

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

SHERYL K. ADAMSON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Camdenton, MO, Employer**

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**Docket No. 03-352
Issued: October 15, 2004**

Appearances:
Sheryl K. Adamson, pro se
Megan Guenther, Esq., for the Director

Oral Argument May 4, 2004

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 22, 2002 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated September 4, 2002 which denied her claims for a recurrence of disability and intermittent wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this recurrence and intermittent wage-loss case.

ISSUES

The issues are: (1) whether appellant is entitled to intermittent wage-loss compensation for the period March 8 to September 14, 2001; and (2) whether appellant sustained a recurrence of disability effective September 15, 2001 due to her accepted conditions.

FACTUAL HISTORY

On June 29, 2000 appellant, then a 42-year-old rural carrier, filed an occupational disease claim alleging that on June 8, 2000 she first became aware of her muscle spasms and a right hip sprain and that on June 27, 2000 she first realized that they were due to her employment duties.

The Office accepted the claim for right hip strain and aggravation of right hip bursitis. Appellant returned to her full-time duty on September 18, 2000.

Appellant filed a recurrence of disability claim beginning October 30, 2000 which was accepted by the Office for the period November 4, 2000 through February 9, 2001. Appellant returned to limited-duty work on February 19, 2001.

In a January 16, 2001 report, Dr. Keith J. Frederick, an attending physician, released appellant to work with limitations. Diagnoses included greater trochanteric bursitis in the right hip and spinal stenosis with degenerative disc disease.

In a March 20, 2001 report, Dr. Frederick diagnosed history of lumbar spinal stenosis with degenerative disc disease, lumbar strain and left sacroilitits. He noted that he had "limited her work duties to no repetitive bending or lifting. She should not lift more than 10 pounds."

In a May 8, 2001 report, Dr. Frederick noted a physical examination revealed fairly good lumbar flexibility and "75 percent range of motion and only mild discomfort at the end points." He diagnosed lumbar stenosis with degenerative disc disease and concluded that appellant had a 10 percent permanent impairment of the whole body.

In a July 19, 2001 report, Dr. Matthew F. Gornet, an attending Board-certified orthopedic surgeon, concluded that appellant "suffers from central disc protrusion at L4-5 and L5-S1, coupled with an annular tear or tear in the disc at this level. This diagnosis would be fairly classic of causing buttock and hip pain." He opined appellant's "symptoms were initially misdiagnosed and this has rendered some confusion regarding her current treatment." In concluding, the physician opined that appellant's "current symptoms and disability are directly causally connected to her work-related injury."

On August 6, 2001 appellant filed a claim for a recurrence of disability beginning March 8, 2001.

In an August 7, 2001 letter, the Office accepted the condition of displacement, intervertebral disc at L4-5 and L5-S1 and authorized appellant's request for Dr. Gornet to be her treating physician.

On September 6, 2001 appellant filed claims for compensation (Form CA-7) for intermittent wage loss of 112.25 hours during the period March 8 through July 27, 2001¹ and intermittent wage loss of 83 hours for the period August 2 to September 6, 2001.

In a September 20, 2001 disability note, Dr. Gornet indicated that appellant was totally disabled for work beginning September 14, 2001 and that he had last seen appellant on July 19, 2001.

¹ In an October 20, 2001 leave time analysis (Form CA-7A), appellant requested compensation for the dates March 8, April 2, 12 and 16, May 17, June 11 to 14, June 27 to 29, July 10, 16 to 20 and 27, 2001 due to trouble walking.

On October 1, 2001 appellant filed a claim for a recurrence of disability beginning September 15, 2001.² Appellant also filed a Form CA-7 requesting compensation for the period September 14 to October 22, 2001.

In an October 10, 2001 letter, the Office informed appellant that her case was currently open for “medical treatment for your work-related condition” and that her claim was accepted to include displacement, intervertebral disc at L5-S1. Moreover, appellant was informed that “her claimed recurrence will not be further developed since your case is already open for treatment” and that she “will not have to submit a CA-2a in the future” unless advised by the Office.

