

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KEVIN S. MARTINEZ and U.S. POSTAL SERVICE,
POST OFFICE, Omaha, NE

*Docket No. 03-1527; Submitted on the Record;
Issued October 14, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether appellant established that he sustained a recurrence of disability for the period October 20, 2001 through May 29, 2002, causally related to his prior accepted back injuries.

On August 21, 2000 appellant, then a 38-year-old automation clerk, filed a claim for traumatic injury, Form CA-1, alleging that on that date he sustained a back injury while lifting heavy mail. Appellant stopped work on August 22, 2000 and returned to limited duty on August 26, 2000. On November 20, 2000 the Office of Workers' Compensation Programs accepted appellant's claim for lumbar sprain. In a report dated August 13, 2001, Dr. Samuel P. Phillips, appellant's treating Board-certified orthopedic surgeon, provided permanent work restrictions. He indicated that, within an eight-hour day, appellant should avoid bending and stooping, could lift no more than 25 pounds, should be able to sit with his feet flat on the floor or use a foot rest and should be able to change positions from sitting, standing or walking, at least every two hours. Appellant remained in his limited-duty capacity until October 20, 2001, when he stopped work and began filing a series of Form CA-7 claims for compensation. On November 30, 2001 the Office expanded its acceptance to include aggravation of lumbar disc disease and a herniated disc at L5-S1. On May 20, 2002 the Office authorized surgical discectomy, which was performed on May 30, 2002. The Office began paying appellant compensation for total disability following the surgery.

In a decision dated September 17, 2002, the Office denied appellant's claim for a recurrence of disability for the period October 20, 2001 through May 29, 2002.

Following an oral hearing, held at appellant's request, in a decision dated March 28, 2003, an Office hearing representative affirmed the Office's prior decision.

The Board finds that appellant has not established that he sustained a recurrence of disability for the period October 20, 2001 through May 29, 2002.

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 total disability and show that he cannot perform such light duty. 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 job requirements.¹ This burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.² Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.³ Rationalized medical evidence is medical evidence, which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁴

Appellant testified that he worked limited duty until October 20, 2001, when the employing establishment assigned him to the night shift, performing a modified version of his prior job in the 117 area. He stated that he tried the job for one shift and then refused to return because the job was outside of his physical restrictions, requiring that he work nights and bend, stoop and lift trays over his limits.

The medical records indicate that just prior to his claimed recurrence, on October 10, 2001 appellant expressed concern over the proposed job change to his physician, Dr. Patrick W. Bowman, a Board-certified orthopedic surgeon, who stated: "[Appellant] comes in essentially because of difficulties at work. He feels that his leg pain is getting worse as well. [Appellant] has been on Ultram until just recently, but now has discontinued, taking over-the-counter medications. His concern is a move now at work, to move him into permanent nights. [Appellant] has significant difficulty at nights and is concerned about the impact on his low back and legs." Dr. Bowman did not report any worsening of appellant's condition on physical examination and concluded: "We had a long discussion. [Appellant] feels he can carry on and is not interested in any surgical option now or even any more aggressive conservative treatment such as blocks, etc. His main concern is his disposition on the job. I have given him a note saying it would be best for him to avoid night shifts. This is based on his complaints and experience. I told him if this opinion needs to be definitive beyond that it would be difficult and he will simply have to deal with his supervisor over this." Dr. Bowman's report does not reflect

¹ *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

² *Ricky S. Storms*, 52 ECAB 349 (2001).

³ *Manuel Gill*, 52 ECAB 282 (2001).

⁴ *Claudio Vazquez*, 52 ECAB 496 (2001).

any concerns appellant may have had about bending, stooping or lifting requirements in the 177 area position, only his dissatisfaction with the night shift. In an accompanying work status report dated October 10, 2001, he indicated that appellant could return to work within his previous restrictions and added that “it would be medically beneficial for [appellant] to avoid night shifts at work.”

In a medical report dated November 6, 2001, Dr. Phillips repeated his opinion that, within an eight-hour day, appellant should avoid prolonged sitting, standing or walking, spending a maximum of 2 hours in any one position, could twist for 2 hours, could push, pull and lift up to 25 pounds and could squat, kneel or climb for a maximum of 1 hour total.

