14, 2006. Dr. Heavilon opined that appellant had experienced a recurrence of radicular symptoms beginning approximately in July 2005 and Dr. Sasso first reported appellant's change of symptoms in August 2005. Dr. Sasso repeatedly opined that appellant was totally disabled beginning April 8, 2006 due to the degenerative changes at L3-4. As of May 22, 2006, he indicated that appellant could return to duty as of May 30, 2006. On June 1, 2006 Dr. Sasso noted that appellant had been placed off work from April 8 to May 30, 2006 and provided treatment consisting of a nerve root injection on June 26, 2006. Following referral to Dr. Heavilon, the Office authorized additional surgery on November 14, 2006, which was performed on January 11, 2007. The weight of the medical opinion evidence establishes that appellant sustained a recurrence of total disability commencing April 8, 2006 and that his disability continued through May 30, 2006.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish a recurrence of total disability for the period April 8 to May 30, 2006. The case is remanded for the Office to pay appropriate compensation benefits for this period of total disability.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2007 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for payment of compensation benefits consistent with this decision of the Board.

Issued: May 15, 2008
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