

In a May 2003 report, Dr. Robert P. Mayson, Board-certified in obstetrics and gynecology, placed appellant on light duty due to pregnancy. In a June 23, 2003 report,

Dr. Safrir Neuwirth, Board-certified in obstetrics and gynecology, informed the Office that appellant would not be returning to work during her pregnancy due to complications. On April 6, 2004 appellant filed a Form CA-2a, claim for benefits, alleging that she sustained a recurrence of disability on April 1, 2004 which was causally related to her accepted lower back condition. She returned to work on May 15, 2004 and subsequently missed periods of work intermittently since that date.

In a report dated August 18, 2004, Dr. Francisco Delvalle, Board-certified in physical medicine and rehabilitation, diagnosed lumbar radiculopathy and opined that appellant was totally disabled from May 20 through the present date and continuing. By decision dated July 12, 2005, the Office denied appellant's claim for a recurrence of disability, finding that she failed to submit medical evidence demonstrating how the claimed recurrence was related to the original work-related injury. On April 3, 2006 appellant again requested reconsideration. She submitted a March 27, 2006 report from Dr. Delvalle wherein he discussed her work history, medical history, course of medical treatments and the results of the most recent medical examination, which diagnosed a disc herniation and opined that this condition was causally related to appellant's employment injury. Dr. Delvalle also opined that appellant's pregnancy was not the cause of the herniated disc. By decision dated June 19, 2006, the Office denied modification of the prior decision.

This is the second appeal before the Board. In an April 5, 2007 decision,¹ the Board set aside the June 19, 2006 decision. The Board found that Dr. Delvalle's reports had raised an uncontroverted inference of causal relationship between appellant's employment and her lower back pain beginning in 2004 and were sufficient to require further development of the case record by the Office. The Board noted that the record contained extensive medical evidence indicating that there was a causal relationship between appellant's employment duties and her lower back condition. The Board stated that Dr. Delvalle indicated that appellant's pain was from a disc herniation which was work related and documented by a magnetic resonance imaging (MRI) scan in 2001 and that appellant's pregnancy was not the direct cause of a herniated disc. The Board found that the reports from Dr. Delvalle regarding the causal relationship between appellant's herniated disc and her employment duties were unrefuted and sufficient to require further development of the case record by the Office. The Board therefore remanded the case to the Office for further development of the medical evidence regarding causal relationship between appellant's condition and her accepted lower back condition. The complete facts of this case are set forth in the Board's April 5, 2007 decision and are herein incorporated by reference.

The Office referred appellant, the case record and the statement of accepted facts to Dr. David Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated May 19, 2007, Dr. Rubinfeld stated that the disc herniation diagnosed by Dr. Delvalle was not causally related to appellant's September 10, 2001 work injury. He opined that the disc herniations described in the April 7, 2004 MRI scan were small, consistent with normal, age-related changes and were unlikely to be symptomatic. Dr. Rubinfeld also stated that there was no evidence present on examination that appellant did not have any radiculopathy

¹ Docket No. 06-2038 (issued April 5, 2007).

causally related to the September 2001 work injury nor did the MRI scan reveal the type of nerve compression that would result in a radiculopathy. He advised that appellant's subjective complaints were not supported by objective findings on examination. Dr. Rubinfeld asserted that appellant's April 6, 2004 work stoppage, as well as her subsequent work stoppage on June 21, 2004, was not due to the September 10, 2001 employment incident, which was a minor injury and unlikely to recur. He concluded that appellant was capable of performing her normal duties as a letter carrier.

By decision dated June 26, 2007, the Office denied appellant compensation for a recurrence of her accepted lower back condition, finding that Dr. Rubinfeld's referral opinion represented the weight of the medical evidence.

In a letter dated September 11, 2007, appellant's attorney requested reconsideration. Counsel contended that transcripts of Dr. Rubinfeld's testimony in other cases indicated that he harbored a *bias* against using the term "herniations," which diminished the probative value of his medical reports.

