

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

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**L.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Camarillo, CA, Employer**

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**Docket No. 12-1510  
Issued: February 8, 2013**

*Appearances:*  
*Daniel M. Goodkin, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On July 5, 2012 appellant, through her counsel, filed a timely appeal of a January 9, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.<sup>2</sup>

**ISSUE**

The issue is whether appellant met her burden of proof to establish a recurrence of disability beginning February 17, 2011 causally related to her May 10, 2010 employment injury.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Counsel did not appeal OWCP's May 29, 2012 decision granting appellant a schedule award for three percent permanent impairment of the left lower extremity.

## **FACTUAL HISTORY**

On May 10, 2010 appellant, then a 48-year-old letter carrier, sustained lower back pain while lifting a mail tray. By decision dated June 11, 2010, OWCP accepted her traumatic injury claim for lumbar sprain. Appellant returned to modified duty effective June 24, 2010 and thereafter received partial wage-loss compensation for the period June 29 to September 4, 2010.

In a September 2, 2010 report, Dr. Brett M. Rosenberg, a Board-certified orthopedic surgeon, related that appellant experienced lower back pain radiating to the left leg. On examination, he observed left paraspinal muscle tenderness to palpation, 60-degree lumbar flexion, 20-degree lumbar extension, 60-degree lateral lumbar rotation bilaterally, 20-degree lateral lumbar flexion bilaterally and decreased L5 and S1 nerve root sensation. Dr. Rosenberg also elicited a positive left straight leg raise test. He diagnosed lumbar radiculopathy and advised appellant to avoid bending, stooping and lifting, and pushing and pulling items weighing over 10 pounds.<sup>3</sup>

An October 4, 2010 note from Dr. Charles H. Avery, an internist, excused appellant from work through October 15, 2010 as a result of an unidentified injury sustained on September 20, 2010. The employing establishment later informed OWCP in an October 13, 2010 letter that she was involved in a motor vehicle accident during a scheduled day off on September 20, 2010.<sup>4</sup> In an undated statement, Gilbert de la Torre, a supervisor, maintained that appellant showed him a cellular phone photograph of her vehicle, the right side of which “appeared to be totaled.”

In October 14 and November 4, 2010 reports, Dr. Rosenberg examined appellant and noted an improvement of her symptoms. An October 7, 2010 magnetic resonance imaging (MRI) scan exhibited L4-5 degenerative changes and L5-S1 disc bulge. Dr. Rosenberg diagnosed L5-S1 disc herniation, lumbar strain and lumbar radiculopathy. He recommended light duty, but expected appellant to resume her regular work in approximately four weeks.

November 11 and 15, 2010 medical forms from Dr. Avery indicated that appellant was injured in a nonindustrial automobile collision on September 20, 2010. The employing establishment added in a November 17, 2010 letter to OWCP that she remained absent from work since the day of the accident.

In a December 23, 2010 report, Dr. Rosenberg examined appellant and found 90-degree lumbar flexion, 30-degree lumbar extension, 80-degree lateral lumbar rotation bilaterally and 30-degree lateral lumbar flexion bilaterally. He diagnosed lumbar strain and resolved lumbar radiculopathy, concluded that appellant was permanent and stationary as of December 23, 2010 and released her to regular duty without restrictions. Dr. Rosenberg cautioned, “[Appellant] is at risk for a recurrence of symptoms.”

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<sup>3</sup> Dr. Rosenberg presented similar findings in a September 30, 2010 report.

<sup>4</sup> According to the case record, as early as October 26, 2010, OWCP asked appellant to provide information about the September 20, 2010 motor vehicle accident. Appellant did not respond to this inquiry.

In a January 6, 2011 report, Dr. Rosenberg remarked that appellant's condition worsened immediately following her discharge. On examination, he observed left lumbar spine tenderness to palpation, 70-degree lumbar flexion, 10-degree lumbar extension, 60-degree lateral lumbar rotation bilaterally, 20-degree lateral lumbar flexion bilaterally and decreased S1 nerve root sensation. Dr. Rosenberg also elicited a positive left straight leg raise test. He advised appellant to avoid prolonged ambulation and lifting, and pushing and pulling items weighing over 10 pounds.<sup>5</sup>

Dr. Vadim Lipel, an anesthesiologist, detailed in a February 25, 2011 report that appellant complained of lower back and left leg symptoms. On examination, he observed lumbar spine tenderness to palpation, limited flexion and extension secondary to pain, diminished left lateral foot sensation to light touch and a positive left straight leg raise test. An MRI scan demonstrated L4-S1 disc extrusion measuring four millimeters. Dr. Lipel diagnosed lumbar disc disease and L5-S1 disc herniation due to the May 10, 2010 employment injury.