On November 2, 2001 the Office referred the case to an Office medical adviser for an opinion regarding the cause of appellant’s recently diagnosed herniated disc and the night shift restriction. In his response, the Office medical adviser recommended that the Office accept appellant’s herniated disc as causally related to his initial work injury, but further stated that there was “no medical basis” to preclude him from working the night shifts at work.

By letter dated November 30, 2001, the Office informed appellant that it had expanded its acceptance of his claim to include his additional back conditions. The Office further informed appellant that, while Dr. Phillips’ permanent restrictions, as set forth in his August 13, 2001 report, were considered by the Office to be medically necessary, the Office did not find Dr. Bowman’s October 10, 2001 night shift restriction to be medically necessary.

The relevant medical evidence from the claimed recurrence of October 20, 2001 includes reports from appellant’s treating physicians, Drs. Phillips and Bowman. In a narrative report dated November 29, 2001, Dr. Phillips noted that appellant was having ongoing difficulties with his lower back and that on October 10, 2001 Dr. Bowman suggested that it would be medically beneficial to avoid night shifts. Dr. Phillips noted that appellant described being up all day and having difficulty sleeping during the day, leaving him with very poor stamina in the evenings. Appellant indicated to him that with his ongoing back difficulties, he found it virtually impossible to continue with night shifts. On physical examination, Dr. Phillips noted only that appellant exhibited considerable stiffness and mobilized poorly. He stated: “I feel it is reasonable to take him off of night shifts as a result of his diminished stamina.” In an accompanying form report, Dr. Phillips placed appellant on total disability for two weeks or until he was able to get off the night shift. He noted that the restriction on night shifts was permanent.

On December 12, 2001 the employing establishment offered appellant a permanent rehabilitation position as a modified mail processor, working the night shift from 2:00 p.m. to 10:50 p.m. The various duties and their physical requirements were described in detail and while they included some work in the 117 area, all duties were within the physical restrictions provided by Dr. Phillips, with the exception of no night work and the physical restrictions themselves were also accurately described in detail in the job offer. On December 19, 2001 appellant declined the job offer. In a letter dated December 21, 2001, the employing establishment stated that, while appellant asserted that the offered position was not within his restrictions, the position was comprised of essentially the same limited duties he had previously performed when he was working the day shift.

In a report dated January 24, 2002, Dr. Phillips noted that appellant was now working a day time light-duty position which allowed for sitting or standing on an intermittent basis.⁵ He noted that his findings on physical examination were unchanged and suggested that appellant's shifts remain between the hours of 6:00 a.m. and 6:00 p.m. and that standing, sitting and walking be limited to 2 hours maximum. In an accompanying form report, Dr. Phillips reiterated his prior restrictions, including the restriction on night shifts.

Appellant also submitted additional reports from Dr. Bowman. In a June 11, 2002 attending physician's report, Form CA-20, he diagnosed an employment-related L5-S1 disc herniation and indicated that appellant had been totally disabled since October 2001 and would be reevaluated on June 19, 2002. In a work status report dated June 19, 2002, Dr. Bowman noted that appellant had recently undergone a surgical microdiscectomy. He stated: "[Appellant] has been severely symptomatic despite conservative treatment since October 2001, [-- b]ecause he was not offered light duty, I am of the opinion [that] he could not do his regular job and, [therefore,] was disabled for work." In his final treatment note relevant to the issue of recurrence of disability, also dated June 19, 2002, Dr. Bowman further explained, stating: "I did give [appellant] a note today opining that we kept him off of work because of the inability of the [employing establishment] to give him part-time light duty. They are now contesting that recommendation. I gave [appellant] a note today stating that he was disabled from October 2001 because of severe symptomatology with his back. The significance is that he did not have the option to work part-time with modification, but was required to do his usual job."

In a response dated July 9, 2002, the employing establishment stated that Dr. Bowman's statement was incorrect, that appellant was offered a rehabilitation position on December 19, 2001 which he denied because it was on the night shift. The employing establishment noted that these were the same hours that appellant worked when he was working his permanent regular bid job.

