

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

S.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Brunswick, NJ, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 10-1265
Issued: March 18, 2011**

Appearances:
Robert D. Campbell, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On April 2, 2010 appellant, through counsel, filed a timely appeal of an October 6, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant established that he sustained a recurrence of disability beginning December 22, 2007 causally related to his accepted January 26, 2004 employment injury; and (2) whether appellant has established a causal relationship between his sciatica and the accepted employment injury.

On appeal counsel contends that the Office erred in failing to expand his claim to include sciatica as a consequential injury and to accept his recurrence claim.

FACTUAL HISTORY

On January 27, 2004 appellant, then a 58-year-old carrier, filed a traumatic injury claim alleging that on January 26, 2004 he injured his left knee when he slipped on ice going up stairs

to deliver mail. The Office accepted the claim for left knee medial meniscus tear and authorized arthroscopic left knee partial medial meniscectomy surgery, which was performed on July 30, 2004, and left bicompartamental knee arthroplasty, which occurred on June 18, 2007.¹ It accepted appellant's claims for recurrences of disability beginning April 3, 2006 and June 18, 2007. Appellant returned to light-duty work on December 17, 2007, stopped on December 22, 2007 and returned to work on May 1, 2008.

On December 17, 2007 appellant accepted a light-duty position which required no standing more than 30 minutes, no lifting or carrying more than 20 pounds and no walking over an hour.

On January 28 and February 21, 2008 appellant filed a claim for a recurrence of disability beginning December 22, 2007. He stated that compensating for walking with his bad knee due to surgery aggravated his sciatic nerve.

The Office referred appellant for a second opinion. In a November 8, 2008 report, Dr. Andrew M. Hutter, a second opinion Board-certified orthopedic surgeon, diagnosed status post left knee replacement and concluded that appellant was capable of returning to work with restrictions. In concluding, he opined that appellant had reached maximum medical improvement. In an attached work capacity evaluation form, Dr. Hutter provided restrictions which included up to four hours of walking, standing and operating a motor vehicle and no squatting, kneeling or climbing.

Appellant included a December 27, 2007 report from Dr. Alfred J. Tria, Jr., a treating Board-certified orthopedic surgeon, reported seeing appellant that day for increasing sacroiliac joint pain. A physical examination revealed tenderness over the sacroiliac joint, but that range of motion was the same. Dr. Tria concluded that appellant was unable to work due to his sciatica for three to four weeks. In a January 3, 2008 report, he stated that the development of sciatica following bicompartamental knee replacement was not uncommon with prolonged periods of physical therapy and that it was part of the surgery.

On January 29, 2008 Dr. Tria reported a mild antalgia component to appellant's gait which he attributed more to sciatica than the knee. A physical examination of the left knee revealed no effusion or tenderness and good range of motion and that appellant could return to light-duty work in another six weeks.

On March 3, 2008 the Office referred appellant to Dr. Thomas Nordstrom, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Tria and Dr. Hutter on the issue of whether appellant required physical therapy and the extent and degree of any employment-related disability.

Dr. Tria, in a March 11, 2008 report, stated that appellant was doing well and would be released to light-duty work in a month. He related that appellant had to stop working due to his sciatica.

¹ On January 9, 2006 the Office granted appellant a schedule award for 30 percent impairment of his left lower extremity.

By decision dated April 1, 2008, the Office denied appellant's recurrence claim. It found no evidence of a material worsening of his condition or a change in his light-duty requirements. The Office also found the evidence insufficient to establish that appellant's sciatica was causally related to the accepted employment injury.

Subsequent to the denial of an April 1, 2008 decision, the Office received Dr. Nordstrom's March 18, 2008 report. A physical examination revealed tenderness over the sacroiliac joint in the sciatic area. Dr. Nordstrom reported that appellant stopped work in December 2007 due to sciatica, that there is a causal relationship between his current condition and the employment injury and that he has residual left knee pain as a result of the two knee surgeries.

On May 1, 2008 Dr. Tria again related that the development of low back sciatica is very common following knee surgery. He noted that it was identified through the knee range of motion, knee extension and a straight leg raising tests. In concluding, Dr. Tria stated that patients with any element of lumbar spine arthritis who have physical therapy "may illustrate sciatica during the course of the treatment protocol."

On August 7, 2008 appellant accepted a light-duty job offer from the employing establishment which required up to four hours of standing and no lifting more than 20 pounds.

On September 2, 2008 appellant requested reconsideration and filed an addendum on November 6, 2008. In support of his request, he submitted a July 16, 2008 report from Dr. Nicholas Diamond, an examining osteopath, diagnosing post-traumatic left knee medial meniscus tear, partial left knee medial meniscectomy, chronic left knee tenosynovitis, status post left knee replacement and post-traumatic left knee varus degenerative joint disease.

By decision dated December 1, 2008, the Office denied modification.

On June 16, 2009 Dr. Tria noted that appellant recently retired and that it took him a long time to recover. He reported a normal gait and stance, no effusion or tenderness and improved range of motion.

On July 2, 2009 appellant's counsel requested reconsideration.

By decision dated October 6, 2009, the Office denied modification.²

LEGAL PRECEDENT -- ISSUES 1 & 2

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish, by the weight of the reliable, probative and substantial evidence, a recurrence of disability and to

² The Board notes that, following the October 6, 2009 decision, the Office received additional evidence. The Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

show that he cannot perform such light duty.³ 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 light-duty requirements.⁴

A recurrence of disability is defined as 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 that caused the illness.⁵ The Board has held that whether a particular injury causes an employee to be disabled for work is a medical question that must be resolved by competent and probative medical evidence.⁶ The weight of medical opinion is determined on the report of a physician, who provides a complete and accurate factual and medical history, explains how the claimed disability is related to the employee's work and supports that conclusion with sound medical reasoning.⁷

For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship.⁸

ANALYSIS -- ISSUES 1 & 2

The Board finds that the case is not in posture for a decision as to whether appellant sustained a recurrence of disability. The case must be remanded to the Office for further development.

