

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

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MARJORIE M. BAPTISTE, Appellant

and

U.S. POSTAL SERVICE, PRIORITY MAIL  
PROCESSING CENTER, West Bethpage, NY,  
Employer

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**Docket No. 04-1942  
Issued: December 29, 2004**

*Appearances:*  
Thomas S. Harkins, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On July 27, 2004 appellant filed a timely appeal of the May 5, 2004 and August 21, 2003 merit decisions of the Office of Workers' Compensation Programs, which denied her claims for recurrence of disability. Appellant also timely appealed the Office's May 5, 2004 decision denying reconsideration of the August 21, 2003 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether appellant sustained a recurrence of disability on July 20 and August 16, 2001, causally related to her February 27, 2001 employment injury; and (2) whether the Office properly denied appellant's request for a review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On February 27, 2001 appellant, then a 38-year-old casual mail clerk, sustained a traumatic back injury while in the performance of duty. Appellant stopped working on March 1, 2001. The Office accepted her claim for lumbar sprain. Appellant returned to limited-duty work on March 14, 2001, however, she worked only one day and then filed a claim for recurrence of disability beginning March 15, 2001. She accepted a limited-duty position on April 19, 2001 and returned to work the following day.

Appellant stopped work on July 20, 2001. She filed a claim for recurrence on August 13, 2001, alleging that she sustained a recurrence of disability on July 20, 2001, causally related to her February 27, 2001 employment injury. Appellant was off work from July 20 to August 12, 2001.<sup>1</sup>

The relevant medical evidence included a July 27, 2001 lumbar magnetic resonance imaging (MRI) scan, which revealed diffuse annular bulges at L4-5 and L5-S1, mild narrowing of the exiting L4 neural foramen, bilaterally and benign osseous hemangioma at the L5 vertebral body. In a report dated August 2, 2001, appellant's then treating physician, Dr. Jacob M. Toledano, a Board-certified orthopedic surgeon, advised that appellant was on bed rest from July 19 to August 6, 2001. His treatment notes for that date referenced the recent MRI scan findings. Dr. Toledano stated that appellant may return to light duty on August 6, 2001. He restricted appellant to no lifting in excess of 35 to 40 pounds.

Appellant stopped work again on August 16, 2001. At that time, she did not file an additional claim for recurrence of disability beginning August 16, 2001.

In a September 6, 2001 attending physician's report (Form CA-20), Dr. Toledano diagnosed lumbosacral sprain and strain. He also reported diffuse bulging at L4-5 and L5-S1, with some mild narrowing of the exiting L4 neural foramen. Dr. Toledano indicated that appellant was partially disabled from July 20 to August 12, 2001. Additionally, he noted that he had advised appellant on August 30, 2004 that she could return to full-time, limited duty beginning September 4, 2001. Her only restriction was no lifting over 35 to 40 pounds.<sup>2</sup>

On September 26, 2001 Dr. Pavani R. Tipirneni, a Board-certified physiatrist, examined appellant and he diagnosed lumbar disc bulging and left sciatica. While under his care, appellant received physical therapy, acupuncture and a series of nerve blocks. Dr. Tipirneni submitted reports dated November 6, 20 and 29, and December 6, 20 and 31, 2001. His diagnoses included disc bulges as noted on an MRI scan, lumbar disc syndrome, cervical and lumbar subluxations, cervical and lumbar myofascitis and lumbar radiculopathy. Dr. Tipirneni stated that appellant suffered a significant injury to her lumbar spine as a result of her work-related injury of

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<sup>1</sup> On August 9, 2001 the employing establishment offered appellant a limited-duty assignment, which she accepted. She returned to work August 13, 2001.

<sup>2</sup> Dr. Toledano also submitted an October 4, 2001 work capacity evaluation (Form OWCP-5c) noting appellant's lifting restriction of 35 to 40 pounds.

February 27, 2001. He also stated that appellant was totally disabled from the date of her initial injury until January 7, 2002.

