

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

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<b>M.P., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 09-1999</b>
	)	<b>Issued: May 6, 2010</b>
<b>DEPARTMENT OF THE ARMY, DEFENSE</b>	)	
<b>LANGUAGE INSTITUTE, Monterey, CA,</b>	)	
<b>Employer</b>	)	

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*Appearances:* *Case Submitted on the Record*  
*Alan J. Shapiro, Esq.,* for the appellant  
*Office of Solicitor,* for the Director

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 3, 2009 appellant timely appealed the June 23, 2009 merit decision of the Office of Workers' Compensation Programs, which affirmed the denial of her claim for recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of the claim.<sup>1</sup>

**ISSUE**

The issue is whether appellant sustained a recurrence of disability on September 8, 2008, causally related to her August 21, 2001 employment injury.

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<sup>1</sup> The record on appeal contains evidence submitted after the Office issued its June 23, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2009).

## **FACTUAL HISTORY**

Appellant, a 58-year-old retired associate professor, sustained an employment-related injury on August 21, 2001.<sup>2</sup> The Office initially accepted her claim for sacroiliac strain, left hip strain and left thigh strain. The claim was subsequently expanded to include intervertebral disc displacement, lumbosacral radiculitis, sciatica and lumbar spinal stenosis. Appellant received appropriate wage-loss compensation. She underwent Office-approved surgery on March 19, 2002 and returned to work on June 17, 2002.<sup>3</sup> Over the next six-year period, appellant routinely attended physical and/or aqua therapy as often as three to four days per week for two hours each visit. She essentially worked a six-hour day, three to four hours of which were devoted to teaching French.<sup>4</sup> The Office compensated appellant for the time spent obtaining medical treatment for her employment-related injuries.<sup>5</sup>

On September 15, 2008 appellant filed a claim for compensation (Form CA-7) for temporary total disability during the period September 8 through November 28, 2008. In support of her claim, she submitted a September 8, 2008 report from Dr. Howard J. Rosen, a Board-certified anesthesiologist, with a subspecialty in pain medicine. Dr. Rosen had been treating appellant for approximately five years and advised that she should not work for 60 days. He explained that appellant was being treated for back pain and could not perform her duties. According to Dr. Rosen, appellant was very depressed, she hurt all over and simply did not feel up to working.

In a letter dated September 19, 2008, the Office advised appellant of the requirements for establishing a claim for recurrence of disability. It further stated that Dr. Rosen's September 8, 2008 report was insufficient to establish a recurrence of disability. Appellant was allowed an additional 30 days to submit evidence in support of her recurrence claim.

In a follow-up report dated October 8, 2008, Dr. Rosen again recommended that appellant be placed on disability for the next 60 days. He noted that she appeared to be very depressed and recommended that she see a psychiatrist. In addition to depression, Dr. Rosen diagnosed postlaminectomy lumbar pain and myofascial pain. He attributed appellant's depression to the pain she experienced all over.

By decision dated November 17, 2008, the Office denied appellant's claim for recurrence of disability beginning September 8, 2008.

The Office subsequently received Dr. Rosen's treatment notes dated November 10, 2008. Dr. Rosen extended appellant's disability through January 10, 2009. He indicated that she did not appear to be capable of working at the time. Dr. Rosen reported diffuse pain over appellant's back and sciatic region. He also noted that appellant had been treated with injections over her

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<sup>2</sup> Appellant slipped and fell while walking out of her classroom. She reportedly landed on the left side of her body.

<sup>3</sup> Dr. Mark W. Howard, a Board-certified orthopedic surgeon, performed a bilateral L4-5 and left L5-S1 hemilaminotomy and left L4-5 microdiscectomy.

<sup>4</sup> Up until the time of her employment injury, appellant had worked a full-time schedule.

<sup>5</sup> Appellant also received wage-loss compensation for intermittent periods of temporary total disability.

iliac crest that would hopefully bring her relief. Additionally, Dr. Rosen indicated that appellant was depressed, but on medication. Appellant saw Dr. Rosen again on December 2, 2008. Dr. Rosen noted that she was going to a neurosurgeon. Appellant stopped seeing Dr. Rosen in mid-December 2008, and later requested authorization from the Office to select a new attending physician.

On December 8, 2008 appellant requested an oral hearing.

Dr. Glenn Harper, a Board-certified neurosurgeon, saw appellant on December 11, 2008 and recommended an anterior cervical discectomy and fusion (Form C4-6) and posterior lumbar interbody fusion (L4-5). Recent x-rays and magnetic resonance imaging (MRI) scans of the cervical and lumbar spine revealed multilevel degenerative changes, including disc bulges, disc protrusions and disc space narrowing.