On August 19, 2002 at the request of the Office, appellant was examined by Dr. Anil K. Agarwal, a Board-certified orthopedic surgeon, to whom he was referred for a second opinion evaluation. He reviewed the relevant medical evidence of record and the statement of accepted facts provided by the Office and provided his findings on physical examination. With respect to appellant's work status, Dr. Agarwal stated: "I studied the job offer dated December 19, 2001 and objective findings that [appellant is] capable in performing the job." [sic]

The Board finds that the medical evidence of record is insufficient to establish that appellant sustained a recurrence of disability for the period October 20, 2001 to May 29, 2002, causally related to the accepted employment injuries. On August 13, 2001 prior to appellant's work stoppage, Dr. Phillips stated that he could continue to work eight hours a day within certain physical restrictions. A review of Dr. Phillips' subsequent reports dating from August 13, 2001 through March 4, 2002, reveals that these physical restrictions remained unchanged, with the exception of the additional restriction that appellant avoid night shifts. However, Dr. Phillips did not provide a detailed, rationalized explanation as to why appellant's accepted back conditions prevented him from working the night shift. Rather, he simply stated that, due to a lack of

⁵ The Board notes that there is no indication in the record that appellant had in fact returned to work. In a treatment note dated March 4, 2002, Dr. Phillips noted that appellant had not worked since the prior October.

stamina, appellant was unable to tolerate the night shift. Again, Dr. Phillips did not provide any further explanation, based on objective medical findings, for this constraint, but rather appeared to base this restriction on appellant's subjective complaints.

The Board has held that a disability assessment which appears to be based solely on appellant's subjective pain and fatigue complaints, rather than on any diagnosis based on objective criteria, is of limited probative value.⁶ As Dr. Phillips' reports do not support a finding that appellant either sustained a worsening of his employment related condition or that there was a change in the light-duty job such that appellant's accepted conditions prevented him from performing the light-duty job, Dr. Phillips' reports are insufficient to support appellant's claim for a recurrence of disability for the period October 20, 2001 through May 29, 2002.

Similarly, Dr. Bowman's reports are of diminished probative value as he also does not provide any objective basis for restricting appellant from working nights and in his initial report containing this recommendation, specifically stated that the night shift restriction was based on appellant's complaints and experience and that it would be difficult to provide a definitive medical report supporting this restriction.⁷ While in later reports, Dr. Bowman stated that he kept appellant off of work because the employing establishment had failed to provide light duty, this assertion is inaccurate, as appellant, himself testified that he was immediately placed on light duty upon his return to work on August 26, 2000. In addition, appellant was offered a permanent light-duty position on December 12, 2001, which, with the exception of the shift hours, was within the permanent physical restrictions delineated by Dr. Phillips.

Medical opinions which are based on an incomplete or inaccurate factual background are entitled to little probative value in establishing a claim for compensation benefits.⁸ In addition, the Board notes that an Office medical adviser reviewed this case and opined that there was no medical basis for the restriction on night shift work. Finally, Dr. Agarwal, the Office second opinion physician, opined that appellant could perform the December 12, 2001 offered position. Therefore, as appellant failed to submit any rationalized medical evidence to indicate that his disability for work from October 20, 2001 through May 29, 2002 was causally related to his accepted employment injuries, he has failed to establish the requisite causal relationship⁹ and the Office properly denied his recurrence claim.

As appellant has failed to submit rationalized medical evidence establishing that he sustained a recurrence of disability causally related to his accepted employment injury, he has not met his burden of proof.

⁶ *Mary Lou Barragy*, 46 ECAB 781 (1995).

⁷ *Id.*

⁸ *Daniel J. Overfield*, 42 ECAB 718 (1991).

⁹ *Mary J. Briggs*, 37 ECAB 578 (1986).

The decisions of the Office of Workers' Compensation Programs dated March 28, 2003 and September 17, 2002 are hereby affirmed.

Dated, Washington, DC
October 14, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member