At the request of the employing establishment, Dr. William A. Healy, Jr., a Board-certified orthopedic surgeon, examined appellant on December 17, 2001. In a report dated December 19, 2001, he noted his agreement with the diagnosis of lumbar sprain as the most likely cause of appellant's initial complaints. Dr. Healy also stated that "[i]t may be that [appellant] had a recurrence or aggravation of that condition in [July 2001]." However, he stated that presently she had basically recovered from her injury. Based on recent x-rays of appellant's hips, Dr. Healy stated that she now had calcific bursitis of the right hip area, which appeared to account for some of her complaints. He also reported that there were no positive neurological findings noted on examination. Dr. Healy found that appellant was physically able to return to work and carry out her normal activities. He also noted that he had reviewed the MRI scan findings, but they did not change his opinion.

Dr. Tipirneni provided additional reports dated March 2 and April 3, 2002. He diagnosed cervical and lumbar subluxations, cervical and lumbar myofascitis and cervical and lumbar radiculopathy. Dr. Tipirneni also indicated that appellant should continue physical therapy for another four weeks.

In a decision dated July 24, 2002, the Office denied appellant's claim for recurrence of disability beginning July 20, 2001. Appellant requested an oral hearing, which was held on June 12, 2003. By decision dated August 21, 2003, the hearing representative affirmed the July 24, 2002 decision.

On February 11, 2004 appellant's counsel requested reconsideration of the hearing representative's August 21, 2003 decision. Counsel also filed a claim for recurrence of disability beginning August 16, 2001. The evidence that accompanied the request for reconsideration included copies of Dr. Tipirneni's previously submitted medical reports from November 2001 to April 2002, a July 27, 2001 MRI scan and a previously submitted electrodiagnostic study dated December 10, 2001. Additional medical evidence included two November 5, 2001 reports from Dr. Tipirneni, in which he diagnosed lumbar disc bulges, sciatica and lumbar myofascitis. Dr. Tipirneni also provided an October 22, 2003 report in which he reviewed appellant's treatment dating back to his initial September 26, 2001 examination. He noted diagnoses of disc bulging at L4-5 and L5-S1, lumbar neuritis and sciatica. In his most recent report, Dr. Tipirneni stated that appellant "suffered a significant injury to her lumbar spine as a result of her motor vehicle accident on [February 27, 2001]."

By decision dated May 5, 2004, the Office denied appellant's claim for recurrence of disability beginning August 16, 2001. In a separate decision, also dated May 5, 2004, the Office denied appellant's request for reconsideration of the hearing representative's August 21, 2003 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position, or the medical evidence of record

establishes that she can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the employment-related condition or a change in the nature and extent of the light-duty job requirements.<sup>3</sup>

### ANALYSIS -- ISSUE 1

At the time of her claimed recurrence of disability on July 20, 2001, appellant had been working limited duty in accordance with Dr. Toledano's restriction of no lifting in excess of 35 pounds. Appellant has not alleged that her recurrence was due to a change in the nature and extent of her light-duty job requirements and the record does not support such a finding. Alternatively, appellant may establish a recurrence of disability by demonstrating a change in the nature and extent of the employment-related condition.<sup>4</sup>

Dr. Toledano was appellant's treating physician at the time of her July 20, 2001 claimed recurrence. Although he stated in his August 2, 2001 report that appellant was on bed rest from July 19 to August 6, 2001, Dr. Toledano did not explain how appellant's condition changed such that she was unable to perform her limited-duty assignment. Dr. Toledano's August 2, 2001 treatment notes referenced the July 27, 2001 lumbar MRI scan results, but he did not specifically relate these findings to appellant's February 27, 2001 employment injury or otherwise indicate that this condition precluded appellant from performing her limited-duty assignment.<sup>5</sup> It is also noted that, when he released appellant to return to work on August 6, 2001, he imposed the same 35- to 40-pound lifting restriction that had been in effect dating back to April 2001.<sup>6</sup> Additionally, in his September 6, 2001 report, Dr. Toledano indicated that appellant was partially disabled from July 20 to August 12, 2001, which does not support appellant's claim that she was totally disabled from performing her limited-duty assignment. Moreover, this latter report provided no information regarding appellant's claimed recurrence of disability on August 16, 2001. Dr. Toledano merely reported that he advised appellant on August 30, 2001 that she could return to limited-duty work on September 4, 2001.

Dr. Tipirneni first examined appellant more than two months after her claimed July 20, 2001 recurrence of disability and he did not offer an opinion regarding disability at that time. In a December 20, 2001 attending physician's report, he diagnosed disc bulge and lumbar disc

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<sup>3</sup> *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>4</sup> *Mary A. Howard*, *supra* note 3.