On January 29, 2009 the Office approved appellant's request to change physicians. Appellant selected Dr. Gerald F. Wahl, a Board-certified neurologist, who first examined her on February 12, 2009. In his initial report, Dr. Wahl diagnosed cervical and lumbar disc disease, history of fibromyalgia and secondary depression. He did not, however, address whether appellant was disabled on or after September 8, 2008. Dr. Wahl's follow-up reports dated March 12 and May 7, 2009 also did not address disability.

A telephonic hearing was held on April 6, 2009. Posthearing, appellant submitted an undated statement describing various job changes during fiscal year 2007-08 that affected her health. The hearing representative issued a June 23, 2009 decision affirming the denial of appellant's claim for recurrence of disability.

### **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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>6</sup> This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to 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 the employee's established physical limitations.<sup>7</sup> Moreover, when the claimed recurrence of disability follows a return to light-duty work, the employee may satisfy her burden of proof by showing a change in the nature and extent of the injury-related condition such that she was no longer able to perform the light-duty assignment.<sup>8</sup>

Where an employee claims a recurrence of disability due to an accepted employment-related injury, she has the burden of establishing that the recurrence of disability is causally

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<sup>6</sup> 20 C.F.R. § 10.5(x).

<sup>7</sup> *Id.*

<sup>8</sup> *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

related to the original injury.<sup>9</sup> This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the condition is causally related to the employment injury.<sup>10</sup> The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.<sup>11</sup>

### ANALYSIS

Proceedings under the Act are not adversarial in nature and the Office is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>12</sup> The Office accepted appellant's claim for a left hip, left thigh and lumbar condition, including sciatica, lumbar spinal stenosis and intervertebral disc displacement. With respect to the latter accepted condition, appellant underwent Office-approved surgery on March 19, 2002. Following surgery, she came under the care of Dr. Rosen, a pain management specialist. For more than five years, both the Office and the employing establishment honored Dr. Rosen's requests for continued therapy and part-time, limited-duty work to accommodate appellant's ailing back. On September 8, 2008 Dr. Rosen recommended that appellant not work for 60 days. He was treating her for back pain and reportedly she could not perform her duties. Dr. Rosen further explained that appellant was very depressed, she hurt all over and simply did not feel up to working. In an October 8, 2008 report, he diagnosed postlaminectomy lumbar pain and myofascial pain. Dr. Rosen continued to find appellant disabled for work. He also recommended that appellant see a psychiatrist for her pain-related depression. In subsequent treatment notes, Dr. Rosen reported diffuse pain over appellant's back and sciatic region. One of appellant's accepted conditions is sciatica. A Board-certified neurosurgeon who examined appellant on December 11, 2008 recommended, *inter alia*, lumbar interbody fusion at L4-5; the same area of the previous Office-approved surgery. The record indicates that appellant has ongoing lumbar complaints in the area where she had previously undergone surgery. Although Dr. Rosen's treatment notes from September through December 2008 are not sufficiently rationalized to discharge appellant's burden of proving that her claimed recurrence of disability beginning September 8, 2008 is causally related to her accepted employment injury, this evidence is sufficient to require further development of the case record by the Office.<sup>13</sup> On remand, the Office should refer appellant, the case record, and a statement of accepted facts to an appropriate orthopedic specialist for an evaluation and a rationalized medical opinion regarding whether she sustained a recurrence of disability on or about September 8, 2008.

In addition to demonstrating a change in the nature and extent of the injury-related condition, appellant may also establish a recurrence of disability by showing that the physical

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<sup>9</sup> 20 C.F.R. § 10.104(b); *Carmen Gould*, 50 ECAB 504 (1999); *Helen K. Holt*, 50 ECAB 279, 382 (1999); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

<sup>10</sup> See *Helen K. Holt*, *supra* note 9.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (June 1995).

<sup>12</sup> *Horace L. Fuller*, 53 ECAB 775, 777 (2002); *James P. Bailey*, 53 ECAB 484, 496 (2002); *William J. Cantrell*, 34 ECAB 1223 (1983).

<sup>13</sup> *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978).

requirements of her light-duty assignment were altered so that they exceeded her established physical limitations.<sup>14</sup> Appellant claimed that the added responsibility of being appointed manager of the curriculum and test development project while being expected to continue teaching three hours per day affected her health. The Board notes that there is scant information regarding her light-duty assignment. What is known is that appellant worked a total of six hours a day and taught French for approximately three to four hours each day. However, there is little information about the physical requirements of her part-time, light-duty assignment. One cannot properly determine whether there was a change in appellant's light-duty assignment without first knowing what her light-duty assignment entailed. Accordingly, the Office should solicit additional input from both her and the employing establishment regarding the physical requirements of her light-duty assignment. After the Office has developed the case record to the extent it deems necessary, a *de novo* decision shall be issued.

### **CONCLUSION**

The case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 23, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: May 6, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>14</sup> 20 C.F.R. § 10.5(x).