Appellant returned to a light-duty position on December 17, 2007. On February 21, 2008 he claimed that his condition had worsened on December 22, 2007 such that he was no longer able to perform the light-duty position. Appellant did not allege a change in his light-duty job requirements. Therefore, he has the burden to establish that he cannot perform such light duty. As part of this burden, appellant must show a change in the nature and extent of the injury-related condition.⁹

³ K.C., Docket No. 08-2222 (issued July 23, 2009); *Richard A. Neidert*, 57 ECAB 474 (2006).

⁴ C.S., Docket No. 08-2218 (issued August 7, 2009); *Joseph D. Duncan*, 54 ECAB 471 (2003); *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ 20 C.F.R. § 10.5(x). See *S.F.*, 59 ECAB 525 (2008); *Albert C. Brown*, 52 ECAB 152 (2000); *Terry R. Hedman*, *supra* note 4.

⁶ See *R.C.*, 59 ECAB 546 (2008); *Carol A. Lyles*, 57 ECAB 265 (2005); *Donald E. Ewals*, 51 ECAB 428 (2000).

⁷ See *C.S.*, *supra* note 4; *Sandra D. Pruitt*, 57 ECAB 126 (2005).

⁸ *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁹ *Joseph D. Duncan*, *supra* note 4; *Jackie D. West*, 54 ECAB 158 (2002); *Roberta L. Kaaumoana*, *supra* note 4; *Terry R. Hedman*, *supra* note 4.

Initially, the Board notes that the Office incorrectly determined that a conflict existed between Drs. Tria and Hutter at the time of the referral to Dr. Nordstrom as there was no conflict in the medical opinion evidence regarding appellant's December 22, 2007 recurrence of disability claim. While Dr. Tria attributed appellant's disability beginning December 22, 2007 to his sciatica, Dr. Hutter did not address this issue as his report predated appellant's recurrence claim. As Dr. Hutter did not address whether appellant's December 22, 2007 recurrence was employment related, there was no conflict at the time of the referral to Dr. Nordstrom.¹⁰ As there was no conflict in the medical opinion evidence, the Board finds that Dr. Nordstrom served as a second opinion referral physician rather than an impartial medical specialist.

Dr. Nordstrom reported that appellant stopped working in December 2007 due to his sciatica and reported physical examination findings of sciatica without opining as to the cause of either. Although he concluded that appellant's current condition was causally related to the accepted employment injury, he provided no opinion as to whether appellant's work stoppage, *i.e.*, disability, on December 22, 2007 was causally related to his accepted employment injury.

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature, nor are the Office a disinterested arbiter.¹¹ While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹² This holds true in recurrence claims as well as in initial traumatic and occupational claims. When the Office obtains an opinion from an Office referral physician, it has the responsibility to obtain an evaluation from the referral physician that resolves the issue involved in the case.¹³ It undertook development of the medical evidence by referring appellant to Dr. Nordstrom. The Office has an obligation to secure a report adequately addressing the relevant issue of whether appellant's December 22, 2007 recurrence of disability was causally related to his accepted employment injury. The case will be remanded for the Office to obtain clarification of Dr. Nordstrom's opinion on whether appellant's December 22, 2007 recurrence of disability was causally related to his accepted employment injury. Dr. Nordstrom should explain whether the sciatica, to which he attributes appellant's work stoppage, is a residual of the accepted employment injury and attendant surgeries. If the Office is unable to obtain such clarification, then appellant should be referred to another Board-certified specialist for an

¹⁰ Section 8123(a) provides that, if there is 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. 5 U.S.C. § 8123(a). *See also Joseph Roman*, 55 ECAB 233 (2004) (A physician was properly an impartial medical specialist with respect to the issue in conflict, the need for surgery, at the time appellant was referred to him. However, there was no medical conflict regarding appellant's disability for work at the time of the referral; therefore, the specialist was not an impartial medical specialist on other issues and his report was not entitled to special weight on these other issues).

¹¹ *R.B.*, Docket No. 08-1662 (issued December 18, 2008); *Rebecca O. Bolte*, 57 ECAB 687 (2006); *Peter C. Belkind*, 56 ECAB 580 (2005).

¹² *Donald R. Gervasi*, 57 ECAB 281 (2005); *Betty J. Smith*, 54 ECAB 174 (2002).

¹³ *See Peter C. Belkind*, 56 ECAB 580 (2005) (where the opinion of the Office's second opinion physician was unclear on whether the claimant had any permanent impairment due to his accepted employment injury, the Board found that the Office should secure a report adequately addressing the relevant issue). *See also Melvin James*, 55 ECAB 406 (2004).

examination and an opinion on the issue of whether the December 22, 2007 recurrence of disability was causally related to his accepted employment injury and whether his sciatica was causally related to the January 26, 2004 injury and, if so, the period of disability. Following such further development of the case record as it deems necessary, the Office should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for a decision as to whether appellant has established that he sustained a recurrence of disability on December 22, 2007 and whether his sciatica is causally related to his January 26, 2004 employment injury.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 6, 2009 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: March 18, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁴ The Board notes that in view of the disposition of this case, it is harmless error that the Office denied appellant's claim prior to the receipt of Dr. Nordstom's report.