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

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| **J.N., Appellant** | ) | |
| **and** | ) | **Docket No. 10-606** |
| | ) | **Issued: April 20, 2011** |
| **U.S. POSTAL SERVICE, POST OFFICE, Media, PA, Employer** | ) | |

*Appearances:*
*Jeffrey P. Zeelander, Esq.*, for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On January 5, 2010 appellant, through her attorney, timely appealed the November 10, 2009 merit decision of the Office of Workers' Compensation Programs, which denied her claim for wage-loss compensation. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.[2]

### ***ISSUE***

The issue is whether appellant is entitled to wage-loss compensation for the period May 7 through December 21, 2007.

[1] 5 U.S.C. §§ 8101-8193.

[2] The record on appeal contains evidence received after the Office issued its November 10, 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) (2010).

## ***FACTUAL HISTORY***

Appellant, then a 47-year-old letter carrier, has an accepted claim for aggravation of sciatica and aggravation of displacement of lumbar intervertebral disc, which arose on June 1, 2006. Her injury occurred when she "twisted putting down a ½ tub" of flats. Appellant previously sustained an employment-related lumbar strain and herniated disc. At the time of the June 1, 2006 injury, she was performing limited-duty work as a consequence of her February 11, 2003 employment injury.[3] Following the June 2006 injury, appellant received continuation of pay for 45 days. The Office then paid her wage-loss compensation for the period of July 17, 2006 through May 6, 2007.

By decision dated February 27, 2008, the Office found that the medical evidence did not establish appellant's entitlement to wage-loss compensation on or after May 7, 2007.[4]

Appellant subsequently requested reconsideration. In a May 8, 2008 report, Dr. Dworkin, diagnosed traumatic sciatica and noted that she was having difficulty with walking and sitting. He scheduled appellant for an epidural steroid injection.[5] In a similarly dated (Form CA-20) (attending physician's report), Dr. Dworkin diagnosed recurrent traumatic sciatica. He identified both February 11, 2003 and June 1, 2006 as the date of injury. Dr. Dworkin noted that he first examined appellant on September 11, 2003 and had treated her since then. He also noted that she had been totally disabled since June 1, 2006 and that her disability was ongoing. In the "remarks" section of the report, Dr. Dworkin noted back and leg pain from discogenic pain syndrome. He also provided a May 8, 2008 (Form CA-17) (duty status report), which indicated that he had not yet advised appellant to return to work.

In a decision dated February 17, 2009, the Office denied modification of the February 27, 2008 decision.

On April 21, 2009 appellant requested reconsideration. The request was accompanied by an April 23, 2009 Form CA-17, and a similarly dated Form CA-20, both from Dr. Dworkin. By decision dated June 9, 2009, the Office again denied modification.

The Office referred appellant for a second opinion evaluation by Dr. Ronald M. Krasnick, a Board-certified orthopedic surgeon. The stated purpose of the referral was to determine if appellant continued to have residuals of the accepted work injuries and to clarify her injury-related diagnoses.

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[3] Appellant initially filed a claim for recurrence of disability (Form CA-2a). However, because she described a new traumatic injury occurring on June 1, 2006, the Office treated it as a separate claim rather than a recurrence of her February 11, 2003 injury.

[4] On her December 13, 2007 (Form CA-7), appellant claimed temporary total disability for the period July 17, 2006 through December 21, 2007. The Office awarded compensation from July 17, 2006 through May 6, 2007 ostensibly based on the January 11, 29 and May 7, 2007 reports of her treating physician, Dr. Gerald E. Dworkin, a Board-certified physiatrist, who found that she was totally disabled dating back to June 1, 2006. In a January 29, 2007 report, Dr. Dworkin indicated that appellant was bedridden three to four days a week and on May 7, 2007 he indicated that her injury had yet to resolve. He also noted that her expected recovery date was undetermined.

[5] Appellant subsequently received injections on July 21, 2008 and April 20, 2009.