On October 17, 2001 appellant filed a Form CA-7 requesting compensation for intermittent wage loss of 33.75 hours for the period August 30 through September 12, 2001.³

In an October 22, 2001 report, Dr. Gornet noted that he could not state emphatically whether she could or could not work, prior to his first examination date with appellant, which was on July 19, 2001. The physician indicated that he had placed her off work as of October 22, 2001 and stated that she was temporarily totally disabled until she found an alternative treating physician. In an attached work capacity evaluation (Form OWCP-5c), Dr. Gornet opined that appellant was totally disabled as of October 22, 2001.

On November 18, 2001 appellant filed a Form CA-7 for the period October 23 to November 16, 2001.

By decision dated December 5, 2001, the Office denied appellant’s claim for intermittent compensation for the period March 8 through September 14, 2001. The Office also denied appellant’s claim of a recurrence of total disability beginning September 15, 2001.

Appellant requested an oral hearing which was held on May 29, 2002.⁴

By letter dated January 4, 2000, the Office authorized appellant’s request for consultation with Dr. Jeffrey T. MacMillan, an attending Board-certified orthopedic surgeon. In a February 7, 2002 report, he diagnosed degenerative disc disease at L4-5 and L5-S1. Regarding her ability to work, Dr. MacMillan opined that he “would suggest that [appellant] avoid repetitive or extended periods of bending, stooping, heavy lifting or carrying.” Dr. MacMillan recommended a functional capacity evaluation to determine her work restrictions. He prescribed a trial period use of a transcutaneous electrical nerve stimulation (TENS) unit for her low back pain and noted that appellant was totally disabled.

² Appellant noted that she went to work and left after working 1.5 hours as she felt too weak to finish working the entire day.

³ In an October 20, 2001 Form CA-7A, appellant requested compensation for the dates August 30, September 6, 7 and September 10 to 12, 2001 due to being too weak to work and unable to stand up.

⁴ On June 26, 2002 the Office authorized an interbody lumbar fusion at L4-5 and L5-S1. Appellant was placed on automatic rolls for temporary total disability effective July 22, 2002.

In a February 26, 2002 duty status report (Form CA-17), Dr. MacMillan diagnosed degenerative disc disease at L4-5 and indicated that appellant continued to be temporarily totally disabled from her position as mail carrier.

In a March 26, 2002 report, Dr. MacMillan diagnosed degenerative disc disease at L4-5 and L5-S1. Her disability status was noted as “no repetitive or extended periods of bending, stooping, heavy lifting or carrying.” He noted her desire to proceed to surgery for an interbody fusion. A March 28, 2002 magnetic resonance imaging scan was obtained of the low back listing disc protrusions of L4-5 and L5-S1.

By decision dated September 4, 2002, the hearing representative affirmed the denial of appellant’s claims for a recurrence of disability and her request for intermittent wage loss.⁵

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees’ Compensation Act has the burden of establishing the essential elements of his or her claim including the fact that the injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁶ As used in the Act, the term “disability” means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁷ Disability is thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.⁸ Whether a particular injury caused an employee disability from employment is a medical issue, which must be resolved by competent medical evidence.⁹

ANALYSIS -- ISSUE 1

The Board notes that the Office accepted appellant’s claim for right hip strain and aggravation of right hip bursitis and subsequently expanded the claim to accept displacement of the intervertebral disc at L4-5 and L5-S1. The Office has not accepted the conditions of lumbar spinal stenosis with degenerative disc disease.

The Board finds that appellant has not submitted medical evidence sufficient to establish that she was unable to perform his work duties during the intermittent periods for which she claimed compensation. Appellant submitted reports dated March 20 and May 8, 2001 from her attending physician, Dr. Frederick, a September 20, 2001 disability slip and a July 19, 2001 report by Dr. Gornet. However, none of the reports or the September 20, 2001 disability slip

⁵ Subsequent to appellant’s appeal to the Board on November 22, 2002, the Office issued a decision dated December 5, 2002 which denied waiver of an overpayment.