In a February 17, 2011 report, Dr. Rosenberg limited appellant to sedentary tasks and prohibited postal route duties.<sup>6</sup>

The employing establishment notified OWCP in an April 12, 2011 letter that it attempted to find a job that accommodated appellant's new physical restrictions, but could not offer such a position as of February 19, 2011. It also provided the following chronology: she was placed on part-time modified assignment from June 26 to September 4, 2010, used personal leave from September 7 to 18, 2010, was involved in a motor vehicle accident during a scheduled day off on September 20, 2010, remained off the job until November 18, 2010 due to nonindustrial injury, returned to light duty from November 18 to December 22, 2010, used personal leave from December 23, 2010 to January 12, 2011 and resumed light duty from January 13 to February 16, 2011.

Appellant filed multiple claims for wage-loss compensation beginning February 17, 2011.

OWCP informed appellant in an April 26, 2011 letter that additional evidence was needed to establish her recurrence of disability claim.<sup>7</sup> It gave her 30 days to submit a medical report from a physician explaining the connection between her present condition and the May 10, 2010 work injury.

In an April 5, 2011 report, Dr. Andrew D. Rah, a Board-certified orthopedic surgeon, noted that a May 10, 2010 MRI scan exhibited L5-S1 disc bulge measuring one millimeter, desiccation and minimal posterior annular defect while an October 7, 2010 MRI scan revealed L4-5 and L5-S1 disc bulges, degenerative changes and evidence of posterior L5-S1 annular tear. On examination of the lumbar spine, he observed tenderness, paraspinal spasms, 50-degree

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<sup>5</sup> Dr. Rosenberg presented similar findings in a February 3, 2011 report.

<sup>6</sup> Dr. Rosenberg presented similar findings in subsequent reports for the period March 17 to May 12, 2011.

<sup>7</sup> The case record does not indicate that appellant filed a Form CA-2a. Instead, OWCP treated her wage-loss compensation claims as a recurrence of disability claim.

flexion, 20-degree extension, 50-degree lateral rotation bilaterally and 20-degree lateral flexion bilaterally. Dr. Rah diagnosed L5-S1 annular tear and lumbar radiculitis due to the May 10, 2010 employment injury and opined that appellant was totally disabled.<sup>8</sup>

Dr. Elise L. Bukont, an osteopath and Board-certified family practitioner, stated in an April 28, 2011 report that an individual may sustain disc herniation when he or she lifts an object. In particular, when he or she bends forward or twists, the spine flexes and the intervertebral disc is compressed. The disc is further strained when the person lifts from this position, rupturing the outer capsule. Based solely on a review of the medical file, Dr. Bukont attributed appellant's L5-S1 disc herniation, lumbar strain and lumbar radiculopathy to the May 10, 2010 employment incident.

On June 28, 2011 OWCP expanded appellant's traumatic injury claim to include L5-S1 annular tear with radiculitis.

By decision dated July 6, 2011, OWCP denied appellant's claim for recurrence of disability, finding the evidence insufficient to establish that she experienced a spontaneous change in her medical condition due to the May 10, 2010 employment injury.

Counsel requested reconsideration on October 11, 2011 and submitted an August 23, 2011 report from Dr. Rah, who commented that appellant had ongoing lower back and radicular pain, but was unable to identify a specific dermatome distribution. Dr. Rah noted that his objective findings were limited to range of motion deficiencies. He added that the medical evidence did not demonstrate that appellant's L5-S1 annular tear resolved.<sup>9</sup>

On January 9, 2012 OWCP denied modification of the July 6, 2011 decision.

### **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 resulting from a previous injury or illness without an intervening cause or a new exposure to the work environment that caused the illness. It can also mean an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>10</sup>

An employee who claims a recurrence of disability due to an accepted employment injury has the burden of proof to establish by the weight of substantial, reliable and probative evidence

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<sup>8</sup> In a May 31, 2011 report, Dr. Rah presented similar findings and diagnoses. He added that appellant was limited to walking and sitting, as needed, and should not lift or carry items weighing more than 10 pounds precluded. If the employing establishment could not accommodate these restrictions, Dr. Rah recommended vocational rehabilitation services.