In a report dated July 1, 2009, Dr. Krasnick advised that appellant's diagnoses included temporary aggravation of displacement of lumbar intervertebral disc without myelopathy and temporary aggravation of sciatica. He noted that she had no objective evidence of radiculopathy; however, she had continuing residuals, which he identified as a "tendency for recurrent back pain, mechanical." Dr. Krasnick also noted there was a "slight exaggeration of symptomatology objectively." Appellant also had recurrent muscle spasm and subjective complaints of low back pain. Dr. Krasnick imposed limitations on bending and lifting in excess of 30 pounds. He explained that, while appellant was unable to perform her usual occupation, she could perform her modified duties.[6] In response to the Office's question regarding "[p]eriods of total disability due to the work-related condition," Dr. Krasnick indicated that appellant had been disabled from June 1, 2006 to the present. He also stated that she had reached maximum medical improvement and required no additional treatment and specifically no "additional injections."

On August 17, 2009 the Office forwarded Dr. Krasnick's report to Dr. Dworkin for his review and comment. That same day it wrote him requesting a supplemental report that specifically addressed the period during which the claimant was totally disabled by the effects of the work injuries.... The Office also asked Dr. Krasnick to address when total disability ceased.

That day the Office also sought additional medical information from both Dr. Dworkin and Dr. Krasnick. It also received appellant's request for reconsideration dated August 13, 2009. Counsel premised the request for reconsideration on Dr. Krasnick's July 1, 2009 report, and particularly his finding that appellant "[had] been disabled from June 1, 2006 to the present."

In a supplemental report dated August 19, 2009, Dr. Krasnick indicated that appellant sustained a lumbosacral strain/sprain on February 11, 2003 when she slipped and fell on ice and snow. This initial injury rendered her partially disabled, but not totally disabled. Dr. Krasnick explained that, while appellant was incapable of carrying the mail, she was able to case mail. Appellant's June 1, 2006 injury exacerbated her strain/sprain and despite conservative treatment, she remained symptomatic. Dr. Krasnick stated that "[o]nce again [she] is a candidate for casing mail," and she should be seen as partially disabled. He concluded that appellant had "partial but not complete disability from February 11, 2003 up until the present time."

Dr. Dworkin did not respond to the Office's August 17, 2009 request to comment on Dr. Krasnick's July 1, 2009 report, but the Office received various treatment records from the Whalen Rheumatology Group. The records covered the period of June 6, 2006 through October 27, 2009, representing approximately three dozen visits. Kelly A. O'Connor, a certified registered nurse practitioner (CRNP), treated appellant during her numerous visits.

By decision dated November 10, 2009, the Office found that appellant was not totally disabled from May 7 through December 21, 2007. Based on Dr. Krasnick's opinion, it determined that she was only partially disabled and capable of performing a modified position similar to the one she held at the time of her June 1, 2006 injury.

[6] In January 2007, the employing establishment offered appellant her previous limited-duty modified letter carrier position. Appellant declined the offer on February 3, 2007 based on Dr. Dworkin's January 29, 2007 report, which indicated that she was bedridden three to four days a week and was unable to sit and stand for either short or long periods of time.

## ***LEGAL PRECEDENT***

When the Office accepts that an employee sustained an employment-related injury and advises the employee that she must file a Form CA-7 with supporting medical evidence to establish a period of disability, the employee retains the burden of proof to establish continuing disability until the Office advises the employee that it has placed the claim on the periodic rolls and that CA-7 forms with supporting evidence are no longer needed.[7] As explained in the Office regulations, "It is the employee's responsibility to submit Form CA-7. Without receipt of such claim, [the Office] has no knowledge of continuing wage loss. Therefore while disability continues, the employee should submit a claim on Form CA-7 each two weeks until otherwise instructed by [the Office]."[8]

Benefits are available only while the effects of a work-related condition continue.[9] Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.[10]

The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty and must include objective findings in support of its conclusions.[11] Subjective complaints of pain are not sufficient, in and of themselves, to support payment of continuing compensation.[12] Likewise, medical limitations based solely on the fear of a possible future injury are also not sufficient to support payment of continuing compensation.[13]

## ***ANALYSIS***

Based on Dr. Dworkin's reports the Office accepted appellant's June 1, 2006 employment-related injury and paid her almost a year's worth of wage-loss compensation for temporary total disability through May 6, 2007. While the Office paid appellant for an extensive period of time (294-calendar days) based on the Form CA-7 submitted, it did not place her on the

[7] *Carlos A. Marrero*, 50 ECAB 117, (1998); *Donald Leroy Ballard*, 43 ECAB 876 (1992).

