

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

K.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Buffalo, NY, Employer**

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**Docket No. 09-2206
Issued: May 18, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2009 appellant filed a timely appeal from the August 4, 2009 merit decision of the Office of Workers' Compensation Programs denying claimed periods of recurrences 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 that he sustained recurrences of total disability between October 27, 2004 and April 15, 2005 due to his October 24, 2004 employment injury.

FACTUAL HISTORY

This is the second appeal in this case. The Board issued a decision on January 15, 2009 affirming the Office's finding that appellant did not meet his burden of proof to establish that he

sustained recurrences of total disability between October 27, 2004 and April 15, 2005.¹ In support of his claim, appellant had submitted reports of Dr. Shannon T. Herr, an attending chiropractor, and Dr. Gerald L. Peer, an attending Board-certified anesthesiologist. The Board agreed with the Office's findings that Dr. Herr's reports did not constitute probative medical evidence because he did not qualify as a physician under the Federal Employees' Compensation Act and that Dr. Peer did not provide any indication that the disability he found between March 18 and April 1, 2005 was related to the October 24, 2004 employment injury or any other employment-related cause. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

Appellant continued to claim that he sustained recurrences of total disability between October 27, 2004 and April 15, 2005. In a February 19, 2009 report, Dr. Peer stated that appellant underwent a surgical procedure performed by him on March 18, 2005, which was related to his on-the-job injury of October 24, 2004. He stated:

"The bill for this procedure was accepted and paid for by [the Office] in relation to this injury. [Appellant] did have a normal period of total disability from work following the surgical procedure on March 18, 2005. This disability is therefore related to his on-the-job injury of October 24, 2004."²

Appellant also submitted reports, dated January 29, March 13, May 19 and July 8, 2009, in which Dr. Peer discussed the treatment of his medical problems. Dr. Peer noted that appellant continued to experience pain in his neck and low back.³ None of the reports related the observed conditions or provided treatment to appellant's October 24, 2004 employment injury or otherwise indicated that he sustained work-related recurrences of total disability between October 27, 2004 and April 15, 2005. The record contains several bills and authorization letters from the period around March 2005.

In an August 4, 2009 decision, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to show that he sustained recurrences of total disability between October 27, 2004 and April 15, 2005 due to his October 24, 2004 employment injury.

¹ Docket No. 08-1829, issued January 15, 2009. Portions of the Board's decision indicate that appellant claimed recurrences of disability between April 15, 2005 and October 27, 2007 but the decision actually found that he did not establish his claim of recurrences of disability between October 27, 2004 and April 15, 2005. The Office accepted that on October 24, 2004 appellant, then a 47-year-old mail handler, sustained a lumbar sprain/strain due to moving an all-purpose container filled with mail. Appellant stopped work on October 24, 2004 and returned to his regular work the next day. He stopped work on October 27 to 29, November 10 to 14, December 12 to 13 and 22 to 25, 2004, January 25 to 30, February 2 to 6 and 14 to 20 and March 19 to April 15, 2005 and claimed that these work stoppages constituted recurrences of total disability due to his October 24, 2004 employment injury.

² A review of the record reveals that on March 13, 2005 Dr. Peer performed a radiofrequency facet neurolysis procedure at left L3, L4 and L5 under fluoroscopy. The procedure was designed to interrupt the flow of pain signals.

³ On March 13, 2009 Dr. Peer performed a bilateral radiofrequency facet neurolysis procedure at L3, L4, L5, 51 under fluoroscopy.

LEGAL PRECEDENT

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.⁴ This burden includes the necessity of 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 supports that conclusion with sound medical rationale.⁵ Where no such rationale is present, medical evidence is of diminished probative value.⁶

ANALYSIS

The Office accepted that appellant sustained a lumbar sprain/strain at work on October 24, 2004. Appellant stopped work on October 24, 2004 and returned to his regular work as a mail handler the next day. He stopped work on October 27 to 29, November 10 to 14, December 12 to 13 and 22 to 25, 2004, January 25 to 30, February 2 to 6 and 14 to 20 and March 19 to April 15, 2005 and claimed that these work stoppages constituted recurrences of total disability due to his October 24, 2004 employment injury.

The Board finds that appellant did not submit sufficient medical evidence to establish that he sustained recurrences of total disability between October 27, 2004 and April 15, 2005, due to his October 24, 2004 employment injury.

In a February 19, 2009 report, Dr. Peer, an attending Board-certified anesthesiologist, stated that appellant underwent a surgical procedure performed by him on March 18, 2005, which was related to his on-the-job injury of October 24, 2004. A review of the record reveals that on March 13, 2005 he performed a radiofrequency facet neurolysis procedure at left L3, L4 and L5 under fluoroscopy. Dr. Peer asserted that the bill for this procedure was accepted and paid by the Office as related to the work injury. He noted, “[that appellant] did have a normal period of total disability from work following the surgical procedure on March 18, 2005. This disability is therefore related to his on-the-job injury of October 24, 2004.”

The Board notes that this report does not contain sufficient rationale to support appellant’s claim that he sustained a recurrence of disability between October 27, 2004 and April 15, 2005. The record contains bills and authorization letters from the period around March 2005, but none of these documents show that the Office paid for and/or accepted that the radiofrequency facet neurolysis procedure performed on March 18, 2005 was related to the October 24, 2004 employment injury.⁷ Dr. Peer did not describe the March 18, 2005 procedure

⁴ *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

⁵ *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Brusco*, 33 ECAB 1138, 1140 (1982).

⁶ *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁷ The Office paid some medical bills during this period but there is no indication that it approved the March 18, 2005 test as work related.

or explain how it was necessitated by the October 24, 2004 employment injury. Moreover, he did not identify any specific period of disability. In addition, it should be noted that appellant's claim was only accepted for a lumbar sprain/strain and not for any radicular pain condition.

Appellant also submitted reports, dated January 29, March 13, May 19 and July 8, 2009, in which Dr. Peer discussed the treatment of his neck and low back problems.⁸ However, Dr. Peer did not provide an opinion that his observed conditions or need for treatment were related to his October 24, 2004 employment injury. He did not indicate in these reports that appellant sustained work-related recurrences of total disability between October 27, 2004 and April 15, 2005.

An award of compensation may not be based on surmise, conjecture or speculation. Neither, the fact that appellant's claimed condition became apparent during a period of employment nor his belief that his condition was aggravated by his employment is sufficient to establish causal relationship.⁹ Appellant failed to submit rationalized medical evidence establishing that his claimed recurrence of disability is causally related to the accepted employment injury and therefore the Office properly denied his claim for compensation.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained recurrences of total disability between October 27, 2004 and April 15, 2005 due to his October 24, 2004 employment injury.

⁸ On March 13, 2009 Dr. Peer performed a bilateral radiofrequency facet neurolysis procedure at L3, L4, L5, 51 under fluoroscopy.

⁹ See *Walter D. Morehead*, 31 ECAB 188, 194-95 (1986).

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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