<sup>5</sup> Where appellant claims that a condition not accepted or approved by the Office was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

<sup>6</sup> While Dr. Toledano released appellant to return to work effective August 6, 2001, appellant did not resume work until one week later on August 13, 2001. The limited-duty position she returned to was consistent with Dr. Toledano's restriction of no lifting over 35 to 40 pounds.

syndrome, which he related to appellant's February 27, 2001 employment injury.<sup>7</sup> Dr. Tipirneni also stated that appellant was totally disabled from February 27, 2001 to January 7, 2002. However, his disability assessment is of limited probative value as it is evident that Dr. Tipirneni was unaware that appellant had worked full-time, limited duty from April 20 to July 19, 2001 and from August 13 to 15, 2001. None of his numerous reports included an explanation as to why appellant's was unable to perform her limited-duty assignment. Furthermore, in his most recent report dated October 22, 2003, Dr. Tipirneni attributed appellant's lumbar condition to "her motor vehicle accident on [February 27, 2001]."

Dr. Healy was the only other physician to address appellant's claimed recurrence of disability. In his December 19, 2001 report, he stated that "[i]t may be that [appellant] had a recurrence or aggravation of [her] condition in [July 2001]." Medical opinions that are speculative or equivocal in character are of little probative value.<sup>8</sup>

The reports of Drs. Healy, Toledano and Tipirneni are insufficient to establish a change in the nature and extent of appellant's employment-related condition. Accordingly, appellant failed to establish that she sustained a recurrence of disability on July 20 and August 16, 2001, causally related to her February 27, 2001 employment injury.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.<sup>9</sup> Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>10</sup> Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

In the February 11, 2004 request for reconsideration, counsel generally argued that appellant established a recurrence of disability beginning July 20, 2001. Additionally,

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<sup>7</sup> His opinion on etiology consisted of a check mark in the "yes" box in response to the question "Do you believe the condition found was caused or aggravated by an employment activity?" The Board has consistently held that an opinion on causal relationship that consists merely of a "yes" response on a Form CA-20 is of little probative value and is, therefore, insufficient to establish causal relationship. *E.g., Lee R. Haywood*, 48 ECAB 145, 147 (1996).

<sup>8</sup> *Frank Luis Rembisz*, 52 ECAB 147, 150 (2000).

<sup>9</sup> 5 U.S.C. § 8128(a).

<sup>10</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>11</sup> 20 C.F.R. § 10.608(b) (1999).

appellant's counsel argued that the claim should be expanded to include additional medical conditions. Although counsel referenced Dr. Tipirneni's opinion in his request for reconsideration, he neglected to specifically identify which particular conditions, either cervical or lumbar, he believed should be accepted as arising from the February 27, 2001 employment injury. The Office hearing representative specifically commented on Dr. Tipirneni's findings in the August 21, 2003 decision and found the evidence insufficient to establish an employment-related recurrence of disability beginning July 20, 2001. Appellant's February 11, 2004 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>12</sup>

With respect to the third requirement, that the information submitted constitute relevant and pertinent new evidence not previously considered by the Office, appellant submitted, among other things, additional reports from Dr. Tipirneni dated November 5, 2001 and October 22, 2003. This additional evidence, however, does not address the relevant issue on reconsideration. Neither report specifically addresses appellant's claimed recurrence of disability from July 20 to August 12, 2001. Furthermore, the reports are repetitive. The remainder of the evidence submitted on reconsideration was already part of the record, and therefore, it is insufficient to warrant reopening the claim for merit review.<sup>13</sup> Because appellant did not submit any relevant and pertinent new evidence, she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).<sup>14</sup>

As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Board finds that the Office properly denied the February 11, 2004 request for reconsideration.

### CONCLUSION

The Board finds that appellant failed to establish that her claimed recurrences of disability on July 20 and August 16, 2001 were causally related to her February 27, 2001 employment injury. The Board also finds that the Office properly denied appellant's February 11, 2004 request for reconsideration.

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<sup>12</sup> 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999).

<sup>13</sup> Evidence that is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening the claim. *Saundra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>14</sup> 20 C.F.R. § 10.606(b)(2)(iii) (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 5, 2004 and August 21, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 29, 2004  
Washington, DC

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member