[8] 20 C.F.R. § 10.102 (b) (1). The Board notes that the Office procedure manual suggests that "[w]here prolonged (over 90 days) or permanent disability is expected, compensation for wage loss should be paid on the periodic rolls." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.4 (March 2010). As the Board explained in *Lan Thi Do*, 46 ECAB 366 (1994), if the short-term rolls is utilized and wage-loss benefits are paid continuously for over a year, the claim should have been paid on the periodic rather than short-term rolls and appellant is entitled to pretermination notice prior to termination of compensation.

[9] *Id*. at § 10.500(a).

[10] *Id.*

[11] *Id*. at § 10.501(a)(2).

[12] *Id.*

[13] *Id.*

periodic compensation rolls. The burden therefore remained on appellant to establish continuing disability.

The contemporaneous medical evidence from Dr. Dworkin, dated May 7, 2007, indicated that appellant's injury had yet to resolve. Dr. Dworkin also noted that appellant's expected recovery date was undetermined. This report did not provide a definitive assessment regarding the extent and anticipated duration of any employment-related disability.

Although Dr. Dworkin indicated that appellant remained totally disabled, his May 8, 2008 and April 23, 2009 reports did not adequately explain how her June 1, 2006 employment injury continued to preclude her from performing any and all work. These reports were cursory. The Whalen Rheumatology Group treatment records are also insufficient because there is no clear indication that the nurse practitioner's findings were reviewed and approved by a physician. A nurse practitioner is not considered a "physician" under the Act.[14]

The Office therefore referred appellant to Dr. Krasnick, who initially found that she "[had] been disabled from June 1, 2006 to the present." Dr. Krasnick's July 1, 2009 report also indicated that she continued to have residuals of her employment injury, but she was capable of performing her previous modified duties. The Office requested a supplemental report to clarify the timeframe that appellant was totally disabled as a result of her employment injuries.[15] In his August 19, 2009 supplemental report, Dr. Krasnick indicated that appellant "had partial but not complete disability from February 11, 2003 up until the present time." The Office relied upon his opinion to find that appellant was not totally disabled for the claimed period of May 7 to December 21, 2007. It further found that appellant was able to perform the modified position the employing establishment offered her in January 2007.

Once the Office undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[16] Rather than clarifying matters, Dr. Krasnick's August 19, 2009 supplemental report undermined what appeared to be a finding that appellant had been totally "disabled from June 1, 2006 to the present." His subsequent statement that she had "partial but not complete disability from February 11, 2003 up until the present time" not only contradicted his previous report, but also ran afoul of the Office's decision to award wage-loss compensation for temporary total disability from July 17, 2006 through May 6, 2007. Dr. Krasnick essentially provided two contradictory findings regarding the extent of any disability attributable to appellant's June 1, 2006 employment injury. Accordingly, the case shall be remanded to the Office to resolve any and all inconsistencies arising from Dr. Krasnick's July 1, 2009 Office-directed examination. After the Office has developed the case to the extent it deems necessary, a *de novo* decision shall be issued regarding appellant's claimed entitlement to wage-loss compensation on or after May 7, 2007.

[14] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t); *see, e.g., L.D.*, 59 ECAB 648, 656 (2008); *Roy L. Humphrey*, 57 ECAB 238, 242 (2005).

[15] Counsel ascribed an improper motive for seeking a supplemental report from Dr. Krasnick. However, there is noting in the record to support counsel's allegation that the Office's request was "intended solely to manufacture evidence unfavorable to [appellant]."

[16] *Richard F. Williams*, 55 ECAB 343, 346 (2004).

## ***CONCLUSION***

The case is not in posture for decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 10, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision.

Issued: April 20, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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