<sup>9</sup> Dr. Rah imposed similar physical restrictions for an indefinite duration. *See id.*

<sup>10</sup> *J.F.*, 58 ECAB 124 (2006); 20 C.F.R. § 10.5(x).

that the disability for which he or she claims compensation is causally related to the accepted injury. This burden requires that an employee furnish 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 reasoning.<sup>11</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>12</sup> While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, it must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.<sup>13</sup>

### ANALYSIS

OWCP accepted that appellant sustained lumbar sprain and L5-S1 annular tear with radiculitis while in the performance of duty on May 10, 2010 and paid partial wage-loss compensation for the period June 29 to September 4, 2010. Appellant was assigned to light duty effective June 24, 2010, performed in this capacity through February 16, 2011 and subsequently filed claims for wage-loss compensation beginning February 17, 2011. Dr. Rosenberg related in a January 6, 2011 report that her symptoms reemerged sometime after he released her to regular duty without restrictions on December 23, 2010. In addition, according to the employing establishment's chronology, the events of which were not disputed by either appellant or her counsel, she used personal leave from December 23, 2010 to January 12, 2011. The case record does not indicate that her light-duty assignment during this period was withdrawn or altered so as to exceed her then-established physical restrictions. Thus, the question is whether appellant experienced a spontaneous change in the nature and extent of a medical condition attributable to the May 10, 2010 employment injury.

Medical evidence of bridging symptoms must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.<sup>14</sup> In a December 23, 2010 report, Dr. Rosenberg evaluated appellant, diagnosed lumbar strain and resolved lumbar radiculopathy and discharged her to regular duty. Two weeks later, he commented in a January 6, 2011 report that her condition deteriorated. On February 17, 2011 Dr. Rosenberg removed appellant from her postal route and placed her on sedentary work. None of his reports for the period January 6 to May 12, 2011, however, explained with sound medical reasoning how this recurrence was connected to the May 10, 2010 injury. Moreover, Dr. Rosenberg did not obtain a complete and accurate factual history: he was unaware that appellant was injured in a nonindustrial motor vehicle collision on September 20, 2010 and was on personal leave from December 23, 2010 to January 12, 2011.<sup>15</sup>

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<sup>11</sup> *Ronald A. Eldridge*, 53 ECAB 218 (2001).

<sup>12</sup> *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

<sup>13</sup> *Ricky S. Storms*, 52 ECAB 349 (2001).

<sup>14</sup> *Storms, id.* See also *Richard McBride*, 37 ECAB 748, 753 (1986).

<sup>15</sup> See *M.W.*, 57 ECAB 710 (2006); *James A. Wyrick*, 31 ECAB 1805 (1980) (medical opinions based on an incomplete or inaccurate history are of diminished probative value).

Dr. Rah opined in reports for the period April 5 to August 23, 2011 that the May 10, 2010 employment injury, namely L5-S1 annular tear with radiculitis, led to appellant's recurrence of disability. Nevertheless, he did not fortify his conclusion with medical rationale.<sup>16</sup> As noted, the need for rationalized medical opinion evidence is particularly important because the case record indicates that appellant sustained a nonindustrial injury on September 20, 2010 and claimed that her recurrence occurred sometime before January 6, 2011 when she was on personal leave.<sup>17</sup> The remaining evidence from Dr. Lipel and Dr. Bukont did not address recurrence of disability and thus offered limited probative value on the matter.<sup>18</sup> In the absence of rationalized medical opinion evidence, appellant did not meet her burden of proof.

Counsel contends on appeal that Dr. Rosenberg's December 23, 2010 report was influenced by appellant's request to be released to regular duty due to mounting financial pressure rather than medical rationale. The case record does not corroborate this assertion: Dr. Rosenberg indicated in October 14 and November 4, 2010 reports that appellant's lumbar condition was improving to such an extent that he expected her to resume regular work.<sup>19</sup>

Appellant may submit new evidence or argument as part of a formal written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant did not establish that she sustained a recurrence of disability causally related to her May 10, 2010 employment injury.

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<sup>16</sup> *George Randolph Taylor*, 6 ECAB 986, 988 (1954).

<sup>17</sup> *See L.R.*, Docket No. 10-744 (issued October 25, 2010) (recurrence of disability does not occur where the claimant's work stoppage is caused by a new or intervening injury, even if the new injury involves the same part of the body previously injured); *A.M.*, Docket No. 09-1895 (issued April 23, 2010) (when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of FECA).

<sup>18</sup> *C.M.*, Docket No. 10-2191 (issued July 12, 2011).

<sup>19</sup> The Board notes that appellant cited *Cheryl A. Weaver*, 51 ECAB 308 (2000) for the proposition that an employee's short-lived and unsuccessful attempt to return to duty does not automatically discharge OWCP's burden to justify termination of compensation. Because the present case is concerned with recurrence of disability, *Weaver* is inapposite.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 9, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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