By decision dated December 10, 2007, the Office denied modification of the previous decision.

In a letter dated February 4, 2008, appellant's attorney requested reconsideration. Counsel again contended that Dr. Rubinfeld's bias against using the term "herniations," displayed in other cases, detracted from the probative value of his medical reports. Appellant submitted several reports from Dr. Delvalle dated February 15, June 3, August 8, September 30, 2005 and March 13, 2006 and April 16, June 22 and September 10, 2007 in which he essentially reiterated his previous findings and conclusions.

By decision dated May 1, 2008, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require it to review its prior decision.

On May 12, 2008 appellant again requested reconsideration and submitted another report from Dr. Delvalle dated November 6, 2007. In this report, Dr. Delvalle stated that he had treated appellant since May 20, 2004 for her condition of lumbar radiculopathy secondary to disc herniation. He noted that appellant had complaints of lower back pain which were predominantly axial and at times radiates to the gluteal area. On physical examination the mobility of appellant's lumbar spine was limited due to pain and stiffness on forward flexion and extension. Appellant had an MRI scan of the lumbar spine dated June 28, 2007 which showed disc herniations at L4-5 and L5-S1, greatest at L4-5 with associated facet joint arthropathy. Dr. Delvalle concluded that appellant did not have medical clearance to return to work because her duties required her to stand and walk more than 30 minutes at one time as well as lift heavy equipment.

By decision dated July 18, 2008, the Office denied modification of the prior decision.

LEGAL PRECEDENT

An individual who claims a recurrence of disability resulting from an accepted employment injury has the burden of establishing that the disability is related to the accepted injury. This burden requires furnishing medical evidence from a physician who on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and who supports that conclusion with sound medical reasoning.² A recurrence of disability is defined as the inability to work caused by a spontaneous change in a medical condition which results from a previous injury or illness without an intervening injury or new exposure in the work environment that caused the illness.³

ANALYSIS

Following the Board's April 5, 2007 decision, the Office referred appellant to Dr. Rubinfeld for a second opinion examination, who stated in a May 19, 2007 report that appellant's April 6 and June 21, 2004 work stoppages were not due to the September 10, 2001 employment incident. Dr. Rubinfeld advised that the September 2001 injury was one that was minor and unlikely to recur, he opined that the disc herniations noted by Dr. Delvalle in the April 7, 2004 MRI scan were small, consistent with normal, age-related changes, probably asymptomatic and were not causally related to appellant's September 2001 employment injury. The Office found that the weight of the medical evidence was represented by Dr. Rubinfeld's second opinion. The Board finds that the medical evidence of record is now in conflict. In a April 5, 2007 decision, the Board found that appellant had submitted extensive evidence, *i.e.*, Dr. Delvalle's reports, indicating that there was a causal relationship between appellant's employment duties and her lower back condition as of April 1, 2004. Therefore, contrary to the Office's subsequent determinations, Dr. Rubinfeld's referral opinion created a conflict in the medical evidence regarding whether appellant sustained a recurrence of her lower back condition as of April 1, 2004.

When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."⁴ Accordingly, the Board will set aside the Office's December 10, 2007 decision and remand the case to it for referral to an impartial medical specialist to resolve the conflict in medical evidence regarding whether appellant sustained a recurrence of her lower back condition as of April 1, 2004. After such development as it deems necessary, the Office shall issue a *de novo* decision.

The Board finds that the Office's July 18, 2008 decision must be set aside and the case remanded to resolve the conflict in medical evidence.

² *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

³ *See* 20 C.F.R. § 10.5(x); *Donald T. Pippin*, 54 ECAB 631 (2003).

⁴ Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 18 and May 1, 2008 and December 10, 2007 decisions of the Office of Workers' Compensation Programs be set aside consistent with this decision.

Issued: May 13, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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