⁶ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *Patricia A. Keller*, 45 ECAB 278 (1993); *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.400(b).

⁸ *See Maxine J. Sanders*, 46 ECAB 835 (1995); *Fred Foster*, 1 ECAB 21 (1947).

⁹ *See Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

specifically address appellant's ability to work on the dates in question. The record is devoid of medical evidence pertaining to the following dates for which appellant claimed compensation: March 8, April 2, 12 and 16, May 17, June 11 to 14 and 27 to 29, July 10, 16 to 20 and 27, August 20, September 6 to 7 and 10 to 12, 2001.

LEGAL PRECEDENT -- ISSUE 2

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 establishes that the employee 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 to show that he or she 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.¹⁰

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her June 8, 2000 employment injury.¹¹ This burden includes the necessity of furnishing 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 employment factors and supports that conclusion with sound medical reasoning.¹² However, it is well established that proceedings under the Act¹³ are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹⁴

ANALYSIS -- ISSUE 2

The Board notes that appellant was initially treated for an accepted right hip strain and bursitis. Following additional diagnostic testing, the Office accepted displacement of the intervertebral discs at L4-5 and L5-S1. Appellant received conservative treatment consisting of epidurals and TENS unit. The Office informed appellant in an October 10, 2001 letter that her case was currently open for "medical treatment for your work-related condition," her claim was expanded to include displacement, intervertebral disc at L5-S1 and "her claimed recurrence will not be further developed since your case is already open for treatment" and that she "will not have to submit a CA-2a in the future" unless advised by the Office.

¹⁰ *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Barry C. Peterson*, 52 ECAB 120 (2000); *Carlos A. Marrero*, 50 ECAB 117 (1998); *Terry R. Hedman*, 38 ECAB 222 (1986).

¹¹ *Carmen Gould*, 50 ECAB 504 (1999); *Lourdes Davila*, 45 ECAB 139 (1993); *Dominic M. DeScala*, 37 ECAB 369 (1986); *Bobby Melton*, 33 ECAB 1305 (1982).

¹² *Alfredo Rodriguez*, 47 ECAB 437 (1996); *Louise G. Malloy*, 45 ECAB 613 (1994).

¹³ 5 U.S.C. §§ 8101-8193.

¹⁴ *Richard E. Konnen*, 47 ECAB 388 (1996); *William J. Cantrell*, 34 ECAB 1233 (1983).

In support of her claim for a recurrence of disability beginning September 15, 2001, appellant submitted medical evidence from Dr. Gornet and Dr. MacMillan who described their treatment for her accepted L4-5 and L5-S1 disc displacements. Both physicians indicated that appellant was totally disabled from her position as a mail carrier and described the conservative treatment methodologies and additional diagnostic studies obtained prior to her July 22, 2002 surgery. Although the medical evidence from Dr. Gornet and Dr. MacMillan is not fully rationalized, the reports of the physicians are sufficient to require further development as to appellant's disability for work on and after September 15, 2001 to July 22, 2002. Moreover, the Board notes that in an October 10, 2001 letter the Office informed appellant that "her claimed recurrence will not be further developed since your case is already open for treatment" and that she "will not have to submit a [Form] CA-2a in the future." The Board will remand the case for further medical development as to whether appellant was totally disabled beginning September 15, 2001.

CONCLUSION

The Board finds that appellant has not established that she is entitled to intermittent wage-loss compensation for the period March 8 to September 14, 2001. The Board finds that further medical development is required on whether appellant sustained a recurrence of disability effective September 15, 2001 due to her accepted conditions.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs is affirmed with regard to entitlement for intermittent wage-loss compensation and set aside and remanded with regard to her claim for a recurrence of disability beginning September 15, 2001. The case will be remanded to the Office for further proceedings consistent with the above opinion.

Issued: October 15, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member